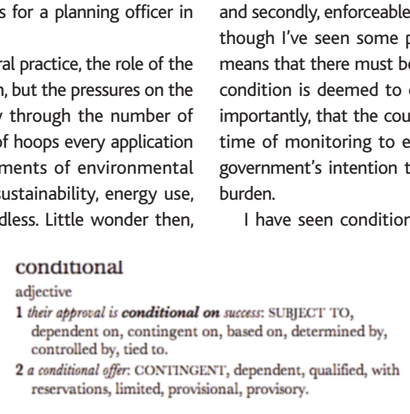
Conditioning or sectioning – the jury's still out

... not be the punchiest of titles, nor perhaps the most riveting of subjects, but it has become a bone of contention, not to say, a complete dog's dinner says Roger Wilson

If I were a planning officer, I might make the strategic decision to avoid mentioning it at social parties, or, better still, I'd invent another career in those circumstances. The alternative is to invite all sorts of unwelcome comments about the state of the system, or …. how could they, i.e. you, possibly allow such a hideous scheme next to a listed building. Alternatively, why did they, i.e. you, refuse permission for that harmless extension to my good friends - they're such nice people too! – It's a travesty of common sense. Such are the risks for a planning officer in normal social intercourse.

Since my early days of architectural practice, the role of the planning officer hasn't changed much, but the pressures on the system have increased significantly through the number of applications, costs and the number of hoops every application has to jump through, from assessments of environmental impact, transportation, landscape, sustainability, energy use, archaeology…. the list is almost endless. Little wonder then, that it suits both applicant and planning officer to push a number of issues to one side, if not under the carpet, certainly to be dealt with later. Why do today what can be put off for a few months!


conditional
adjective
1 *their approval is* ***conditional on*** *success*: SUBJECT TO, dependent on, contingent on, based on, determined by, controlled by, tied to.
2 *a conditional offer*: CONTINGENT, dependent, qualified, with reservations, limited, provisional, provisory.

It is for these reasons that conditions are imposed to control development, at least that was the government's intention – to remove from councillors' valuable time, the need to debate the minutiae of uncontentious matters. So far, so good. In most cases, these were imposed without discussion between applicant and council, and simply controlled the timing of development and such things as the external materials. Once submitted, these conditions were 'discharged' - end of story, job done.

Now things are far more complex. There can be 20-30 conditions applied to a simple office building and drafts of these can pass back and forth between council and applicant over a long period, right up until the time the application is determined. The public never see these because they're not part of the public file, and it takes a very skilled observer to spot inappropriate or technically incorrect conditions suggested in the officer's report to Members and to get these changed often at the last minute. Most significantly for the decision making process, it often shifts determination of controversial issues from public and elected Member scrutiny to be settled by officers under delegated powers, long after the dust of public angst has settled.

The fundamental basis of imposing conditions is that without them, the council or decision maker would refuse planning permission. Certainly, as a Planning Inspector, this was the abiding question in my mind. Contrary to the council's offering a 'wish list', anything that wasn't essential was rejected. Also rejected were conditions that required an 'undefined proposal', i.e. something that had not yet been designed (and indeed may not be possible to design or manufacture) to overcome a planning issue; for example, a noise reduction mechanism to allow a 'bad neighbour' to live alongside a residential use. Such were the infinite range of 'conditional' possibilities that the government introduced a guide to their use. Two of those key requirements are that any condition should, firstly, be precise and secondly, enforceable. The first should be self-explanatory, though I've seen some pretty woolly examples. The second means that there must be a recognised standard by which the condition is deemed to comply, but also, and perhaps more importantly, that the council is not expected to endure a lifetime of monitoring to ensure compliance. It was never the government's intention to land councils with a never-ending burden.

I have seen conditions requiring or implying that equipment is to be maintained to certain standards of performance. Is it reasonable or practical to expect a council to monitor such a situation for compliance over the lifetime of the building? Alternatively, is it reasonable to expect residents or members of the public to recognise non-compliance of such highly specialised issues as noise or air quality? I think not! On noise, given that the human ear cannot detect less than a 3dB change in level to either noise coming from equipment or background noise against which it is measured, it would place an unreasonable burden on both council and the public. Consider also, whether a council has the resources to enforce maintenance regimes for such equipment - for how long would a broken extraction fan remain unrepaired for the want of enforcing suitable maintenance? In such sensitive areas of environmental control, the margin for compliance is small, and even minor changes could cause an infringement. Thus, the use of conditions here is an inadequate mechanism and heavy reliance on them is unsafe. Moreover, any assessment should not be dependent on a specific operator, e.g. an hotelier, and remember that this may not be the original developer, where the proposed use is readily transferable to any other operator. Alternatively, if such conditions were not imposed, it is axiomatic that the scheme would be unacceptable, and therefore should be refused planning permission.

One aspect of the modern planning process is the use of legal agreements or obligations (under Section 106 of the Planning Act). These agreements introduced a much broader scope of enterprise and control and are considered a step-up from conditions. In the early days, it gave both sides an opportunity to extend the scope to include financial contributions

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covering matters well beyond the terms of the development - A new cricket ground in return for a supermarket was not unknown. Some councils used the opportunity to swell their coffers, while developers were not averse to active collusion, if only because it offered the chance for developing a site that would not normally have been available to them. This practice was rightly curtailed because circumstances got so ridiculous that permission was being granted for some really awful schemes only because of the size of the cheque that accompanied them!

Happily, matters have become more regulated, but in my recent experience, no less contentious. Developers, in the full knowledge that conditions would not suffice, have offered a Section106 agreement covering a range of issues from Construction Management Plans (CMP), Green transport, 'local' staffing and employment, environmental performance and Operational Management Plans among others. Again, the scope is almost limitless.

At first sight, these seem quite a good idea. Whereas a developer could appeal against a condition, the same could not be said of a binding obligation into which the developer had freely entered. However, there are significant issues arising from such agreements that give cause for concern. Firstly, they give false hope to councils that they can control development. For example, how is a council to control the staffing and employment policy of a company? Without actively engaging with that company on a regular basis, there is no control – so, this is an unrealistic prospect; similarly, green transport policies. Are the council to follow employees to the bus, just to make sure an unauthorised car trip isn't being made? Secondly, unlike other planning documents that describe the characteristics of a development proposal, their final content is often excluded from public consultation and scrutiny.

I have recently come across CMPs, which, on the face of it, are environmentally good, and support best practice in the industry. But in order to achieve anything, they have to be monitored regularly. Contrary to general expectation, the council does not employ a department policing construction sites. Instead, they rely on the public to do it for them. Any reported infringements are normally followed up. But how is the public to know of an infringement? Contractors do not display the agreed CMP for the public's scrutiny. An enquiry to the site manager is likely to be met with a frosty response, or an unhelpful gesture. A similar question to the council is met with the response: 'that's a confidential matter between us and the developer'. So much for open government. The very essence of a planning permission is signed behind closed doors that have then been firmly shut in the public's face.

Another aspect of agreements is that they are signed by the developer and council (naturally)…. and 'any other person who has an interest in the land'. In commercial cases, it can involve a range of parties from mortgages, tenants, and other financial partners. This can take quite a time to assemble and all must sign up to it. Because such agreements are now subject to a similar amendment application and/or appeal regime, they no longer have the binding authority they once did. In the past, Courts have overturned the agreements where judges have decided that they are no longer valid or reasonable, for example, the attachment of residential use to agricultural holdings. I can also imagine a strong case for extinguishing a requirement for a hotel company to operate in a certain manner. Hotel managements change faster than Mercedes change Lewis Hamilton's tyres, so binding one company to another's policy is as unrealistic as it might be seen to be unreasonable. So ends a key element of the council's control mechanism.

So, who would want to be a planning officer - the jury is still wondering? Equally important, should members of the public have to monitor conditions or agreements drawn up by council officers to protect their amenity when that, surely, was the very purpose of making a planning application in the first place. If planning officers cannot get the application in the right form before the council Members have to decide yae or nae, then at least make sure the conditions meet the rules, i.e. necessity, precision, relevancy, enforceability and reasonableness. Don't leave an unholy legacy for other council staff and the public to pick over for eternity. If S106 agreements are required, then make them open and transparent operating under the same rules. ■

If that's not enough on 'conditions' then read Andy Rogers' column! – *Ed.*