

Appendix

Circular 11/95: Use of conditions in planning permission

Ability to Enforce

26. A condition should not be imposed if it cannot be enforced. It is often useful to consider what means are available to secure compliance with a proposed condition. There are two provisions which authorities may use to enforce conditions: an enforcement notice, under section 172 of the Act, or a breach of condition notice under section 187A. (Detailed advice about breach of condition notices is in Annex 2 of DOE Circular 17/92 (WO Circular 38/92)). Precision in the wording of conditions will be vital when it comes to enforcement (see paragraph 27 below)....

Conditions depending on others' actions

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40. It is the policy of the Secretaries of State that such a condition should only be imposed on a planning permission if there are at least reasonable prospects of the action in question being performed within the time-limit imposed by the permission (see endnote 3).

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Endnotes

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3. *British Railways Board v Secretary of State for the Environment and Hounslow LBC* [1994] J.P.L. 32; [1993] 3 P.L.R.125-the House of Lords established that the mere fact that a desirable condition, worded in a negative form, appears to have no reasonable prospects of fulfillment does not mean that planning permission must necessarily be refused as a matter of law. However, the judgment leaves open the possibility for the Secretary of State, to maintain as a matter of policy that there should be at least reasonable prospects of the action in question being performed within the time-limit imposed by the permission.



OFFICE OF THE DEPUTY PRIME MINISTER

25 November 2002

Dear Colleague

CIRCULAR 11/95: USE OF NEGATIVE CONDITIONS

I am writing to draw your attention to the advice in paragraph 40 and the footnote on page 16 of the Annex of Circular 11/95 on The Use of Conditions in Planning Permissions. The advice is on conditions worded in a negative form, prohibiting development until a specified action has been taken.

Following the High Court case *Merritt v SSETR and Mendip District Council* we need to amend the advice in Circular 11/95. Until we are able to amend the Circular, please would you note the following advice when imposing negative planning conditions.

The advice in Circular 11/95 on conditions depending on other's actions (Annex paragraphs 38 and 39), says that it is unreasonable to impose a condition worded in a positive form which developers would be unable to comply with themselves, or which they could comply with only with the consent or authorisation of a third party. Similarly, conditions which require the applicant to obtain an authorisation from another body should not be imposed.

Although it would be *ultra vires* to require works which the developer has no powers to carry out, or which would need the consent or authorisation of a third party, it may be possible to achieve a similar result by a condition worded in a negative form, prohibiting development until a specified action has been taken.

The way the advice is currently worded in paragraph 40 is that such a condition should only be imposed on a planning permission **if there are at least reasonable prospects** of the action in question being performed within the time-limit imposed by the permission.

As a result of the Judgement in *Merritt*, paragraph 40 should be amended to read, "It is the policy of the Secretary of State that such a condition may be imposed on a planning permission. However, when **there are no prospects at all** of the action in question being performed within the time-limit imposed by the permission, negative conditions should not be imposed. In other words, when the interested third party has said that they have no intention of carrying out the action or allowing it to be carried out, conditions prohibiting development until this specified action has been taken by the third party should not be imposed."

The foot note at the bottom of page 16 should be replaced with "A policy of refusing permission where there was no reasonable prospect of planning conditions being

met could be lawful, but sound planning reasons for the refusal should be given and it should be made clear that this was only a starting point for consideration of cases.”

Yours sincerely,

JOHN STAMBOLLOUIAN

Overarching National Policy Statement for Energy (EN-1)

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Part 4 Assessment Principles

4.1 General points

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4.1.7 The IPC should only impose requirements⁷² in relation to a development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. The IPC should take into account the guidance in Circular 11/95, as revised, on “The Use of Conditions in Planning Permissions” or any successor to it.

4.1.8 The IPC may take into account any development consent obligations⁷³ that an applicant agrees with local authorities. These must be relevant to planning, necessary to make the proposed development acceptable in planning terms, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects.

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5.4 Civil and military aviation and defence interests

Introduction

5.4.1 Civil and military aerodromes, aviation technical sites, and other types of defence interests (both onshore and offshore) can be affected by new energy development....

IPC decision making

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5.4.17 Where, after reasonable mitigation, operational changes, obligations and requirements have been proposed, the IPC considers that:

- ..a development would prevent a licensed aerodrome from maintaining its licence;
- ..the benefits of the proposed development are outweighed by the harm to aerodromes serving business, training or emergency service needs, taking into account the relevant importance and need for such aviation infrastructure; or
- ..the development would significantly impede or compromise the safe and effective use of defence assets or significantly limit military training;
- ..the development would have an impact on the safe and efficient provision of en route air traffic control services for civil aviation, in particular through an adverse effect on the infrastructure required to support communications, navigation or surveillance systems;

consent should not be granted.

Mitigation

5.4.18 Where a proposed energy infrastructure development would significantly impede or compromise the safe and effective use of civil or military aviation or defence assets and or significantly limit military training, the IPC may consider the use of ‘Grampian¹¹¹, or other forms of condition which relate to the use of future technological solutions, to mitigate impacts. Where technological solutions have not yet been developed or proven, the IPC will need to consider the likelihood of a solution becoming available within the time limit for implementation of the development consent. In this context, where new technologies to mitigate the adverse effects of wind farms on radar are concerned, the IPC should have regard to any Government guidance which emerges from the joint Government/Industry Aviation Plan....

¹¹¹ A negative condition that prevents the start of a development until specific actions, mitigation or other development have been completed.

National Planning Policy Framework

Introduction

1. The National Planning Policy Framework sets out the Government’s planning policies for England and how these are expected to be applied.¹ It sets out the Government’s requirements for the planning system only to the extent that it is relevant, proportionate and necessary to do so. It provides a framework within which local people and their accountable councils can produce their own distinctive local and neighbourhood plans, which reflect the needs and priorities of their communities.

2. Planning law requires that applications for planning permission must be determined in accordance with the development plan,² unless material considerations indicate otherwise.³ The National Planning Policy Framework must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions.⁴ Planning policies

and decisions must reflect and where appropriate promote relevant EU obligations and statutory requirements.

3. This Framework does not contain specific policies for nationally significant infrastructure projects for which particular considerations apply. These are determined in accordance with the decision-making framework set out in the Planning Act 2008 and relevant national policy statements for major infrastructure, as well as any other matters that are considered both important and relevant (which may include the National Planning Policy Framework). National policy statements form part of the overall framework of national planning policy, and are a material consideration in decisions on planning applications.

4. This Framework should be read in conjunction with the Government's planning policy for traveller sites. Local planning authorities preparing plans for and taking decisions on travellers sites should also have regard to the policies in this Framework so far as relevant.

5. This Framework does not contain specific waste policies, since national waste planning policy will be published as part of the National Waste Management Plan for England.⁵ However, local authorities preparing waste plans and taking decisions on waste applications should have regard to policies in this Framework so far as relevant.

Achieving sustainable development

International and national bodies have set out broad principles of sustainable development. Resolution 42/187 of the United Nations General Assembly defined sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs. The UK Sustainable Development Strategy *Securing the Future* set out five 'guiding principles' of sustainable development: living within the planet's environmental limits; ensuring a strong, healthy and just society; achieving a sustainable economy; promoting good governance; and using sound science responsibly.

6. The purpose of the planning system is to contribute to the achievement of sustainable development. The policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system.

7. There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:

- **an economic role** – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;

- **a social role** – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community’s needs and support its health, social and cultural well-being; and

- **an environmental role** – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy.

8. These roles should not be undertaken in isolation, because they are mutually dependent. Economic growth can secure higher social and environmental standards, and well-designed buildings and places can improve the lives of people and communities. Therefore, to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously through the planning system. The planning system should play an active role in guiding development to sustainable solutions.

9. Pursuing sustainable development involves seeking positive improvements in the quality of the built, natural and historic environment, as well as in people’s quality of life, including (but not limited to):

- making it easier for jobs to be created in cities, towns and villages;
- moving from a net loss of bio-diversity to achieving net gains for nature;⁶
- replacing poor design with better design;
- improving the conditions in which people live, work, travel and take leisure; and
- widening the choice of high quality homes.

10. Plans and decisions need to take local circumstances into account, so that they respond to the different opportunities for achieving sustainable development in different areas.

The presumption in favour of sustainable development

11. Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.⁷

12. This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material

considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place.

13. The National Planning Policy Framework constitutes guidance⁸ for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications.

14. At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.

For **plan-making** this means that:

- local planning authorities should positively seek opportunities to meet the development needs of their area;

- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
- specific policies in this Framework indicate development should be restricted.⁹

For **decision-taking** this means:¹⁰

- approving development proposals that accord with the development plan without delay; and

- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
- specific policies in this Framework indicate development should be restricted.⁹

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10. Meeting the challenge of climate change, flooding and coastal change

93. Planning plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions, minimising vulnerability and providing resilience to the impacts of climate change, and supporting the delivery of renewable

and low carbon energy and associated infrastructure. This is central to the economic, social and environmental dimensions of sustainable development.

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98. When determining planning applications, local planning authorities should:

- not require applicants for energy development to demonstrate the overall need for renewable or low carbon energy and also recognise that even small-scale projects provide a valuable contribution to cutting greenhouse gas emissions; and
- approve the application¹⁸ if its impacts are (or can be made) acceptable. Once suitable areas for renewable and low carbon energy have been identified in plans, local planning authorities should also expect subsequent applications for commercial scale projects outside these areas to demonstrate that the proposed location meets the criteria used in identifying suitable areas.

Plan-making

Local Plans

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Using a proportionate evidence base

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Defence, national security, counter-terrorism and resilience

164. Local planning authorities should:

- work with the Ministry of Defence's Strategic Planning Team to ensure that they have and take into account the most up-to-date information about defence and security needs in their area; and
- work with local advisors and others to ensure that they have and take into account the most up-to-date information about higher risk sites in their area for malicious threats and natural hazards, including steps that can be taken to reduce vulnerability and increase resilience.

Beverley Borough Local Plan (June 1996)

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NATURAL AND RURAL ENVIRONMENT

Development Limits and Open Countryside

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Policy E3

To protect the open countryside, planning permission will not be granted for development outside the development limits identified on the Proposals Map other than for the purposes of agriculture, forestry, outdoor sport, cemeteries, rural diversification, essential utility development, uses ancillary to existing residential curtilages, or other uses appropriate to a rural area and then only if the proposal is appropriate to a rural area and any built development is located, designed and landscaped to minimise the visual impact.

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Policy In13

Proposals for renewable energy development will be allowed provided the development will meet all of the following criteria:

- a) it will not significantly detract from the character, appearance or amenity of the area.....

National Policy Statement for Renewable Energy Infrastructure (EN-3)

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2.7 Onshore Wind

Introduction

2.7.1 Onshore wind farms are the most established large-scale source of renewable energy in the UK. Onshore wind farms will continue to play an important role in meeting renewable energy targets.

2.7.2 Onshore wind farm proposals are currently likely to involve turbines from between two megawatts (MW) of generating capacity and up to three and a half MW individually, but as technology develops, this could increase. The total number of turbines comprising a wind farm of 50 MW capacity or greater covered by this NPS is therefore likely to be fourteen or more. This scale of development will inevitably have some visual and/or noise impacts, particularly if sited in rural areas.

Factors influencing site selection by applicant

2.7.3 The key considerations involved in the siting of an onshore wind farm are likely to be influenced by factors set out in the following paragraphs.

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Proximity of site to dwellings

2.7.6 Commercial scale wind turbines are large structures and can range from tip heights of 100m up to 150m although advances in technology may result in larger machines coming on the market. All wind turbines generate sound during their operation. As such, appropriate distances should be maintained between wind turbines and sensitive receptors to protect amenity. The two main impact issues that determine the acceptable separation distances are visual amenity and noise. These are considered in the Landscape and visual (paragraph 2.7.46) and Noise and vibration (paragraph 2.7.52) impact sections below.

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Technical considerations for the IPC when determining onshore wind farms

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Onshore Wind Farm Impacts – Landscape and visual

Introduction

2.7.46 Generic landscape and visual impacts are covered in Section 5.9 of EN-1. In addition, there are specific considerations which apply to onshore wind turbines, which are set out in the following paragraphs.

Applicant's assessment

2.7.47 Detailed pre-application consultation should be carried out in accordance with the assessment policy set out in Section 5.9 of EN-1.

IPC decision making

2.7.48 Modern onshore wind turbines that are used in commercial wind farms are large structures and there will always be significant landscape and visual effects from their construction and operation for a number of kilometres

around a site.

2.7.49 The arrangement of wind turbines should be carefully designed within a site to minimise effects on the landscape and visual amenity while meeting technical and operational siting requirements and other constraints.

2.7.50 There are existing operating wind farms where commercial scale wind turbines are sited close to residential dwellings. The IPC should consider any evidence put before it on the experience of similar-scale turbines at similar distances to residential properties.

Mitigation

2.7.51 It is unlikely that either the number or scale of wind turbines can be changed without significantly affecting the electricity generating output of the wind farm. Therefore, mitigation in the form of reduction in scale may not be feasible.

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