

## REPORT OF HEAD OF DEVELOPMENT MANAGEMENT

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### **SUBJECT: WELSH GOVERNMENT CONSULTATION DOCUMENT: THE USE OF PLANNING CONDITIONS FOR DEVELOPMENT MANAGEMENT**

#### **Purpose of Report**

- 1. To inform members of a Welsh Government Consultation regarding the “Use of Planning Conditions for Development Management”.**
- 2. To endorse the recommended response**

#### **Background**

On 29 January 2014 the Welsh Government published the consultation document ‘The Use of Planning Conditions for Development Management.’ The consultation closes on 25 April 2014.

Members resolved to delegate authority for the consideration and response to the consultation to the Development Management Committee at its Authority meeting on 2 April 2014.

#### **The Proposed Changes**

The Welsh Government considers that the current advice on the impositions of conditions set out in Circular 35/95 is in need of updating. A number of recommendations have been made in the ‘Study to Examine the Planning Application Process’ and also by the Independent Advisory Group to the Welsh Government on the emerging planning bill, with regard to the application and use of planning conditions. This consultation proposes to replace Circular 35/95 with an updated and revised version, including a number of “model” conditions.

The consultation includes a draft revised Circular and a number of questions on the proposed content of the Circular including the detailed list of 133 recommended model conditions. The Circular is intended to provide contemporary guidance with regard to the effective implementation of planning conditions with regard to up to date issues and with regard to more recent legislation, guidance and case law.

It is not intended to change the approach to assessing conditions in respect of the six tests, but seeks views on the retention of these, and with regard to a new “best practice” approach to standardised decision notices that would structure conditions within the decision notice in the order that they would be discharged. The consultation also seeks views on whether advance notice should be given to applicants as to the conditions that are likely to be imposed and considers matters relating to monitoring and enforcement.

This Authority is proposing to submit a response to the consultation document on behalf of PCNPA, Snowdonia and the Brecon Beacons National Park Authorities. On this occasion this Authority is responsible for the co-ordination of a 3 Park response

and the response has therefore been formulated through discussion with the other two National Park Authorities.

### **Response to the Consultation**

The Welsh Government has requested feedback on fifteen questions and the questions and recommended responses are listed at Appendix A.

The review and updating of Circular 35/95 is welcomed in principle and will enable it to take account of more recent legislation, guidance and case law as well as provide assistance with regard to conditions in relation to more contemporary planning issues (such as renewable energy schemes). A common approach to the structure of the decision notice is also agreed with as it will enable a clearer breakdown for applicants as to those conditions which require discharging early in the process. This will also assist in the Authority's monitoring role. It is not however agreed with that the content of conditions should be shared with applicants prior to the decision notice being issued as there is the potential for delay in the system where there are areas of disagreement and which will in turn reduce the speed of determination and the eight week performance. It is considered that these discussions should take place during the pre-application stage with a view to reducing the number of conditions imposed on planning permissions, and to provide information up front rather than post decision.

The response also raises a number of detailed comments in relation to the model conditions, but these are welcomed in the main and will provide a more consistent application of conditions.

### **Recommendation**

That members endorse the recommendations set out in Appendix A.

### **Background Documents**

Welsh Government Consultation Document – The Use of Planning Conditions for Development Management, 29<sup>th</sup> January 2014

<http://wales.gov.uk/topics/planning/policy/circulars/welshofficecirculars/circulars3595>

<http://wales.gov.uk/topics/planning/planningresearch/planningappprocess/papers/planningappstudy/?lang=en>

<http://wales.gov.uk/newsroom/planning/2012/120917independentreport/?lang=en>

*(For further information, please contact Vicki Hirst: Head of Development Management)*

*Author: Vicki Hirst*

*Consultees: Jane Gibson, Tracy Nettleton/Helen Rice/Christopher Morgan (BBNPA), Jonathan Caley/Aled Lloyd/Iwan Evans (Snowdonia NPA)*

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## Consultation Response Form

### The Use of Planning Conditions for Development Management

We want your views on our proposals for amendments to some non-domestic permitted development rights in Wales. Your views on the draft text for the subsequent Amendment Order and draft Technical Guidance document are also sought.

***Please submit your comments by: 25/04/2014***

If you have any queries on this consultation, please email:

[planconsultations-b@wales.gsi.gov.uk](mailto:planconsultations-b@wales.gsi.gov.uk) or telephone Owain Williams on 029 2082 1715.

#### Data Protection

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

The Use of Planning Conditions for Development Management		
Date of consultation period: 29/01/2014 – 25/04/2014		
<b>Name</b>	Vicki Hirst	
<b>Organisation</b>	On behalf of all three National Parks in Wales - Brecon Beacons, Pembrokeshire Coast and Snowdonia	
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<b>E-mail address</b>	vickih@pembrokeshirecoast.org.uk	
<b>Type</b> <i>(please select one from the following)</i>	Businesses/Planning Consultants	<input type="checkbox"/>
	Local Planning Authority	<input checked="" type="checkbox"/>
	Government Agency/Other Public Sector	<input type="checkbox"/>
	Professional Bodies/Interest Groups	<input type="checkbox"/>
	Voluntary sector (community groups, volunteers, self help groups, co-operatives, social enterprises, religious, and not for profit organisations)	<input type="checkbox"/>
	Other (other groups not listed above) or individual	<input type="checkbox"/>

Q1	Do you think an updated circular on conditions is required?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Comments:**

Yes to take account of relevant and up to date legislation, processes and case law.

It is suggested that WG should give a commitment to review the model conditions on a five year rolling basis to ensure they remain up-to-date and consistent.

Alternatively the conditions could be made available on the WG website and updated as and when there is caselaw or other pertinent information eg Inspectors' decisions which demonstrate the need for the conditions to be amended, improved or added to. (Similarly to PPG Wales - online version only).

Q2	Do you agree that the information retained from Circular 35/95 should be carried forward	Yes	Yes	No

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	into the new circular?		(subject to further comment)	
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Comments:**  
 Circular 35/95 provides a good foundation for the imposition of planning conditions and it is not considered that there is any substantive evidence to suggest that its content is no longer valid except where updates as in Q1 are required.

<b>Q3</b>	Do you consider:	Yes	Yes (subject to further comment)	No
	(i) that all six tests are still relevant today and should be retained?			
	(ii) that there are additional tests that could be used (demonstrate with case law if possible)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments:**  
 The reasonableness test can be open to interpretation and it is suggested that this could be more focussed in terms of definition in the Circular.

<b>Q4</b>	Do you consider that any significant pieces of recent case law have been overlooked, which would provide better examples than those used, to support the text?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments:**  
**Technoprint Plc & Anor, R (on the application of) v Leeds City Council & Anor [2010] EWHC 581 (Admin) (24 March 2010)** is particularly helpful in relation to land contamination issues and clarifies that any reasonable authority must obtain sufficient information to understand the extent of contamination prior to the determination of applications.

In relation to conditioning matters which are subject to legislation outside the planning remit, the advice set out in a case known as the Halkyn case is beneficial in that it clarified that in some circumstances a condition that requires the developer to submit an European Protected Species Licence prior to the commencement of development can be imposed. (Duke of Westminster vs WAG (Case No: CO/1872/03).

**Telford and Wrekin BC v SSCLG [2013] EWHC 79 (Admin)** sets out that conditions must be clearly expressed and plain for all to read. The case highlights nine principles for the interpretation of conditions based on case law and would be

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**usefully incorporated into the guidance.**

<b>Q5</b>	Are there any topic areas in Chapter 5.0 which should be expanded on, or, are there any new topic areas you consider should be included?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments:**

Paragraph 5.21 to clarify that planning permission can be renewed provided a valid renewal application is submitted before the expiry of the time limit. Recently many applicants have submitted applications on the day the permission expired when that application was not valid in accordance with the requirements of List 4 as set out in the WG guidance for the validation of applications.

<b>Q6</b>	Do you agree that decision notices should be structured in the manner proposed? If you do not, please suggest an alternative.	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Comments:**

This provides a logical sequence for all involved - it is also suggested that the conditions be broken down into sections for ease of reading and response. This would also assist authorities in discharging conditions.

However, it is likely to necessitate associated non-time constrained conditions to cross refer to the associated time-constrained conditions, e.g. submission of a landscaping scheme prior to commencement (example condition 66) and the subsequent monitoring condition (example condition 67). It is suggested in this instance that the model conditions be adapted to have the submission condition combined with its implementation condition - this would also reduce confusion within the decision notice where these are split. Alternatively the submission condition could have a clear linkage to an implementation one through a phrase such as "the implementation of the scheme hereby approved must be carried out in accordance with condition \* of this permission".

It is also unclear how this structure would sit with regard to the proposals in the Positive Planning consultation on having "live" decision notices which are updated as conditions are discharged. This will need careful attention and should be considered at this stage rather than be "bolted on" to any changes to the structure of the decision notice arising from this consultation.

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Q7	Do you agree that the approved plans and drawings relevant to a decision should be identified in a condition?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p><b>Comments:</b> As Q6 with regard to the "live" decision notice.</p> <p>This is essential for monitoring/enforcement purposes and for developers to be clear on which plans are to be implemented. The use of the condition also allows for Section 73 to be used for varying permissions on matters of detail.</p> <p>However it is noted that at Appeal, conflicting decisions have been issued from Inspectors with some stating that the condition is unnecessary with others including the condition. The Circular's stance on this condition is therefore welcomed and will hopefully result in better consistency. (Please also see our response to Q8).</p> <p>We would therefore welcome this consistency to also be applied to Inspectors' decisions with a clear statement of what plans (referenced) are part of their consideration and exactly what plans have been approved. This should be clearly stated at the beginning of the decision notice and not lost in lengthy paragraphs at the end.</p>				

Q8	Do you agree with the approach taken towards the term 'unless otherwise agreed by the Local Planning Authority' discussed in paragraph 3.36 of the draft circular? If not, please suggest your preferred approach.	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<p><b>Comments:</b> Whilst this is agreed to in principle, there are occasions on very minor matters that would be unduly onerous to require the submission of a Section 73 application (for example the substitution of a different type of material for a roof covering, or an amendment to species in a landscaping plan). The ability for authorities to allow these small changes without further application enables a more flexible and positive approach to be adopted. It is suggested that this could be covered however through the Welsh Government's proposals for allowing non material and material minor amendments.</p>				

<b>Q9</b>	Do you agree that Local Planning Authorities should provide applicants with advance notice of conditions before an application is due to be determined?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<p><b>Comments:</b>                  There is concern that this would introduce further delay and discussion which would potentially provide difficulties for issuing timely decisions and result in delays in the determination of applications</p> <p>Given that the emerging Planning Bill and general advice from Welsh Government encourages pre-application discussions with developers, this would provide the opportunity for applicants to be made aware of the types of conditions likely to be imposed and give an opportunity for information to be provided with the application thus reducing the number of conditions. It is therefore considered that in the majority of cases giving advance notice of conditions would not be necessary.</p> <p>We have experience of providing conditions to applicants who then feel it necessary to obtain legal advice on these, there can then be delay when solicitors not well versed in planning matters question every word and attempt to rewrite conditions. What planners should be able to discuss and consider with applicants is substantive conditions which would effect the development such as timing of work, hours of operation, opening hours, restriction on retail sales, limitation to floorspace uses.</p>				

<b>Q10</b>	Should guidance be provided in the circular with regards to any other conditions related matter?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<p><b>Comments:</b>                  It is considered that consideration should be given towards guidance on the following topics within the Circular:</p> <p><b>Reason(s) for refusal</b> - it would be beneficial to include a short section on best practice on wording reason(s) for refusal.</p> <p><b>Breach of Planning Conditions</b> - whilst guidance on Breach of Planning Conditions is included in the Enforcement Circular, it would be prudent in our opinion to include the breach of conditions procedure within the conditions circular.</p> <p><b>Reasons for Conditions</b> - whilst it is accepted that the reasons for imposing Conditions will vary for each case, it is considered that examples of best practice would be of benefit.</p>				



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Q11	Does Appendix A of the draft circular contain sufficient examples of model conditions?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<p><b>Comments:</b>                      The Circular provides an opportunity to consolidate advice on conditions found in a plethora of guidance such as TANs, Circulars, PINS and British Standard Documents (particularly trees and biodiversity) in one comprehensive document. Further conditions on the following topics would be beneficial:</p> <p><b>Retrospective planning permissions</b>  <b>Biodiversity</b>  <b>Lighting</b>                      General condition requiring a decommissioning plan to be submitted to and approved in writing by the LPA in respect of renewable energy projects (similar to the requirement under the wind category)                      Condition requiring details of the grid connection for renewable energy projects to be in place prior to the renewable energy project being brought into use. This could also require the connection to be via a certain means (ie underground)</p>				

Q12	Do you consider that any of the conditions used should be reworded? If so, which conditions and why? Please suggest alternatives if you are able.	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<p><b>Comments:</b>                      In general, to provide consistency, all "pre-commencement conditions" should be worded in the same way, i.e. either "No development shall take place..." or "Prior to the commencement of development ....". At present the list of model conditions vary significantly and need to be more consistent. Furthermore, all conditions with a requirement to submit a scheme or details should be worded consistently i.e. "submitted to and approved in writing by the Local Planning Authority", at present there is inconsistency in the model conditions. It is also considered that clarification on the definition of "development" for the purposes of implementation should be provided as this can be open to interpretation. It is also suggested that links between submission and implementation conditions be provided (refer to answer to Q6)</p> <p><b>Condition 06 Plan Specification - further to the response to question 7, it is</b></p>				

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considered that to facilitate minor amendments without recourse to a formal application, the words "unless otherwise agreed in writing..." (or anything similar to that) should be included. It is also suggested that the date of the plan be included.

Condition 24 - the words "submitted to and" need to be inserted before "approved in writing by".

Condition 26 - suggest the inclusion of "height" in the list of matters to submitted and approved.

Condition 27 - this condition needs to specify the area to which the condition relates, i.e. suggest inserting the words "affecting the application site area" after "extent of contamination".

Condition 28 - there is concern that this condition would not meet the six test, in that the words, "if contamination is found" is not precise and renders the condition unenforceable.

Condition 35 - suggest the inclusion of the hours of working in the items to be submitted and approved

Condition 36 - should define "decentralised", "renewable" and "low carbon" through reference to national policy advice

Conditions 41 and 42 should refer to sustainable drainage systems not sustainable urban drainage systems

Condition 41 should specify the reference of the submitted details to be sufficiently precise e.g. "in accordance with the submitted details on Plan XX/Drawing XX received on XX". This is essential to ensure that the LPA has the correct plans for the purposes of monitoring and enforcement - some agents would forget to update referencing of plans and this would ensure that there is a check.

Condition 50 - this condition in its current wording appears incomplete.

Condition 60 - this needs an implementation clause to secure compliance

Conditions 66/67 and 68/69 - suggest combining these as one

Condition 69 - should include a clause to replace where plants die

Condition 77 - "steps shall be taken to secure" is open to interpretation and is not considered sufficiently precise to meet the relevant test. This condition should also require those steps to be submitted to and approved by the LPA.

Condition 91/92 - it is not considered that condition 91 is precise and should include an occupancy period for each holiday (ie no more than four weeks per letting with no return to the same person(s) within a period of four weeks following their occupation). This will ensure that the accommodation is only used for short term holiday purposes and not for longer letting tantamount to a

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**full residential use. Whilst the register does assist, this is not in itself sufficient to define the holiday use sufficiently for an applicant to understand the meaning under condition 91.**

**Condition 105 - to be sufficiently precise the condition should refer to Schedule 2 as well as the relevant Part and Class of the GPDO. It is also suggested that the model condition does not refer to the particular Part or Class but leaves this blank [X].**

**Condition 106 - it is suggested that this condition should refer to the notion of a Principal Elevation as introduced in the new Householder permitted development rights to be more precise and accurate.**

**Condition 118 - could also include sand schools/maneges**

**Condition 128 - include with 66,67,68 and 69**

<b>Q13</b>	Do you believe any of the conditions fail any of the six tests identified in the circular?	Yes	Yes (subject to further comment)	No
		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: See response to Q12				

<b>Q14</b>	Should any conditions be totally removed from Appendix A of the draft circular?	Yes	Yes (subject to further comment)	No
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comments: Concerns are raised in relation to the land contamination conditions which seem to suggest that contamination surveys can be condition despite case law such as Technoprint Plc & Anor, R (on the application of) v Leeds City Council & Anor [2010] EWHC 581 (Admin) (24 March 2010) that considers that any reasonable Authority should request as much information as possible at the outset to ensure that the true extent of contamination is known prior to the determination of the planning permission.				
There is also concern at the wildlife protection condition which gives a message that matters concerning protected species can be dealt with under condition. Legislation (and TAN 5) clearly advise that the precautionary principle should apply where there may be damage to protected species/habitats and conditions				

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**should not be used in this instance. The use of this condition needs to be clearly stated (or removed totally).**

## **General**

**Q15**

We have asked a number of specific questions throughout this consultation. If you have any related queries or comments which we have not specifically addressed, please use this space to report them:

**It is suggested that the model conditions be structured in the Circular in the sequence suggested for the decision notice rather than alphabetically. This will enable LPAs to clearly identify those that are pre-commencement conditions and those that are not. This will reduce time in structuring decision notices. The topics concerned could be listed alphabetically within the categories listed in Box 2 of the consultation to further assist.**

**There is also reference in the Circular with regard to the role of statutory consultees in the formulation and discharge of conditions. It is essential that statutory consultees are required to work to the model conditions as many that are suggested by such consultees at present do not meet the 6 tests. Furthermore, the role of statutory consultees in discharging conditions needs to be clear, and that specified time periods for responses be monitored by Welsh Government to avoid undue delay at this stage of the process.**

I do not want my name/or address published with my response (please tick)

### **How to Respond**

**Please submit your comments in any of the following ways:**

#### **Email**

Please complete the consultation form and send it to :

[planconsultations-b@wales.gsi.gov.uk](mailto:planconsultations-b@wales.gsi.gov.uk)

[Please include 'Conditions Consultation – WG-19178' in the subject line]

#### **Post**

Please complete the consultation form and send it to:

**Conditions Consultation  
Development Management Branch  
Planning Division  
Welsh Assembly Government  
Cathays Park  
Cardiff  
CF10 3 NQ**

#### **Additional information**

If you have any queries on this consultation, please

Email: [planconsultations-b@wales.gsi.gov.uk](mailto:planconsultations-b@wales.gsi.gov.uk)

Telephone: Owain Williams on 029 2082 1715