

**EXPLANATORY MEMORANDUM TO**  
**THE TOWN AND COUNTRY PLANNING (PRE-COMMENCEMENT**  
**CONDITIONS) REGULATIONS 2018**

**2018 No. 566**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 The Regulations prescribe the circumstances when permission for the development of land may be granted by the local planning authority (or Secretary of State, as the case may be) subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 This is the first exercise of the power in section 100ZA(6) of the Town and Country Planning Act 1990 (“the 1990 Act”) to prescribe the circumstances when permission for the development of land may be granted subject to a pre-commencement condition without the written agreement of the applicant.

*Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

- 4.1 Section 100ZA was inserted into the 1990 Act by section 14(1) of the Neighbourhood Planning Act 2017 (“the 2017 Act”). Section 100ZA(5) provides that planning permission for the development of land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition. A pre-commencement condition is defined in section 100ZA(8) as a condition imposed on a grant of planning permission (other than a grant of outline planning permission within the meaning of section 92 of the 1990 Act) which must be complied with (a) before any building or operation comprised in the development is begun, or (b) where the development consists of a material change of use of any buildings or other land, before the change of use is begun.
- 4.2 The requirement for the applicant to agree to the terms of a pre-commencement condition does not apply in such circumstances as may be prescribed under section 100ZA(6). The requirement in section 100ZA(5) to obtain the written agreement of the applicant applies to a “relevant” grant of planning permission. Section 100ZA(13) defines a “relevant” grant of planning permission as permission to develop land

granted on an application made under Part 3 of the 1990 Act and the modification of any such grant – these are grants or modifications pursuant to:

- (a) an application for planning permission made or deemed to be made under sections 62A, 70, 73 and 177 of the 1990 Act,
- (b) an application determined under section 77, and
- (c) an appeal made under section 79.

4.3 It should be noted that section 100ZA(5) does not apply to grants or modifications of planning permission under:

- (a) section 90 of the 1990 Act (Government authorisation) – see section 90(3);
- (b) sections 97, 98 or 100 of the 1990 Act (modification of planning permission by local planning authority or Secretary of State) – in these cases there is no application and therefore the modification is not a ‘relevant grant of planning permission’ for the purposes of section 100ZA;
- (c) section 141 of the 1990 Act (modification of planning permission: purchase notices) – for the same reason.

4.4 These Regulations set out the circumstances where planning permission may be granted subject to a pre-commencement condition without the written agreement which would otherwise be required by section 100ZA(5).

4.5 If the applicant has been notified of the intention to impose the pre-commencement condition and fails to provide a “substantive response” as defined in these Regulations within the period specified in the notice the pre-commencement condition can be imposed without their agreement.

4.6 If notice of a proposed pre-commencement condition has been given the application cannot be determined until the period specified in the notice has expired unless, before that date, the applicant provides a substantive response or written agreement to the pre-commencement condition.

4.7 The power to make Regulations under section 100ZA(6) of the 1990 Act was commenced on 19<sup>th</sup> July 2017 (S.I. 2017/767). The requirement to obtain the applicant’s written agreement before imposing a pre-commencement condition will be brought into force on the same day as these Regulations which disapply that requirement.

4.8 Section 14(3) of the 2017 Act provides that section 100ZA of the 1990 Act has effect in relation to conditions on a grant or modification of a planning permission only if the permission is granted or modified on or after the coming into force of that section. The provisions made in these Regulations apply only to conditions on a grant or modification of planning permission granted or modified after the coming into force of these Regulations.

## **5. Extent and Territorial Application**

5.1 This instrument extends to England and Wales.

5.2 This instrument applies only to land in England.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

### *What is being done and why*

- 7.1 These Regulations, which have been subject to consultation (from 30 January to 27 February 2018), set out the circumstances when planning permission may be granted subject to a pre-commencement condition without the applicant's written agreement. This is to ensure there is no undue delay in determining whether a pre-commencement condition can be imposed. The full consultation can be found at: <https://www.gov.uk/government/consultations/improving-the-use-of-planning-conditions-consultation-on-draft-regulations>.

### *Background to policy*

- 7.2 Used effectively, planning conditions attached to a grant of planning permission can be a useful tool for both developers and local planning authorities in securing good development. Planning conditions enable development proposals to proceed where it would otherwise have been necessary to refuse planning permission. Some planning conditions must be complied with by developers before development can start - these are known as 'pre-commencement conditions'. Pre-commencement conditions play an important and useful role in some cases. However, because they must be complied with before development begins, imposing such a constraint on development, when it is not justified, unnecessarily delays the delivery of development and drives up costs.
- 7.3 In response to concerns about unnecessary costs and delays to development caused by the inappropriate use of pre-commencement planning conditions, the Government introduced a measure in the 2017 Act to ensure that pre-commencement conditions are only used where they are absolutely necessary and that parties are in agreement before they are imposed. Provision was also made in the 2017 Act for a power to make Regulations prescribing circumstances when a pre-commencement condition can be imposed without the agreement of the applicant. The power to make Regulations was subject to a requirement to carry out a public consultation in advance of making Regulations.
- 7.4 In line with existing good practice, we expect 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. We expect that the local planning authority will share with the applicant any draft pre-commencement conditions at the earliest possible opportunity. If the applicant confirms their agreement to a pre-commencement condition in writing, that pre-commencement condition can be imposed, and the procedures set out in these Regulations do not apply.
- 7.5 The Regulations consulted on provide that the written agreement of the applicant to the terms of a pre-commencement condition is not required if:
- the local planning authority (or Secretary of State, as the case may be) has given notice in writing to the applicant that, if planning permission is granted the authority or Secretary of State intends to impose the pre-commencement condition specified in the notice, and
  - the applicant does not provide a substantive response to the notice within the period specified in the notice.

- 7.6 The Regulations provide that an applicant’s written agreement would effectively be deemed to have been given to the pre-commencement condition where the applicant does not provide a substantive response to the notice within 10 working days beginning with the day after the date on which the notice was given.

#### ***Consolidation***

- 7.7 This instrument is the first exercise of new powers and as such consolidation is not applicable.

### **8. Consultation outcome**

- 8.1 The consultation ran for 4 weeks (30 January to 27 February 2018) and received 121 responses in total. More than 80% of the responses were received from the following 4 groups: local authorities (45%), individuals (15%) the development sector (13%) and professional associations (10%). The consultation outcome is published online at:

<https://www.gov.uk/government/consultations/improving-the-use-of-planning-conditions-consultation-on-draft-regulations>

Three principal measures were consulted on:

#### **i) The contents of the notice**

Overall there was strong, cross-sector support from respondents (75%) for the proposal that the notice should include full reasons for the proposed pre-commencement condition. They were largely in favour of local planning authorities being clear about why pre-commencement conditions were required. The main objection raised was around the need to clarify the level of detail to meet the requirement to provide ‘full reasons’ for the imposition of a pre-commencement condition. The Department has responded to this by stating that there is already a statutory requirement for local planning authorities to give ‘full reasons’ for any condition imposed on a permission, and if it is a pre-commencement condition, why that is the case (Article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015/595).

#### **ii) Definition of ‘substantive response’**

About half of respondents (46%) agreed with how ‘substantive response’ was defined, recognising that the proposal would encourage more dialogue between applicants and local planning authorities before a decision was taken. The main objection was that applicants who do not agree with a proposed pre-commencement condition (either in principle or on a matter of detail) are not under an equivalent obligation to explain their reasons for doing so. The Department has responded to this by proposing to encourage applicants (in guidance) to explain the reasoning for their response.

#### **iii) The time-limit for responding**

About half of respondents (52%) agreed with setting a fixed period of 10 working days for an applicant to respond to the notice, without giving local planning authorities the discretion to agree with applicants a longer period. This, they felt, would avoid variations to timescales which impact on the ability of local planning authorities to issue prompt decisions. Other respondents were divided, with some suggesting there should be a shorter time period to enable local planning authorities to meet relevant statutory determination targets, while others suggested a longer time period to support a more open relationship between local planning authorities and

applicants. The Department has responded to this by confirming that a fixed period of 10 working days is necessary to avoid undue delays or uncertainty in the planning application process.

## **9. Guidance**

- 9.1 Guidance on the appropriate use of planning conditions is already available in National Planning Practice Guidance. This guidance will be updated prior to the ‘coming into force’ date of these regulations.

## **10. Impact**

- 10.1 Since developers can choose not to respond to the planning authority’s notice in relation to a proposed pre-commencement condition (thus incurring no additional costs than otherwise) and are not compelled to do so, the measure will not impose any new regulatory burdens on business.. The department expects the measure to result in a small reduction in the number of pre-commencement conditions. Internal assessment has confirmed that the expected net annual impact on business will be lower than £5m and, as such, it qualifies for the Better Regulation ‘de minimis’. The department is satisfied that the measure does not appear to have significant distributional impacts, significant gross impacts, or significant wider, social, environmental, financial or economic impacts.
- 10.2 An impact assessment was prepared for primary legislation and can be found at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/582706/Summary\\_of\\_Impacts\\_-\\_House\\_of\\_Lords.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/582706/Summary_of_Impacts_-_House_of_Lords.pdf)

### The impact on the public sector

- 10.3 A new burdens assessment has been prepared in relation the new requirement for local planning authorities to secure the consent of the applicant if they wish to impose a pre-commencement condition. As part of their wider response to the consultation on these regulations, around a quarter of local planning authorities suggested that the new requirements represented an additional burden.
- 10.4 Any additional ‘work’ involved in securing written consent to a proposed pre-commencement condition is likely to be subsumed into other discussions /meetings or correspondence about the application. Agreement on a proposed pre-commencement condition can be reached with the applicant at any point during such negotiations, without serving a notice, in accordance with current good practice, and may be achieved through an exchange of e mails.
- 10.5 Where such agreement has not already been reached these Regulations make provision for a local planning authority to serve a notice setting out the terms of a proposed pre-commencement condition and the reasons for it. The requirement for the local planning authority to provide ‘full reasons’ in the notice is not a new requirement, as all final decisions that include planning conditions must include reasons.
- 10.6 We have assessed that the costs to local planning authorities of securing the written agreement of applicants to pre-commencement conditions will be low, as pre-commencement conditions are not imposed on most planning applications, and where the local planning authority considers them necessary it is current best practice to

discuss them with applicants. The formal notice procedure, set out in these Regulations, should only need to be used in a minority of cases.

- 10.7 The Local Government Association agrees that these changes represent a relatively small part of processing a planning application, but in the absence of any data on how local planning authorities will implement these changes we have agreed to keep the matter under review. We will also provide guidance to local planning authorities prior to these Regulations being brought into effect.

## **11. Regulating small business**

- 11.1 The department is satisfied that the policy will not result in disproportionate burdens on small businesses. It is anticipated that the measure will particularly benefit SMEs, which, in some current cases, may not always normally be consulted on proposed pre-commencement conditions.
- 11.2 As with all applicants, SMEs may choose not to respond to a notice seeking to impose a pre-commencement condition; they may choose this option if they are happy with the proposed condition and/or do not wish to incur any costs in formally accepting the condition, which will be deemed to be given if the local planning authority receives no response within 10 working days.

## **12. Monitoring & review**

- 12.1 The Minister of State, Dominic Raab, has made the following statement regarding a review provision:
- “In my view it is not appropriate to make provision for review in this instrument because it “would be disproportionate, taking into account the economic impact of the regulatory provision on the qualifying activity<sup>1</sup>”. The impact of the measure is also expected to be below the amount of £5 million net annualised (de-minimis).”
- 12.2 The following potential adverse effects of a review have been identified: the costs associated with the monitoring of impacts and carrying out of a review; the challenge in identifying a proportionate approach to data collection and analysis; and the dearth of comprehensive data on planning conditions, which would severely limit the scope and reliability of such a review.

## **13. Contact**

- 13.1 Sean O’Byrne at the Ministry of Housing, Communities and Local Government Telephone: 0303 444 41974 or email: [sean.o’byrne@communities.gsi.gov.uk](mailto:sean.o’byrne@communities.gsi.gov.uk) can answer any queries regarding the instrument.

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<sup>1</sup><http://www.legislation.gov.uk/ukpga/2015/26/section/31/enacted>