

# Conditions

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Updated to incorporate advice on biodiversity enhancement conditions.	

## Key legislation and policy

<b>Legislation</b>	<ul style="list-style-type: none"> <li>• <a href="#">Town and Country Planning Act 1990</a> (TCPA90), sections 70, 72, 91 and 92. Sections 77 and 79 allow an Inspector or the Welsh Ministers similarly to impose conditions.</li> </ul>
<b>National policy and guidance</b>	<ul style="list-style-type: none"> <li>• <a href="#">Planning Policy Wales, edition 10</a> (PPW) contains various broad references to the use of conditions.</li> <li>• <a href="#">The Technical Advice Notes</a> (TANs) consider the planning conditions required for various specialist areas.</li> <li>• <a href="#">Minerals Technical Advice Notes</a> (MTANs) set out relevant conditions for mineral developments.</li> <li>• <a href="#">Welsh Government Circular WGC 016/2014</a> 'The Use of Planning Conditions for Development Management' (October 2014).</li> <li>• <a href="#">Welsh Government Circular 13/97</a> 'Planning Obligations' (July 1997)</li> <li>• <a href="#">Development Management Manual</a> Rev 2 (May 2017), Section 10.</li> </ul>
<b>Judgments</b>	<ul style="list-style-type: none"> <li>• <i>Newbury District Council v Secretary of State for the Environment</i> (1981) (The 'Newbury' test) AC 578.</li> <li>• <i>William John Jory v Secretary of State for the Environment and Regions</i> (2002) EWHC 2724.</li> <li>• <i>I'm Your Man Ltd v SSE &amp; North Somerset DC</i> [1999] 4 PLR 107</li> <li>• <i>Winchester CC v SSCLG &amp; Others</i> [2013] EWHC 101 (Admin)</li> <li>• <i>Telford and Wrekin Council v SSCLG &amp; Growing Enterprises Ltd</i> [2013] JPL 865</li> </ul>
<b>Other guidance</b>	<a href="#">Guidance on the Community Infrastructure Levy</a> , Ministry of Housing, Communities & Local Government.

## Introduction

1. This chapter sets out legal, policy and practical considerations regarding the imposition of conditions on planning permissions in Wales. It is intended to support the Welsh Government Circular WGC 016/2014 'The Use of Planning Conditions for Development Management' (the Circular) and should be read alongside it.
2. Conditions and planning obligations can enable development proposals to proceed where it would otherwise be necessary to refuse planning permission. However, the Circular sets out that conditions should only be imposed where they are:
  - i. Necessary;
  - ii. Relevant to planning;
  - iii. Relevant to the development to be permitted;
  - iv. Enforceable;
  - v. Precise; and
  - vi. Reasonable in all other respects.
3. The Circular refers to these as the 'six tests' and states that each of them needs to be satisfied for each condition that a planning authority (or, by extension, an Inspector) intends to apply.
4. Any proposed condition which fails to meet one of six tests should not be used, even if it is suggested by an applicant, members of a planning committee, statutory consultee or third party.
5. Conditions attached to planning permissions should not duplicate the controls contained in other legislation. Sufficient information should accompany development proposals in order for decisionmakers to be satisfied that proposals are capable of effective regulation.
6. Planning conditions may have serious implications for the individual, so it is important to bear in mind the human rights implications when considering their use:

### Think about:

- (a) The number of conditions imposed through a planning permission should be kept to the minimum necessary to ensure good quality sustainable development.
- (b) If a matter is controlled under other regulatory regimes then it should not be the subject of a planning condition.
- (c) A prescriptive condition setting out what would make the detail of a scheme acceptable is often a better option than an approval of detail condition.

- (d) Consider the impact of a condition on deliverability: inappropriate timing or lack of clarity about phasing can increase risk and cost.
- (e) Wherever practical, frame a requirement as a condition rather than require a planning obligation.
- (f) Informatives are put on a decision notice as guidance for the developer. They are not conditions and are not enforceable.
- (g) If an approval of detail application involves consulting with third parties such as Natural Resources Wales, this should be flagged and explained in the reason for the condition.

## The legal framework

### *The 'Compulsory Standard Conditions'*

7. Section 91(1) of the TCPA90 provides that every planning permission shall be granted or deemed to be granted subject to the condition that the development to which it relates must be begun **not later than the expiration of specified periods**.
8. S92(2) provides that outline planning permission for development consisting in or including the carrying out of building or other operations, shall be granted subject to **specified conditions**.
9. The 'compulsory statutory conditions' apply to permissions granted by planning authorities, Inspectors or the Welsh Ministers.

### *Powers to Impose other Conditions*

10. S70(1)(a) empowers a planning authority, subject to s62D(5), s91 and s92, to grant planning permission on application unconditionally or '**subject to such conditions as they think fit**'.
11. The s70(1)(a) power must be interpreted with regard to the legal tests and policy tests described below, the development plan, other material considerations including PPW and TANs, plus any case law which may be relevant to legal and/or policy matters.
12. S72(1) describes particular types of conditions which may be imposed under s70(1) 'without prejudice to the generality of' that section:

*(a) for regulating the development or use of any land under the control of the applicant...or requiring the carrying out of works on any such land, so far as appears...to be expedient for the purposes of or in connection with the development authorised by the permission;*

***(b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.***

13. Planning permission granted subject to a s72(1)(b) condition shall be referred to as 'planning permission granted for a limited period'; s72(2).
14. S77(4)(a) provides that the powers set out under s70 and 72(1) apply to applications referred to the Welsh Ministers.
15. Schedule 5 of the TCPA90 deals with Mineral Working conditions.

### ***Appeals against Conditions and Retrospective Permission***

16. The Appeals against Conditions chapter gives full advice on such appeals. However, the following is a brief summary.
17. There is a right of appeal under s78(1)(a) to an authority's decision to grant planning permission subject to conditions. S79(1)(b) enables the Secretary of State, and by extension an Inspector dealing with such appeal, to 'reverse or vary any part of the decision...and...deal with the application as if it had been made to [them] in the first instance'.
18. S73 allows for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted. On such an application, the decision-maker shall only consider the question of the conditions that should be imposed on the permission.
19. Where an application is made under s73A, permission is sought for development which has already been carried out – whether it was carried out in breach of a disputed condition or without prior grant of permission. An application under s73A is 'in all respects a conventional planning application, save that development will have been commenced'<sup>1</sup>.
20. If a s73 appeal is made in relation to development that has been carried out in breach of a condition, it may be necessary to determine the appeal as though it were made under s73A, because the power to grant permission will derive from s73A and s70<sup>2</sup>.
21. For advice on the imposition or discharge of conditions under s174(2)(a) and s177 in Enforcement casework, see the Enforcement chapter.

### ***Development Orders***

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<sup>1</sup> *Wilkinson v Rossendale BC* [2002] EWHC 1204 (Admin), cited in *R (oao Thomas) v Merthyr Tydfil CBC & Merthyr Motor Auctions* [2016] EWHC 972 (Admin)

<sup>2</sup> *Lawson Builders Ltd & Lawson & Lawson v SSCLG & Wakefield MDC* [2015] EWCA Civ 122

22. Planning permission granted by any development order may be subject to conditions or limitations as specified. Conditions on classes of permitted development (PD) are conditions on a grant of planning permission, but s70(1), s72(1) and s79(1) of the TCPA90 do not apply.
23. Advice on the grant of an *express* permission subject to conditions which withdraw PD rights is given below. The General Permitted Development Order and Prior Approvals Appeals chapter covers other matters relating to conditions, including imposing conditions in prior approval appeals.

### **The Legal Tests**

24. While planning authorities, the Welsh Ministers and Inspectors may impose 'such conditions as they think fit', the House of Lords held in *Newbury DC v SSE & Others* [1980] 2 WLR 379, [1981] AC 578 that conditions must be:
  - (a) Imposed for a planning purpose and no other purpose, however desirable;
  - (b) Fairly and reasonably related to the development permitted;
  - (c) Not so unreasonable that no reasonable planning authority could have imposed them – that is, '*Wednesbury*' unreasonable<sup>3</sup>.
25. These are the '*Newbury*' or legal tests. While there is some overlap, they should not be confused with the policy tests described below. The legal tests will rarely be addressed in planning appeal casework. Questions relating to the validity of conditions normally arise only in Enforcement appeals proceeding on legal grounds.
26. In s73 or s73A appeals against conditions, you may decide to remove or 'vary' a condition in accordance with the policy tests, but do **not** have the power to decide whether the condition is or is not lawful.

## **Overview of planning policy**

### **The Policy Tests**

27. The Circular states that planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions. However, such conditions should only be imposed where they are:
  - (a) Necessary;
  - (b) Relevant to planning;
  - (c) Relevant to the development to be permitted;
  - (d) Enforceable;
  - (e) Precise; and
  - (f) Reasonable in all other respects.

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<sup>3</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] (Court of Appeal)

28. The Circular refers to these as the 'six tests' and states that each of them needs to be satisfied for each condition that a planning authority (or, by extension, an Inspector) intends to apply. The explanation for each of the tests is set out in section 3 of the Circular and is not repeated here.
29. Any permission granted at appeal will be at risk of challenge if conditions do not meet the six tests including precision, or are incomplete, or are not imposed at all when they should be.
30. Attention is particularly drawn to paragraphs 3.2 to 3.9 of the Circular which advise that in considering whether a condition is necessary decision makers should ask themselves whether planning permission would have to be refused if the requirements of that condition were not imposed. If it would not, then the condition needs special and precise justification.
31. Where a proposed condition fails to meet one of six tests it should not be used, even if it is suggested by an applicant, members of a planning committee or third party. Even if all parties to an appeal agree to a condition being imposed, the Inspector as the decision-maker will need to establish whether the condition would be necessary and meet other tests.
32. Further to the relevant section in the Circular, in considering whether a condition is necessary, bear in mind that it is usually not possible to rely on the description of development to control, restrict or limit a development. It was held in *I'm Your Man Ltd v SSE & North Somerset DC* [1999] 4 PLR 107 that there is no direct or implied legal power to impose a time limitation on a planning permission except by means of 'temporary' condition.
33. However, it is not necessary to impose a condition to define what is permitted if the permission itself does so properly. It was held in *Winchester CC v SSCLG & Others* [2013] EWHC 101 (Admin) upheld in [2015] EWCA Civ 563 that a permission granted for a 'travelling show peoples site' could not be interpreted as a general permission for a residential caravan site, although no occupancy condition had been imposed, because a 'travelling show people's site' is a sui generis use, and other conditions imposed were commensurate with the permission being for that use.
34. When granting permission, any restriction to the development should be secured by condition, whether that be a limitation to opening or operating hours, the occupation of the site or the duration of the permission. Even if the description of development purports to contain a restriction, such as a proposal for 'a dwelling for occupation by a farm worker', a restriction to that end will only be enforceable if secured by condition; see advice on temporary, personal and occupancy conditions and withdrawing PD and change of use rights in section 5 of the Circular.
35. Further to the relevant section in the Circular, Conditions must be worded so that they can be understood by the appellant and/or their successor(s) in title, the authority and interested parties. The condition must be clear as to what is

required and, where relevant, by when. Any rights being removed by condition should be precisely explained by reference to the relevant legislation.

36. The Courts will interpret conditions based on the natural and ordinary meaning of the words – including the meaning conferred by grammar. It was held in *Telford and Wrekin Council v SSCLG & Growing Enterprises Ltd* [2013] JPL 865 that a condition requiring that details of products to be sold ‘*should be submitted to and agreed in writing by the local planning authority*’ did not prohibit the sale of goods **not** on the list because of the difference in meaning between ‘shall’ and ‘should’.

### **Conditions to Avoid**

37. The Circular sets out at 4.23 – 4.27 where conditions should **not** be imposed. In general conditions to avoid include:
- (a) Conditions which unreasonably impact on the deliverability of development;
  - (b) If details are submitted with an outline application for approval, conditions cannot be imposed to reserve these matters for future consideration.
  - (c) Conditions requiring development to be carried out in its entirety.
  - (d) Conditions requiring compliance with other regulatory requirements.
  - (e) Conditions requiring that land is given up or ceded to other parties.
  - (f) Positively worded conditions requiring the payment of money or other consideration.

### **Model Conditions**

38. The Circular provides at Appendix 1 a list of model conditions. This list is not exhaustive but is provided as a reference point.
39. PINS provides its own suite of planning conditions. This can be accessed via ‘PINS Help’ in DRDS. Again, the list is not exhaustive, and the conditions given may need to be amended if appropriate to the case.
40. Treat the wording of any suggested condition with caution and do not rely on it meeting the tests especially if further details are sought; see advice on the Anatomy of Conditions below.

## **Imposing conditions in planning appeals**

### **The Parties and Conditions**

41. The planning authority will be asked to provide a list of suggested conditions and reasons with the questionnaire. They may provide the list with their

statement or via other documentation such as their committee report. Suggested conditions are also included on the Householder Appeal Questionnaire.

42. If the authority does not provide a list, consider whether they ought to be asked to provide one but there is no imperative to allow them that opportunity. You may wish to ask for suggested wording if the authority has only provided a brief outline of conditions/reasons to be imposed.
43. Always check whether the appellant, statutory consultees and/or other parties have suggested conditions; it is not unusual for the Highways Authority or Natural Resources Wales. The need to impose these must be considered against the relevant tests. Sometimes parties will indicate that certain measures might be necessary, such as landscaping – even if they have not discussed conditions in terms. You should consider whether such proposals could and should be secured by condition.
44. As part of your reasoning you may need to address whether a condition suggested by an appellant would overcome the harm identified.
45. ‘Informative’ notes set out on planning permissions do not carry any legal weight and **cannot** be used in place of a condition

### ***Natural Justice***

46. An Inspector may take the view that a condition which has **not** been suggested would be necessary to make a development acceptable. You should not impose conditions where the parties, including third parties, would reasonably expect but did not have any opportunity to comment<sup>4</sup>.
47. A condition may come as a surprise to the parties if it was not mentioned in the written representations or at the hearing or inquiry. You would then need to give the parties a chance to comment unless:
  - (a) The appellant has commented on the mitigation that the condition would achieve, for example, obscure glazing.
  - (b) Other parties have proposed some mitigation and the appellant has had an opportunity to comment.
  - (c) The condition is ‘standard’ and obviously uncontentious for the case, such as use of matching materials as indicated on the plans or application form.
  - (d) The condition is required to secure the provision and/or retention of part of the proposal shown on the plans such as the layout of parking spaces.
48. Inspectors may need to re-draft suggested conditions suggested by the parties so that they comply with the six tests or simply for precision or clarity. It is

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<sup>4</sup> *Jory v SSSLGR* [2002] EWHC 2724



normally possible to do this without referring back to the parties if the essence of the condition is unchanged.

49. If you re-draft a condition, consider whether doing so will make it more onerous or otherwise change its meaning or effect, such that the parties would expect to have an opportunity to comment.

### **Drafting Conditions**

50. The Circular<sup>5</sup> states that conditions should offer flexibility, although not to the extent that the development is substantially different to that which is granted permission.
51. Conditions imposed on a permission are likely to be scrutinised by the parties. Small drafting errors or omissions can alter the intended meaning of a condition or prevent it from being enforced, such that a high court challenge or further application or appeal may follow. Conditions must therefore be carefully written and checked.
52. Where several conditions are imposed, it improves the look and flow of a decision if they are set out in a schedule at the end. You would need to word the 'decision' so that planning permission is granted '*subject to the conditions set out in Schedule 1*' or similar and the schedule is so headed.
53. Where possible, use the PINS suite of planning conditions to ensure consistency and best practice. However, you should always consider whether a relevant standard condition would need to be modified, or a non-standard condition should be used to reflect the circumstances of the case, and perhaps deal with specific requirements of the parties.
54. It is always necessary to check whether every suggested condition:
  - (a) Contains any unnecessary requirements or overly detailed specifications of particular requirements. This sort of assessment should be undertaken, for example, with 'landscaping' conditions. It may be reasonable to leave the planning authority to decide, for example, the extent and species of planting.
  - (b) Refers to any statutory instrument, policy or guidance document which may be subject to future updates or withdrawal such as the GPDO or British Standards. Consider whether it is necessary to refer to the document at all and, if so, whether the condition can be worded to remain enforceable and otherwise stand the test of time.
  - (c) Purports to delegate approval of a scheme to another party, such as Natural Resources Wales. Approval is the responsibility of the planning

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<sup>5</sup> Paragraph 4.4

authority and it will be for them to decide whether or not to consult with any other parties when considering if a submitted scheme is acceptable.

### ***'Anatomy' of a Condition***

55. Many planning conditions have different component parts, such as a requirement to submit details for approval, and implementation (and retention) in accordance with the approval.
56. When considering suggested conditions, you must consider whether each suggested component is necessary – and if any necessary components are missing, for the condition to fulfil the reason for its imposition:
- (a) If **further details** are required, they should be submitted to and approved by the local planning authority in writing.
  - (b) An **implementation clause** should be included where it is necessary to control how the development is carried out: *'Development shall be carried out in accordance with the approved details'*.
  - (c) A **timing clause** should be included where it is necessary to control when something is done: *'The dwellinghouse hereby approved shall not be occupied until a parking space has been laid out in accordance with the approved plan'*.
  - (d) A **retention clause** should be included where it is necessary that something is retained in posterity: *'The parking space shall thereafter be retained for use for parking by the occupiers of the approved dwellinghouse at all times'*.
  - (e) **Maintenance clauses** are occasionally necessary to ensure that the works or installation being required will remain effective. Maintenance should be in accordance with the approved details or with the scheme to be approved by the planning authority.
57. If an essential component part is missing, the condition as a whole may be sufficiently flawed that the entire decision is at risk of challenge or the condition may be unenforceable.

### ***The Order of Conditions***

58. The Circular recommends that conditions should be set out relative to the order in which they are to be discharged, with the time limit condition and condition identifying the approved plans and documents appearing first.
59. A condition should not appear twice on the same decision.

### ***Reasons for Imposing (or not imposing) Conditions***

60. Article 24 of the Town and Country Planning (Development Management Procedure)(Wales) Order 2012 requires decision notices to state clearly and

precisely the full reasons to be given for conditions, and to specify all relevant development plan policies and proposals.

61. Where appeals are **allowed**, subject to conditions, reasons must be given for the imposition of every condition. Reasons also need to be specifically tailored to the development type and context.

**For example:**

**1. The installation of the proposed SCR units and associated components shall be undertaken in accordance with the approved Construction Method Statement.**

**Reason: In the interests of highway safety and pedestrian safety in accordance with policies SP20 and TR2 of the NPTCBC Local Development Plan (2016).**

62. The Circular states that if the reasons for the imposition of conditions are clearly explained developers will be better able to understand the need to comply with them.
63. It is essential that you **double check** your decision to be sure that there is consistency between your reasoning on the main issue(s), reasoning in the Conditions section, overall conclusion and actual decision. If you indicate that a condition would be necessary, it must actually be imposed.
64. Where appeals are dismissed it is essential that the parties can understand why any conditions proposed by them would not overcome the harm.

## **Types of condition**

65. Section 5 of the Circular discusses different types of condition that are used to regulate development. However, questions are frequently raised regarding types of pre-commencement conditions.

### ***Pre-commencement Conditions***

66. The meaning of the term 'pre-commencement condition' is a condition imposed on a grant of planning permission which must be complied with either before any building or other operation comprised in the development is begun, or where the development consists of a material change in the use of any buildings or other land, before the change of use is begun'.
67. For a planning permission to be lawfully implemented, the developer must first ensure that all pre-commencement conditions are complied with (the 'Whitley Principle'<sup>6</sup>).

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<sup>6</sup> works that contravene conditions precedent cannot be taken as lawfully commencing development

68. Development is taken to be **begun** when 'material operations' or 'material development' as described by s56 of the TCPA90 have taken place in accordance with the development permitted<sup>7</sup>.
69. Pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition (including the timing of compliance) are so **fundamental** to the development permitted that it would otherwise be necessary to refuse the whole permission.
70. Where the requirements are 'fundamental', a pre-commencement condition will amount to a 'condition precedent' for enforcement or other purposes. A condition precedent is essentially characterised by:
  - (a) Prohibiting **any** development authorised by the permission from taking place until the condition is complied with; **and**
  - (b) Going to the heart of the permission.
71. Conditions precedent can range from something as considerable as: "no development to commence until a bypass has been completed" to something as routine as: "no development to commence until building materials have been approved".
72. Deciding whether a pre-commencement condition is a condition precedent will turn on its own facts. A planning permission should be read together with all of its conditions to consider both the purpose and effect of the conditions to then see if they go to the heart of the permission (irrespective of whether or not they are prohibitive either in their wording or their effect). For example, is this condition truly intended to prohibit all and any development until the step required in the condition has been discharged?
73. The issue was considered in *Bedford Borough Council v The Secretary of State for Communities and Local Government and Aleksander Stanislaw Murzyn* [2008] EWHC 2304 (Admin). This case concerned the refusal of the local planning authority to issue a certificate of lawful use or development for a barn conversion.
74. The local planning authority took the view that the development that had been carried out was unlawful as two conditions attached to the planning permission for the development (requiring the approval of the landscaping scheme and boundary treatment prior to commencement) had not been complied with. It was found by an inspector on appeal and subsequently in the High Court that neither of these conditions were 'true conditions precedent' in that they did not go to the heart of permission. Therefore, although the conditions had been

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<sup>7</sup> The term 'implementation' is not defined in statute and '*can be used to refer to the beginning of the development authorised by a planning permission...[or] more generally to the carrying out or completion of the development authorised by a planning permission*'; *R (oao) Robert Hitchens Ltd v Worcestershire CC* [2015] EWCA Civ 1060 and see also the Enforcement chapter

breached, the building works that had been commenced were not, by definition, unlawful.

### **Grampian Conditions**

75. Grampian (or negative) conditions have been used to control development under a planning permission where works are to be carried out off-site.
76. The term 'Grampian' derives from the decision in *Grampian Regional Council v City of Aberdeen* (1983) P&CR, 633 and in summary it provides that a condition precluding the implementation of development permitted by a planning permission until some step has been taken is valid. Accordingly, it is lawful for a decision maker 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. However, it is important to note that 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.
77. 'Grampian' conditions can be extremely useful, particularly to secure environmental and infrastructure improvements.

Here is an example of a typical 'Grampian' condition:

*"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) etc*

*The 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 the local planning authority."*

### **'Phasing' Conditions**

78. Phasing of development encourages developers to commence development as soon as possible. Conditions setting out such phasing of operations should require information or works at the most appropriate time. The decision maker needs to give careful consideration to the sequence of development and the stage for compliance imposed when drafting a condition. For example, if information does not have to be provided until prior to occupation then conditions should not burden the developer by requiring it earlier, which can unnecessarily delay development.

## Casework issues

### Amended Applications

79. The Circular advises, “*If some feature of a proposed development, or lack of it, is unacceptable in planning terms, the best course will often be for the applicant to be invited to modify the application (if the modification is substantial, of course, a fresh application may be needed)*”<sup>8</sup>.
80. It would not be appropriate to modify the development so as to make it substantially different from that proposed. However, it may be possible to impose a condition that would result in a minor modification to the development.
81. It was held in *Bernard Wheatcroft Ltd v SSE* [1982] JPL 37 that amended plans can be accepted on appeal and approved through a grant of conditional permission provided there is no substantial difference between what was originally applied for and the amended scheme. The test is:
- ‘whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation’.*
82. Inspectors should decide on the basis of that test whether they could grant permission subject to a condition that would serve to modify the proposed development by tying the permission to revised plans.

### Split Decisions

83. When deciding a planning application or appeal, the planning authority or Inspector may make a ‘split decision’ whereby permission for part of the development is allowed and part is refused. (See also ‘Approach to Decision Making’).
84. Inspectors deciding appeals made under s79 of TPCA90 may also make a split decision, since they may ‘reverse or vary any part of the decision of the local planning authority...’.
85. Where a split decision is made, take care to ensure that any conditions imposed relate only to the part of the development being allowed.

### Conflicting Conditions

86. It is crucial that conditions are not imposed which would conflict with others on the same permission – or conflict with conditions imposed on an existing permission that is still extant and relevant to the site.

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<sup>8</sup> Paragraph 4.12

87. For example, if you need to impose a condition requiring the provision and retention of a visibility splay with no obstructions over 0.6m – or there is a pre-existing condition to that effect – it would be unreasonable to impose another condition requiring that the development is landscaped in accordance with a plan that shows trees within the splay. The appellant would be put at risk of enforcement action if they plant the trees and thereby breach the visibility splay condition.

### **Discretionary or ‘Tailpiece’ Conditions**

88. Conditions are sometimes worded to suggest that the requirements may be changed, usually by including a phrase such as ‘unless otherwise agreed by the local planning authority in writing’. These are sometimes referred to as a ‘tailpiece’ phrases or conditions.
89. Such wording should be considered with care and avoided where possible, because it can create a risk that developers will seek to make significant changes to the development and/or to circumvent the statutory routes to vary conditions, depriving third parties of the opportunity to comment.
90. It was held in *Midcounties Co-operative Ltd v Wyre Forest DC* [2009] EWHC 964 that a tailpiece added to a condition to limit floor space allocations ‘*makes it hopelessly uncertain what is permitted. It enables development not applied for, assessed or permitted to occur. It side steps the whole of the statutory process for the grant of permission and the variation of conditions...*’
91. In *Hubert v Carmarthenshire CC* [2015] EWHC 2327 (Admin), permission had been granted for the construction of a wind turbine and it was held that a condition stating that the turbine should be of certain dimensions ‘*unless given the written approval of the local planning authority*’ could lead to the approval of a turbine of a greater scale and environmental impact than had been permitted; the clause had to be removed.
92. Tailpiece conditions may be used where the potential for change would be minor, perhaps where a condition requires the implementation of a planting scheme submitted with the application, to give the authority scope to agree changes to the timing or species planted.

### **Conditions and Planning Obligations**

93. In some cases a particular requirement or restriction could reasonably be achieved by imposing a planning condition or by the appellant entering into a planning obligation under s106 of the TCPA90. However, decision makers should seek to overcome planning objections, where appropriate, or secure mitigation by condition rather than by a planning obligation.
94. Nevertheless, the Circular sets out at paragraphs 4.22 that there are some matters which are more appropriately required through a planning obligation and should not be required in a condition, for example, commitments on behalf

of the developer involving transfers of land or payments to be made to the local planning authority. Further guidance on the use of Planning Obligations is provided in Circular 13/97 and guidance on the use of the Community Infrastructure Levy is provided by the Ministry of Housing, Communities & Local Government.

95. It is important to note that a condition cannot override, supersede or revoke a completed planning obligation. If a completed obligation has been provided, it will be essential to consider whether a duplicating condition would be necessary.

### ***Sustainable Drainage Systems and Conditions***

96. Schedule 3 to the Flood and Water Management Act 2010 makes the provision of Sustainable Drainage Systems (SuDS) a mandatory requirement for all new developments.
97. From 7 January 2019, the majority of new developments will require SuDS approval. From this date SuDS on new developments must be designed and built in accordance with the Statutory SuDS Standards published by the Welsh Ministers. SuDS Schemes must be approved by the local authority acting in its SuDS Approval Body role (SAB) before construction work begins.
98. The SuDS guidance states that there may be a need for planning obligations, as it is a separate approval, however, imposing conditions or requiring a Section 106 agreement is likely to be unnecessary as they would duplicate other legislation, unless it can be demonstrated that there is a planning purpose for the obligation or condition. For example, a condition simply prohibiting the commencement of development before SuDS approval would not meet the tests in the Circular.

### ***Biodiversity and Conditions***

99. The Circular advises that any necessary measures to protect biodiversity should be in place through conditions and/or planning obligations, before permission is granted. The power (by s70 of the Act) to impose conditions is a way of both defining the limits of that process and also controlling the way that process itself is carried out. This might include conditions relating to hours of work or the erection of protective fencing around trees. It could also include the control of the development for protection of habitats such as nesting birds during the breeding season.
100. In the case of using a condition to control site clearance during the bird breeding season, although disturbance to breeding birds is an offence in itself (in the same way as damage to trees protected under a TPO), imposing a condition to protect against disturbance for the duration of the works is a straightforward mitigation of the effects of the development. Where evidence points to habitats for breeding birds on a proposed development site, the



imposition of such a condition to regulate the development would not be construed as being for an ulterior purpose as opposed to a planning purpose. The condition would be enforceable because any breach of clearance works during the breeding season would be detectable from a site visit with enforcement action in the form of a stop notice or injunction as appropriate.

101. Section 6 and Section 6 of the Environment (Wales) Act 2016 states that a public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions. Policy 9 of Future Wales (FW), which has development plan status, states that; 'In all cases, action towards securing the maintenance and enhancement of biodiversity (to provide a net benefit), the resilience of ecosystems and green infrastructure assets must be demonstrated as part of development proposals through innovative, nature-based approaches to site planning and the design of the built environment'. FW has development plan status
102. PPW<sup>9</sup> says biodiversity enhancement should be addressed at the design stage and encourages LPAs to negotiate with developers to achieve this. However, an appeal scheme that does not include biodiversity enhancement will conflict with the development plan (FW) and, unless material considerations indicate otherwise, should be dismissed.
103. In most cases, it would not be proportionate to dismiss an appeal for otherwise acceptable development because biodiversity enhancement is not embedded in the design. Para 6.4.21 of PPW requires a step wise approach to maintain and enhance biodiversity and enhancement must be secured wherever possible, and advises: 'In some circumstances, it will be appropriate to attach planning conditions, obligations or advisory notes to a permission, to secure biodiversity outcomes. Planning authorities should take care to ensure that any conditions necessary to implement this policy are, relevant to planning, relevant to the development to be permitted, enforceable, precise, and reasonable in all other respects'.
104. To comply with Circular 16/14; The Use of Planning Conditions for Development Management, a condition must satisfy all 6 tests. At para 3.16 the Circular says: 'A condition will not be relevant to a development if it attempts to control something not created by it in the first place'. Consequently, whilst there is clearly some tension between the Circular, PPW and FW, our position is that the weight of policy (particularly expressed via FW) favours the imposition of a biodiversity enhancement condition where appropriate.
105. If you are presented with a biodiversity enhancement condition with no justification from the LPA other than a standard reason, the following wording could be used in your decision:

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<sup>9</sup> Also see Dear CPO letter dated 23/10/19 relating to 'Securing Biodiversity Enhancements'.

*'Circular 16/14; The Use of Planning Conditions for Development Management advises that a condition will not be relevant to a development if it attempts to control something not created by it in the first place. A condition that is not relevant to the development fails the tests in the Circular. Nothing is produced to demonstrate that the proposed biodiversity enhancement condition is necessary to mitigate the impact of the proposed development. Nonetheless national policy as set out in Future Wales and PPW requires development to include biodiversity enhancement and it would be wrong, in my view, to dismiss this appeal and withhold planning permission due to the LPA's failure to achieve biodiversity enhancement at the design stage as required by PPW. I shall therefore impose a condition requiring biodiversity enhancement'.*

106. If no biodiversity enhancement is secured at the design stage and no condition has been suggested, and you intend to allow the appeal, consult the parties on the potential wording and reason for imposing the suggested condition in Dotdocs.

### **Interpreting Conditions**

107. In some cases it may be necessary to interpret a condition e.g. in s79, s73 or s73A appeals, or indeed any PINS casework where the planning history is relevant. *Dunnett Investments Ltd v SSCLG & East Dorset DC* [2016] EWHC 534 (Admin) (upheld in [2017] EWCA Civ 192) summarises the key principles:

- (a) Conditions must be construed in the context of the permission as a whole;
- (b) Conditions should be construed in a common sense way, so that the Court should give the condition a sensible meaning if possible;
- (c) Consistent with that, a condition should not be construed narrowly or strictly;
- (d) There is no reason to exclude an implied condition, but a planning permission is a public document which may be relied upon by parties unrelated to those originally involved;
- (e) The fact that breach of a condition may be used to support criminal trials means that a 'relatively cautious approach' should be taken;
- (f) A condition must be construed objectively; not by what the parties may or may not have intended at the time but what a reasonable reader construing the condition in the context of the permission as a whole would understand;
- (g) A condition should be clearly and expressly imposed;
- (h) A condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood; and
- (i) The process of interpreting a condition as for a planning permission, does not differ materially from that appropriate to other legal documents.

### **Discharge of Conditions**

108. Details required by condition must be submitted to the planning authority. Planning authorities are subject to the usual 8 week target<sup>10</sup> to give notice of their decision on a request to discharge a condition; the clock starts on the day following receipt of the application.
109. There is a right of appeal under s78 of the TCPA90 where an application to discharge a condition is refused or not determined within the statutory period. Such appeals are determined essentially like any other made under s78, that is, on the basis of the main planning issues.
110. The overriding question for the Inspector in these cases is whether the details submitted are sufficient and acceptable for the condition to be discharged, with regard to the condition itself, the reason for imposing the condition, the nature of the development permitted, the objections raised by the authority (if any) and submissions by the appellant.
111. For example, in an appeal against a refusal to approve 'landscaping' details required by condition, the main issue might be: *'the effect of the proposed landscaping scheme on the character and appearance of the approved development'*.

### **When and How Conditions Come into Effect**

112. When and how conditions come into effect depends on the stage of the permission or development that they relate to.
113. If works are carried out in breach of a condition precedent, the permission would not have been lawfully commenced. The development will be without planning permission unless particular circumstances apply as described in the Enforcement chapter. The meaning of 'condition precedent' is given in advice below on pre-commencement conditions.
114. Where a condition is imposed requiring that the development is not carried out except in complete accord with the approved plans, but the development does not in fact conform to the plans:
- (a) If the deviation from the plans is relatively minor, the Council can enforce against a breach of the condition but not the development as a whole.
  - (b) If the deviation from the plans is substantial, perhaps because the building is sited in a significantly different position from that approved, the development as a whole is without planning permission.
115. Thus, the plans condition comes into effect when the development is commenced and remains effective for the lifetime of the permission.
116. Where it is necessary to secure the approval of further details of the development, but these are not of such significance to justify delaying works on

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<sup>10</sup> except EIA development where the planning authority has 16 weeks to make its decision.

site, it may be appropriate to word the condition so as to require the submission of the details before occupation of the development.

117. Pre-occupation conditions, and conditions which relate to the lifetime of the development do not come into effect until the permission has been commenced or implemented. For example:

- (a) A condition requiring that trees on the site are protected during construction would not prevent damage to them before the permitted works are begun;
- (b) A condition removing PD rights for extensions to an existing house would not prevent PD extensions being added before the permission is commenced; and
- (c) A condition specifying the opening hours of a hot food take-away would not come into effect until the permission has been implemented.

118. If pre-occupation or other conditions are not complied with, the authority would need to enforce against a breach of condition, not development without planning permission. This is the case even where there has been a breach of a temporary or personal permission.

## ANNEX

CONDITIONS CHECKLIST		Tick when checked
Do the conditions meet the THREE legal tests?	Imposed for a planning and no other purpose, however desirable.	
	Fairly and reasonably related to the development permitted.	
	Not so unreasonable that no reasonable planning authority could have imposed them.	
Do the conditions meet the SIX circular tests?	Necessary	
	Relevant to planning	
	Relevant to the development permitted	
	Enforceable	
	Precise	
Reasonable in all other respects		
Have you checked the advice in the Circular and other relevant guidance?		
Have you given reasons for altering/not including the conditions suggested by the parties?		
Have you imposed all the conditions you said you would?		
Are the conditions accurate and complete?	Are <b>details</b> to be submitted for approval?	
	Is an <b>implementation</b> clause necessary?	
	... <b>timing</b> clause? ... <b>retention</b> clause? ... <b>maintenance</b> clause?	
	Have you deleted <b>'tailpiece' phrases</b> which could allow significant changes to the development?	

	Ensure that the wording of any model condition is adjusted to suit the circumstances of the case and do not rely on or accept uncritically the proposed wording put forward by any party to the appeal.	
Is the permission <b>retrospective</b> ?	Do <b>not</b> include a 'standard' commencement condition.	
	Do impose the 'plans' condition but with care.	
	Do <b>not</b> impose pre-commencement conditions.	
	Do use a 'retrospective' condition to ensure the submission of details.	
Have you <b>addressed</b> all of the conditions suggested by <b>all</b> of the parties?		
Have you considered whether any conditions <b>not suggested</b> by the parties should be imposed? If <b>YES</b> , would any such conditions come as a surprise to the parties and do you need to consult them about it?		