

Consultation response

Improving the use of planning conditions; draft regulations

27 February 2018

1 Summary

This response should be read in tandem with our response to the government's November 2016 consultation on topic. This is attached at Appendix 2.

The Landscape Institute remains concerned that the proposed regulations will create negative impacts on a number of planning priorities; in particular those related to landscape, environmental sustainability, heritage, and associated matters. Furthermore, we do not believe they will substantially increase the speed of housing delivery.

The Landscape Institute therefore urges the Government to reconsider its proposals concerning the use of pre-commencement conditions as set out in the draft regulations.

2 Who we are

The Landscape Institute (LI) is the royal chartered body for the landscape profession. As a professional organisation and educational charity, we work to protect, conserve and enhance the built and natural environment for the public benefit. The LI represents 5000 landscape architects, planners, designers, managers and scientists. In accordance with our charter, our members are concerned with all aspects of the science, planning, design, implementation and management of landscapes in urban and rural areas.

3 Response to the proposed changes

3.1 The current system

Good landscape delivery relies on good planning. The planning system is an essential mechanism for quality control when dealing with landscape-related issues, as opposed to building, structural, and engineering standards which are largely covered by other regulatory regimes, such as Building Regulations (see Appendix 1).

We believe the current system regarding the application of pre-commencement planning conditions strikes an appropriate balance between speed and ensuring high quality development.

We do not agree with the Government's view that:

"in most cases, local planning authorities and applicants will discuss the range of planning conditions (including any pre-commencement conditions) that will need to be imposed, during the course of their negotiations about the application and before a final decision is made."

Whilst this should occur in a well-managed development (and would include comprehensive landscape design and implementation details and any site protection measures) this does not occur in most cases.

Many development applications have little or no professional landscape input. Those that do usually incorporate these only to a level of outline scheme design, by including drawings with limited information aimed primarily at achieving a planning consent. These approved drawings may then be interpreted by contractors or sub-contractors to the lowest standards that meet with visual compliance. In the absence of the additional documentary detail that is essential for high quality landscape delivery, there is no basis for the local planning authority to intervene to ensure reasonable good practice standards.

Pre-commencement conditions enable the applicant to use a proportionate approach by undertaking initial design work sufficient for a conditional planning permission to be granted, whilst avoiding the need for additional time-consuming and costly detailed design until there is certainty of progress. The planning authority can ensure greater certainty of delivery by requiring additional essential details to be approved prior to commencement.

If these details are not required prior to commencement but submitted later, the desired outcomes are at great risk of delivery failure as they may be compromised by operations on site or poor-quality work, with little or no practical opportunity for enforcement action. Our members (and many local planning authorities) have experience of poorly managed developments where the quality of landscape provision has been substantially downgraded below expected standards to reduce costs or circumvent material constraints.

3.2 The proposed changes

In responding to the 2016 consultation, 42% of respondents were opposed to the principle; an undisclosed proportion of the 44% who were supportive expressed reservations; and the views of 14% were unclear. This does not appear to provide a clear basis of support for the proposals.

We believe that the changes expressed in the draft regulations are likely to lead to the following outcomes:

- If a developer disagrees with a proposed pre-commencement condition relating to landscape and associated site asset protection matters, the planning authority may defer or refuse permission. This would result in an increase in appeals and consequent uncertainty, cost, and delay.
- Alternatively, in the light of a developer's disagreement, both the authority and the developer may need to dedicate considerable resources and time to negotiations seeking to reach agreement on alternatives, with no certainty of outcome.
- Alternatively, in the light of a developer's disagreement, a planning authority may be minded, due to lack of resources, available expertise or other pressures, not to require appropriate detailed information in advance of site works. This would undermine planning's role in ensuring sustainability, certainty, and quality of delivery.
- Alternatively, the planning authority may seek to avoid the use of pre-commencement conditions altogether by requiring full details to be submitted as part of the initial planning application. This would likely result in the developer incurring additional costs and delay and potentially abortive work if the scheme is subsequently refused

It is in the interests of both developers and local planning authorities to avoid the cost, time, and complexity of preparing and analysing detailed design information prior to there being some certainty of development approval. We believe that the submission of additional details for approval prior to operations commencing on site is compatible with practical contractual arrangements and lead-in times and should not result in inappropriate delays.

The Government's response to the 2016 consultation stated:

"The Government recognises the importance and value of certain pre-commencement conditions in promoting sustainable development and ensuring that necessary safeguards are put in place for important matters including heritage and the natural environment. We want to reassure those who expressed concern that these proposals will not restrict the ability of local planning authorities to seek to impose conditions that are necessary to achieve sustainable development, in line with the National Planning Policy Framework."

The Landscape Institute is not persuaded that sufficient safeguards exist for encouraging sustainable development and therefore believe that the proposed regulations should be reconsidered.

APPENDIX 1

1 The importance of the planning system to good landscape delivery

The use of live organic materials (i.e. soils and plants) and the sensitive treatment of the natural environment are key elements of most landscape schemes. The successful implementation of these items is highly dependent upon the quality of materials and workmanship applied, both of which can be highly variable, and which cannot be effectively addressed in the annotated site drawings that typically accompany a planning application. Similarly, the protection of existing natural assets that may be adversely affected by development, such as trees or wildlife habitats, require careful and specialist attention to be applied. These matters are typically set out in detailed documentation and applied on site.

The planning system has long recognised this through conditions requiring additional detailed information relating to landscape operations, design and implementation, and on-site management of natural assets to be submitted for approval prior to the commencement of development. These additional details would typically include planting plans; planting numbers, sizes and schedules; specifications for soil preparation, planting and aftercare; tree protection measures; ecological surveys; impact mitigation; management proposals; and timetables or programmes for implementation of all such operations.

Clearly, the preparation of such detailed information, which in many or most cases, will be essential to achieve the intended or desired results, will be costly to prepare. It may be considered unreasonable for a developer to be expected to commission such detailed information from expert consultants prior to knowing whether or not planning permission is to be granted. However, if such information is not forthcoming between the time of granting a permission and the commencement of operations on site, there is a very real risk that irreparable harm may be caused to sensitive natural assets and / or that the quality of soil preparation or plant materials or the establishment of new planting will not meet reasonable expectations. Indeed, there will potentially be an incentive for an unscrupulous developer or a contractor to reduce costs by cutting corners and working to the lowest standards that would appear to comply with the initially approved plans. If the low standards were to be confirmed in any requirement for submission of details following commencement, the local planning authority would have very little basis for enforcement of its initial expectations.

The planning system is therefore an important mechanism for quality control when dealing with landscape-related issues, as opposed to building, structural and engineering standards which are largely covered by other regulatory regimes, such as Building Regulations.

It can be seen from the above that the landscape design process is separated into two stages: outline and detail. Landscape implementation is a third stage and aftercare a fourth

stage. Furthermore, management operations or interventions may apply throughout and beyond the development process, with some survey and protection actions being required in advance of any other work whilst others may be required during the works and after practical completion.

2 Policy Context and Government Guidance

The Prime Minister has made a strong commitment in the Defra 25-year Environment Plan to pass on an enhanced and better protected natural environment to the next generation.

The policy commitments in Chapter 1 of the Defra 25-year Plan reflect the NPPF's fundamental support for sustainable development and its positive promotion of landscape quality. The landscape treatment of a development proposal is often of great importance to the visual, environmental and social effects of the completed scheme. The associated incorporation of natural assets and systems makes a significant contribution to the sustainability of many schemes. Good landscape design is a critical factor in sensitive and designated locations. The delivery of this raises the need for special considerations in the planning process.

The document also states on page 7:

Population growth and economic development will mean more demand for housing and this Government is committed to building many more homes. However, we will ensure that we support development and the environment by embedding the principle that new development should result in net environmental gain – with neglected or degraded land returned to health and habitats for wildlife restored or created.

This was recognised by Government in Circular 11/95 on the use of planning conditions which sought to address common landscape-related problems on many development sites such as undersized or unhealthy plants, poor soil preparation, poor quality handling and planting, and deficient aftercare and management. The (now extinguished) explanatory text of the Circular as in the box below remains as pertinent today as when it was originally drafted by Government.

49. Landscape design may raise special considerations. The treatment of open space can vary greatly and the objective should be to ensure that the intended design quality is achieved in practice. It is therefore especially important for the authority to give some advance indication of the essential characteristics of an acceptable landscape scheme - always bearing in mind that such requirements should not be unreasonable. It is of equal importance to ensure that the design proposals are reflected in the quality of works and materials that result in the final product. The design and implementation stages of landscape treatment may therefore be addressed more successfully by separate conditions, occurring as they do at different stages and under differing circumstances. The visual impact of a development will often need to be assessed as a whole, and this may well involve considering details of landscape design together with other reserved matters.

Enforcement of landscape requirements

50. To ensure that a landscape design scheme is prepared, conditions may require that no development should take place until the scheme is approved, so long as this requirement is reasonable (model condition 25). Enforcing compliance with landscape schemes can pose problems, since work on landscaping can rarely proceed until building operations are nearing completion, and only on permissions for a change of use would it be acceptable to provide that the development permitted should not proceed until the landscape work had been substantially completed. Where

permission is being granted for a substantial estate of houses, it might be thought appropriate to frame the relevant condition to allow for landscape works to be phased in accordance with a programme or timetable to be agreed between the developer and the authority and submitted for approval as part of the landscape design proposals. Alternatively, the erection of the last few houses might be prohibited until planting has been completed in accordance with the landscape scheme, but in relation to a permission for an industrial or office building it would be possible to impose a condition prohibiting or restricting occupation of the building until such works have been completed.

Appendix 2

1 Full copy of LI Response to previous DCLG proposals dated 2 November 2016

Department for Communities and Local Government Consultation: Improving the use of planning conditions

Response of the Landscape Institute, 2 November 2016

The Landscape Institute

The Landscape Institute (LI) is the royal chartered body for the landscape profession. As a professional organisation and educational charity, we work to protect, conserve and enhance the built and natural environment for the public benefit. The LI represents 5000 landscape architects, planners, designers, managers and scientists. In accordance with our charter, our members are concerned with all aspects of the science, planning, design, implementation and management of landscapes in urban and rural areas.

Planning conditions and the work of the landscape profession

This current consultation is highly relevant to both the LI and its members. Landscape professionals work with engineers, architects, developers and local authorities within the context of the statutory planning system as designers, agents, applicants or consultees. We fully appreciate that planning conditions, when used properly, can enable development proposals to be implemented where they would otherwise have to be refused permission. Our members are trained to understand and to properly apply S70 (1)(a) of the Town and Country Planning Act 1990, the National Planning Policy Framework (NPPF) and its supporting National Planning Practice Guidance (NPPG), which already explains that “...*planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.*”

It should also be remembered that paragraph six of the NPPF explains that “...*the purpose of the planning system is to contribute to the achievement of sustainable development*”. The LI shares the government’s view, as articulated in paragraph seven of the NPPF, that planning should concern itself equally with the economic, social and environmental sustainability. Our members, in collaboration with other professionals, work to achieve forms of development that enhance the natural, built and historic environment, landscape and biodiversity, conserve natural resources and mitigate and adapt to climate change. Our members also work to deliver healthy and safe places for communities to live, and design schemes that support social and cultural wellbeing. Landscape professionals also identify and coordinate the provision of infrastructure, in particular green infrastructure, pedestrian/cycle routes, floodwater management and sustainable drainage systems.

We urge the Department to pay attention to paragraph 203 of NPPF which states that *“Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions”*. It is important to note that the determination of a planning application involves a democratic process of consultation, information-gathering and negotiation in order to achieve the most acceptable and most sustainable form of development. As stated in the consultation document, planning decisions should be ‘clearly seen to be fair, reasonable and practicable’. As we have members who work on both sides of the decision-making process, our response below seeks also to be impartial and constructive.

Before outlining our responses to the specific questions posed, we feel it important that the Department consider our views in relation to the two key issues expressed on page seven of the consultation document and which form the basis of these new proposals:

Issue 1 – Too many unnecessary conditions are imposed

The LI agrees that planning conditions can be a useful tool for both applicants and local planning authorities in bringing forward sustainable development. When used properly, conditions can secure a high quality form of development and enable proposals to proceed where otherwise the development would have been refused planning permission. We agree that each application must be considered on its merits and that conditions should be tailored to tackle site-specific problems. All conditions should meet the NPPF ‘tests’ and be considered carefully to ensure that they are applied correctly to the application under consideration.

However, we have significant reservations when it comes to the allegation that ‘too many’ unnecessary pre-commencement planning conditions are imposed. Consultation questions in the document make it clear that evidence is required to support responses and we offer a generic example in question 6 below. However we are dismayed to see that the proposals are not supported by any evidence, aside from the unsubstantiated statement that:

“There are continuing concerns about the number of unnecessary or otherwise unacceptable conditions attached to permissions.”

Furthermore. NPPG (Use of Planning Conditions) already makes it very clear that:

“Conditions which unreasonably impact on the deliverability of a development and conditions which place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness and should therefore not be used”.

In our view, local planning authorities are in a position to limit the use of conditions only if the necessary information has been provided as part of the application under consideration. For example, a general statement about the developer’s intention to provide sustainable drainage systems will normally need to be supported by a ground investigation report, a flood risk assessment and a preliminary strategy for implementation on the application site. If this information is not available, or is not fully described by the applicant, and where their submission does not satisfy the

concerns of statutory consultees, then it will always be necessary to impose a pre-commencement condition in order to mitigate potential impacts and make the development acceptable in planning terms.

The LI believes that there is also an important question regarding the perception as to what constitutes a 'necessary' or 'unnecessary' condition. Legally this means that, without the condition, the proposed development would have to be refused planning permission. For the local authority and the applicant to agree 'necessity' there needs to be good clear communication at an early stage, prior to determination. There is already a mechanism for this to be achieved by pre-application discussions, but it is not being taken up as frequently or as consistently as it should be. In our view this lack of communication on either or both sides can result in a failure to understand the likely outcomes.

It is the experience of all the LI's professional members that there are very many developers who wish to develop land sustainably, and very many local planning authorities that act promptly to enable that sustainable development to proceed. They make themselves aware of the potential constraints on the land in question, and the likely requirements for mitigation, and act reasonably to negotiate with each other prior to the submission of any application. They agree what information will be required to support the proposal, what consultations will be necessary, and what investigations and surveys will be needed to comply with national guidance. Depending on the requirements of statutory consultees and the consultation responses of local people, the decision can usually be made within the target period, and planning permission granted subject to a limited number of necessary conditions, agreed between the parties. Critical to ensuring that this outcome can be satisfactorily secured, far more frequently than at present, is a consensual approach founded on professionalism, experience, knowledge, good communication and mutual respect between people on both sides who are prepared to plan sustainably and for the long-term.

It also appears that there are landowners and investors who apply for planning permission in the hopes of boosting the value of their land-holdings, possibly in order to sell, but who themselves have no wish to develop the land in the short term. There are others who wish to build houses but hope to resist any additional 'burdens' such as financial contributions, environmental enhancements or community benefits. There are also some local planning authorities that, for political or other reasons, may see developers as a source of funding for public services such as play and recreation, which cannot otherwise be maintained. They each perceive the planning system as a means to benefit the financial position of their organisation, rather than mediating between social, environmental and economic concerns, for the public good. In circumstances such as these, all parties can find themselves taking a more 'attritional' approach that can result in the imposition of pre-commencement conditions that may be perceived as unnecessary.

Thirdly, and the LI considers that this is the most worrying aspect of the decision-making process, there is a notable lack of knowledge and professional expertise among the planning officers left to operate the development management system after more senior officers have been made redundant or retired. It is important to note that the NPPG states that "*...the decision as to whether it is appropriate to impose such conditions rests with the local planning authority*". Very high expectations

are often placed on the granting of planning permission by landowners, developers, local authorities and the public. However many planning officers are not sufficiently skilled or experienced to handle complex applications.

In some authorities, consultant planners are engaged to handle the development management process for major applications. This can be an effective, if temporary, way to overcome the concerns about lack of capacity and delays in the system. However, the value of in-house expertise should not be underestimated. If a developer knows they are dealing with a professional employee of the local authority, communications and collaboration are likely to be better. In addition to this, the benefits of incorporating professional expertise on related matters, for example, landscape, trees and ecology, by using in-house staff to work with in-house planners, is greatly underestimated at a time of declining budgets and continued outsourcing. Dealing with applicants who are unwilling to invest any time or money in the pre-application discussions and pre-submission site investigations, or with elected members who have unrealistic expectations of the potential gains to be made if a planning permission is granted, requires planning officers to be experienced, knowledgeable, well-advised and assertive.

Following stringent budget cuts that have reduced staffing levels in many local authorities, development management officers often have to work under pressure to perform a difficult task to a tight timetable with limited resources. Well-reasoned, well-justified, fair and balanced planning decisions are far less likely to be made in such circumstances. Instead of suggesting to government that some conditions imposed on planning permissions are unnecessary and cause delays, it would be better for all parties to work together cooperatively to achieve the best outcomes, the most acceptable planning decisions, with the fewest necessary pre-commencement conditions and, ultimately, the most sustainable forms of development.

Therefore in our view the Department needs to realise that it takes time, experience and resources on both sides to ensure that conditions are appropriately tailored, and thus necessary to enable planning permission to be granted. At a time when local authority planning departments are increasingly under-resourced and under-funded, applicants can willingly pay for the pre-app service, only to find that the local authority is unable to provide a professional response. The LI therefore welcomes the intention of the consultation to strongly encourage pre-app discussions, as this would help developers to understand the local authorities' requirements and support planning officers to manage expectations on their side, particularly with elected members.

Issue 2 – Use of pre-commencement conditions

This issue is of particular relevance to the LI and the work of our members. The NPPF establishes the importance of good design, including landscape, and the early consideration of this is reinforced by guidance within the NPPG. However in too many cases, our members find that the design and implementation of landscape works, following commencement of a development project, is adversely constrained by works already committed or put in place during site preparation or the early stages of construction.

Furthermore, locally distinctive design and place-making requires existing landscape features such as trees, boundary hedgerows and other natural features to be safeguarded, and opportunities for green infrastructure enhancements to be identified, prior to the application being determined. Protection measures for trees, heritage assets and landscape features must therefore be an essential pre-commencement condition, along with a construction management plan that safeguards features to be retained.

All full applications, and most outline applications, are required by the NPPG and legislation in article 7(1)(c)(ii) of the Town and Country Planning (Development Management Procedure (England) (Order) 2015, to be accompanied by a proposed site layout plan. The LI proposes that this masterplan/ layout plan should be based on, and incorporate, a landscape framework and green infrastructure drawing that is mandatory, so that the application will not be validated without it. This should identify existing features to be retained, others to be enhanced and new landscape features to be created, including sustainable drainage systems, habitat creation, tree planting on circulation routes, play and public/private amenity spaces and clear connections into local and strategic green infrastructure networks. This plan should be fixed in the site masterplan/layout plan and approved with the planning application documents.

Ensuring these steps are taken would go a long way to ensuring that wider government policy objectives are achieved, including flood resilience, biodiversity enhancements, improved public health and climate change adaptation. However, if the outcome of this consultation is not to adopt the above pre-validation change, then the LI must continue to strongly support the use of pre-application landscape conditions to safeguard the following matters before construction operations start on site.

The majority of landscape treatments concern live organic materials, notably soils and plants. These are particularly vulnerable to disturbance and poor management associated with development. The delivery of good quality soft landscape outcomes, as opposed to inorganic construction, is therefore highly dependent upon a level of quality control and continuity of care in implementation and aftercare that cannot easily be conveyed in drawings or plans. Such outcomes are also susceptible to poor practice, inclement weather or neglect. To provide some assured quality of delivery it is therefore important that, where these matters have not been agreed prior to determination, pre-commencement landscape conditions should incorporate requirements for:

- Management of existing vegetation and other features to be retained, including allowance for construction access and operations;
- Specifications, covering soil cultivation and pesticide operations, earthworks, planting, protection measures and post-completion aftercare; and
- Operational timetables or programmes for planting or other action, which may be seasonally dependent.

Subsequently, the detailed landscape proposals must be based on the approved drawings, including 'standard' details including plant schedules, numbers, species, sizes and forms to be supplied, can be required by pre-occupation rather than pre-commencement conditions. Provided the initial

landscape protection measures are strictly enforced on site, the local planning authority can then spend more time consulting and negotiating the final landscape scheme when construction is underway. Landscape management plans should be mandatory pre-occupation conditions because schemes can so often be implemented without thought given to how they will subsequently be managed and maintained and ultimately destroyed by neglect.

Question 1. Do you have any comments about the proposed process for prohibiting pre-commencement conditions from being imposed where the local authority do not have the written agreement of the applicant?

Our members, who have worked for local planning authorities and for the Planning Inspectorate, as well as others who work for developers, report that in many cases the pre-application dialogue functions well. This does vary however from authority to authority. Delays tend to arise from misunderstandings or lack of information on both sides. Disagreements often arise when there is a lack of clarity as to what is required by the local planning authority in order to overcome the need for conditions. Or it can be down to an unwillingness on the part of the applicants to spend time and money revising their proposals or investigating specific matters further, prior to the granting of planning permission.

In the experience of our members, the majority of major planning applications take time and patience to collate, in order for the landowner / developers to be properly advised as to the constraints and opportunities of the site and to formulate their initial proposals, and then for designers and technical consultants to prepare a fully justified planning application. This is particularly so when other regulatory requirements, such as the Environmental Protection Act, apply. Even when planning permission has been granted, preparing technical drawings for submission under Building Regulations takes times and may delay the start on site.

A significant amount of money hangs on securing a favourable planning decision. This may be the landowner's capital gains, the developer's cash-flow or the investor's anticipation of profitable returns. Wise developers, prior to the completion of a contract for the purchase of land, will always seek to identify the potential costs and returns from the proposed development, together with any abnormal costs that are likely to arise. These costs can usually be re-charged to the vendor. In the experience of our members, wise developers are willing to invest time and money at the preliminary stages of a project, because this ultimately brings significant rewards in terms of saleable, high-quality products and increased profits. Therefore, we strongly believe that it is in everyone's interests to investigate potential constraints and solutions prior to the submission of a planning application.

The NPPG provides detailed advice on the use of planning conditions, and also on the procedures to be followed prior to the submission of any planning application. The consultation proposals suggest that draft conditions should be agreed with the applicant prior to determination of the application. This is recommend in the NPPG and already happens in many instances, particularly when the developer's team of specialist consultants has worked hard to agree details of the development prior to the determination of the application, and thus overcome the need for any pre-commencement conditions.

The LI therefore doubts that it is appropriate to introduce piecemeal legislation to support best practice, and to use up valuable parliamentary time to debate whether some developers and some local authorities fail to follow national guidance on the use of planning conditions. In our view this would be an unnecessarily heavy-handed approach.

Question 2. Do you think it would be necessary to set out a default period, after which an applicant's agreement would be deemed to be given? If so, what do you think the default period should be?

The LI considers that it will be necessary to set out a default period after which an applicant's agreement would be deemed to have been given. The default period should be reasonable, to allow the consultant/agent time to consult with the applicant.

Primary legislation and the NPPG require the local planning authority staff to publicise the development proposals for a statutory period of 21 days public consultation. After the first month of gathering background information and consultees' views, the planners and other relevant technical officers are then in a position to discuss with the applicant the potential impacts that have been anticipated and relevant mitigation measures. Where these involve significant changes this may result in the need for revised proposals to be submitted. This leaves a minimum of a month, and for more complex larger proposals, up to two months, for amended proposals to be submitted and / or for planning conditions to be agreed.

Ten working days would in our view be more than generous, bearing in mind local planning authority timetables for the collation, drafting and sign-off of planning officers' reports with draft planning conditions, and the issuing of agendas in advance of committee meetings.

Question 3. Do you consider that any of the conditions referred to in Table 1 should be expressly prohibited in legislation? Please specify which type of conditions you are referring to and give reasons for your views.

The LI notes that the NPPG makes it very clear that the conditions included in Table 1 should not be used as they fail one or more of the six tests defined in the NPPF. The NPPG states *"This applies even if the applicant suggests it or agrees on its terms or it is suggested by the members of a planning committee or a third party. Every condition must always be justified by the local planning authority on its own planning merits on a case-by-case basis."*

Developing new primary legislation to prohibit certain planning conditions would not only be dependent on the availability of valuable parliamentary time, it would also run contrary to established government policies that promote decision-taking and policy-making at a local level. For example, paragraph one of the NPPF *"...sets out the Government's requirements for the planning system only to the extent that it is relevant, proportionate and necessary to do so"*. Furthermore, Section 70 (1) (a) of the Town and Country Planning Act enables the local planning authority to impose *"...such conditions as they think fit"*. *In planning appeals and hearings our members find that*

PINS inspectors consistently state that “each application [appeal] must be considered on its own merits”.

Any proposals which, if enacted, would reduce current regulation and undermine the planning system would, in our view, lead to the anonymous housing development of poor quality, high-density housing with minimal landscape provision. This would undermine efforts in other areas of public policy, for example improving public health, reducing flood risk, enhancing biodiversity and improving climate change resilience.

The LI considers that there is a significant risk that volume housebuilders, if unregulated, will have little financial interest in making provision for design features that do not provide a short-term return on investment i.e. increasing the advance sale of off-plan housing. Their business model is to build houses and sell them at a profit, so that the provision of community benefits, play and recreation, space for biodiversity and green infrastructure counts as a liability on their balance sheets. The few higher quality housing schemes are likely to be target at the upper end of the market, thus disadvantaging many prospective occupiers who quite reasonably expect high quality housing environments as an essential element of all new residential development.

Planning conditions play an important role in delivering sustainable developments, thriving communities and healthy natural environments. A properly resourced local planning authority, including landscape professionals, can provide the framework within which a market that benefits both developers and local communities in the long-term can prosper. Removal of planning guidance will force developers to enter a race to the bottom, whether they like it or not, and regrettably it will be future generations who will pay the price.

The consultation paper explains that *“planning law...gives local planning authorities the flexibility to ensure that impacts are adequately mitigated and developments are acceptable. We want to ensure that impacts are adequately mitigated and developments are acceptable. We want to retain most of this flexibility, but provide local planning authorities and applicants with greater clarity about conditions that do not meet the policy tests, and which should not be used in any circumstances”.* Flexibility in local decision-making is vital in order to uphold the principle that each application should be determined on its own merits.

Therefore, in view of the very clear guidance on the use of conditions in both the NPPG and the NPPG, the LI considers that there is no need for new primary legislation to prohibit any of the conditions in table 1. If the consultation responses reveal other conditions that should be added to the existing list, then a proportionate response would be to amend the online NPPG.

The far more important need appears to be for landowners, developers and local planning authorities to become more aware of the importance of the NPPG and to understand that the government is not just offering advice, but is also defining fair and practicable rules for the operation of the planning system.

Question 4. Are there other types of conditions, beyond those listed in Table 1, that should be

prohibited? Please provide reasons for your views.

The LI feels strongly that it is highly inappropriate to prohibit conditions, pre-commencement or otherwise, that are designed to help deliver policy objectives set out in the NPPF, such as in relation to the protection of the natural or historic environment. This would undermine the fundamental purposes of the planning system: to deliver sustainable development.

Question 5. Do you have any views about the impact of our proposed changes on people with protected characteristics as defined in section 149 of the Equality Act 2010? What evidence do you have on this matter? If any such impact is negative, is there anything that could be done to mitigate it?

The LI has no comment in relation to question five.

Question 6. Do you have any views about the impact of our proposed changes on businesses or local planning authorities? What evidence do you have on this matter? If such impact is negative, is there anything that could be done to mitigate it?

The proposed changes would, in our view, result in negative impacts. In brief, these include:

- An additional layer of complexity in the planning process;
- Fewer tools available to planners to promote sustainable development;
- Increasing the workload of staff within already stretched local planning authorities;
- The potential to commit developers to a 'race to the bottom'
- Delays in obtaining planning permission.

It is unfortunate that the wording of the questions suggests that the needs of developers may sometimes override those of ordinary people hoping to live and work in sustainable neighbourhoods with a healthy environment. In our view, the job of the planning and landscape professions is to balance the demands placed on land by housing, business, transport and leisure with the needs of local communities. The Town and Country Planning Act 1990 and the Localism Act 2011 both support that view.

We believe that the consultation paper also shows bias in stating that *"...where the local authority insists on retaining the substance of a pre-commencement condition, but decides to require discharge at a later stage of the development process e.g. before the development is occupied, this proposal will ensure that the condition doesn't delay the start of the development."*

The LI does not disagree that the timescale of some necessary conditions could be "prior to occupation of the first dwelling" or similar. This will normally be appropriate for conditions requiring details of operations that will not take place until the later stages of the construction process. However, where the condition covers a fundamental issue that was not resolved to the satisfaction of the local planning authority prior to the determination, or seeks to control the early stages of development (for example, hours of site operations, dust control during site preparations, tree

protection, archaeological investigations, ecological surveys, specification of building materials etc.) then it is important to delay the start of construction until the condition has been discharged.

As for the suggested removal of conditions, the LI believes that if a proposed condition meets the tests specified in the NPPF, then it should not be removed. Reduction of costs and delays for a developer will not justify the removal of any condition that is necessary for an unacceptable form of development to be made acceptable prior to the grant of planning permission.

LI members could offer many individual case-studies where pre-commencement conditions have been correctly imposed, and accepted by the developer as necessary, in order for a proposed development not to be refused planning permission. To provide a generic example, one that is discussed very frequently within the landscape profession and the development industry at large, we would use application sites identified within flood risk areas, where built development is not expressly prohibited by law. In recent years there have been many major flooding incidents and the public is becoming more aware of the increasing frequency of these events. A developer submitting an outline application may claim that there have never been any previous incidents of flooding on the application site and may wish to avoid the costs of preparing technical reports into the likelihood of flooding and eliminate the potential for delays to be incurred whilst discussions of the findings take place with the Environment Agency and other statutory bodies.

In this regard, the local planning authority must take into account the requirements of NPPF (set out in paragraphs 100 – 104) and national guidance in NPPG, which require planning authorities to take into account flood risk at all stages of the planning process, to avoid inappropriate development in areas at risk of flooding, and to direct development away from areas of highest risk. If the local authority considers that the proposed development is exceptionally necessary, and that it would not increase the risk of flooding elsewhere, then they may decide to grant planning permission against the advice of the Environment Agency.

In such circumstances the granting of outline planning permission, without a pre-commencement condition that requires a full assessment of potential flood risk, and a detailed surface water drainage strategy to deal with run-off, would give the developer an opportunity to start on site without delay. The developer would make savings in terms of funds that would have been used to pay consultants to produce the necessary technical reports. However the applicant would have failed to provide clear evidence at the outset that the development will be sustainable in terms of surface water management. This would be convenient for the developer and his/her cash-flow, but it would be short-sighted, contrary to Environment Agency advice and potentially damaging in terms of future flooding events affecting the homes of future on-site and downstream occupiers.

The consultation document explains that if the applicant does not agree to the imposition of a pre-commencement condition, the local planning authority would have the option to either change the condition in question, allow the developer to comply with it after the development is underway or remove the condition altogether. The LI considers also that the option should be available to the local authority to refuse to determine the application until the applicant submits sufficient information (as per the example above) which would justify why a pre-commencement condition is not necessary or

appropriate for that particular development. The final sanction available to the local authority, should the applicant fail to comply, would be to refuse the application.

In terms of evidence to support this matter, developer clients of our members report that, when they buy land for development, they are aware that planning permission runs with the land and that any conditions imposed on the permission will bind them, as future owners. If they do not wish to accept the conditions that have been imposed, in particular pre-commencement conditions that are seen as onerous, they will usually make a S73 application to remove or alter those conditions. They know that this will not reverse the decision of the local authority to grant permission. The costs and delays incurred by the developer choosing to make a S73 application tends to be accepted as an inevitable part of the process of getting approval for the form of development that they wish to progress. Rationalising the planning conditions is also usually necessary to reassure potential investors prior to commencement on site.

In terms of local planning authorities, the need to discuss planning conditions with uncooperative applicants prior to the final decision being made will put greater pressure on officers trying to keep within the eight week and 13 week targets for determination. The experience of LI members is that the timescales are already so tight that planning officers rarely have the opportunity to consider a full list of possible conditions until they start to write the draft committee report. This is then signed off by a senior officer before publication, usually seven days before the committee meeting.

Many conditions will lead from the formal responses of statutory and local consultees, whose comments may require further discussions and negotiations with technical officers to decide whether their concerns could be overcome by the imposition of a condition. LI members report that developer clients who choose to engage with the pre-application process consider it to be a positive process, enabling officers representing the local planning authority and consultants acting for the applicant to come together to achieve a form of development that is sustainable. Applicants who are willing to contribute to the process see the up-front negotiations, including planning performance agreements, as worthwhile in terms of achieving a high quality form of development and also potentially avoiding subsequent costs and delays. The NPPG outlines the benefits of pre-application discussions; most of these are recognised and accepted by developers as a way to reduce the number of pre-commencement conditions on a grant of planning permission.

Other than not proceeding with the proposals set out in the consultation, the negative impacts on hard-working public sector planning officers could be overcome by providing financial and professional support to the local authorities struggling to maintain the regulatory targets for planning decisions. As described above, some authorities employ consultants on contract to deal with major applications; others divert staff resources away from pre-application discussions to manage expediently the post-submission stages. Attempting to squeeze more services and better decisions out of the already under-supported planning system is unlikely to succeed. More legislation without greater cooperation between the parties could lead to more unnecessary pre-commencement conditions being applied to rushed and ill-considered planning decisions.

Overall, it appears that the proposals set out in the consultation represent an attempt by

government to push through unsatisfactory planning applications with minimal cost to developers. The unintended consequence is likely to be that costs are pushed onto communities and the environment, which are more difficult to measure in financial terms. We therefore suggest that what is needed is:

- A greater understanding of, and willingness to comply with, the existing clear guidance in the NPPF and NPPG relating to the use of planning conditions;
- A mandatory requirement for applicants promoting major developments to fully engage with the pre-applications discussion process; and
- A new ministerial directive, supported by additional funding as necessary, requiring local authorities to provide and operate a professional and responsive pre-application service in order to minimise the need for pre-commencement conditions in all cases.