From Concept to Construction: How to Design, Submit and Determine Planning Applications to Maximise Flexibility

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Introduction

This paper deals with the desire for planning permissions to be flexible enough to enable changes and amendments to be accommodated. There are many good reasons why a planning permission needs to be flexible, but the common ones are:

- the scheme may be at an early stage in the design process and there is a high degree of uncertainty around aspects of its physical design or its land use components;
- the market is uncertain and the scheme needs to be able to respond to market changes;
- there may be supply problems with materials, or better products or techniques may become available; and/or
- the client changes their mind.

The need to change a design, and potentially a planning permission, is a normal feature of the development process and the planning system should be capable of dealing with it in an effective and efficient manner. However, our planning system was never explicitly designed to have this flexibility. Custom and practice grew up to deal with minor amendments, but until s.96A was introduced into the Town and Country Planning Act 1990 ("the 1990 Act") by the Planning Act 2008, there was never a statutory basis for dealing with amending planning permissions. In this paper I will argue that the current provisions still fall short of being an adequate and comprehensive basis to deal with amendments and changes.

Since the Town and Country Planning Act 1947 Act we have had the current provisions in s.97 (to either revoke or modify consents before they are implemented) and s.102 (to require discontinuance of a use or alteration or removal of buildings once they have been completed) of the 1990 Act. These powers are designed to deal with problems that have occurred following the granting of a planning permission which in retrospect is considered to have been a bad decision. They are essentially drafted as aggressive powers (e.g. the local planning authority ("LPA") is imposing them on the developer and have to pay him/her compensation) rather than being there to facilitate changes that the developer wants to make. These powers are therefore of little use in dealing with the need for flexibility that this paper is addressing.

The way the development plan for an area is drafted should also take into account the need for flexibility. LPAs should understand the market conditions in their area through empirical research and plan clearly for those needs. However, that is not the same as being overly specific and prescriptive where it is clear that conditions and knowledge do not support that approach. For example, when I led the planning function in Croydon, we were planning a significant amount of development in the metropolitan centre. Where we knew that developers were ready to come forward with schemes we worked collaboratively with them to produce detailed masterplans to guide development. However, at the time we did not have any clear prospect of a retail developer to renew the main shopping mall, the Whitgift Centre, despite it being clear that it was necessary. We decided to not produce a masterplan for that area as that would be too prescriptive.

Instead, we included a simple sketch in the Opportunity Area Planning Framework that we were preparing with the Greater London Authority that set out some key urban design principles. This gave us what we needed to take forward a detail proposal when the Croydon Partnership (a Westfield and Hammerson JV) came on the scene a little later. This paper will not touch further on this area as it is outside of its scope.

The Government considers that the introduction of extensive new permitted development provisions allows flexibility. However, the wide use of prior notification that is a feature of this recent trend, is the worst of both worlds. The developer still has to gain a consent (albeit on more limited issues) and the LPA has a considerable amount of work in a short timescale with a very inadequate fee.

Finally, as my last introductory preamble I should add a word of caution against too much flexibility. A balance needs to be struck between the flexibility that is necessary for developments, particularly large multi-phased developments that will be built out over many years, and the need to have something tangible and clear to assess and determine. This is of course important for the LPA, but it is arguably even more so for the community. It is at the point that the planning application is publicised that the community has the opportunity to comment on the application and potentially influence the decision. Once planning permission has been granted, it is very likely that the subsequent approvals (clearing the details through conditions or dealing with minor changes) will not be subject to further advertisement or publicity. The local community, and their political representatives, will often balk at schemes that have low levels of detail. This can be a cause of tension in the process which can often have an impact on the decision. It is important that this is recognised and ways to mitigate it are considered. A good pre-application process, that meaningfully involves the community and councillors, can convey the reality that the design of a development is an iterative process that adds layers of detail as it is progressed. This understanding by a developer, coupled with a sensitivity to the need to involve the community in later stages of detail development where this is necessary, can prove to be an effective counter to the problems that usually arise.

I will look at the considerations of and options for flexibility in four key stages of the development management process:

- Pre-application considerations.
- The application stage.
- Post-determination options.
- Post-commencement issues.

Whilst I will be concentrating on major strategic applications, particularly those that are multi-phased and will be implemented over many years or even decades, the issues that will be covered are applicable to a wide range of application types.

Pre-application considerations

In this section I look at how to design the scheme to be as flexible as possible and how you can submit an application that has the maximum inbuilt flexibility. I will examine four aspects of flexibility:

- The level of detail.
- Uses in an application.
- The extent of the site area.
- The description of the development.

The level of detail

The first question to consider is, what type of application you should make: full or outline?

Outline applications are designed to accommodate situations where flexibility is necessary because the applicant does not want to submit some or all of the reserved matters. An outline application will establish the principle of the development, followed by the details being approved through one or more reserved matters applications. It is often the best option for large developments as it allows for quantum etc to be set, the site to then be phased, with detailed designs coming forward over time for individual phases. This give flexibility around detailed matters.

The balance between certainty and flexibility is a crucial factor in deciding which type of application to make. However, with an outline application there will also be time considerations to take into account, as you are effectively adopting a two-stage approval process.

The reserved matters are defined in the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO 2015")[1] art.2 and explained in more detail in the Planning Practice Guidance ("PPG"):

- **Access:**

  The accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network.[2]

- **Appearance:**

  The aspects of a building or place within the development which determine the visual impression the building or place makes, including the external built form of the development, its architecture, materials, decoration, lighting, colour and texture.

- **Landscaping:**

  The treatment of land (other than buildings) for the purpose of enhancing or protecting the amenities of the site and the area in which it is situated and includes:
  — screening by fences, walls or other means;
  — the planting of trees, hedges, shrubs or grass;
  — the formation of banks, terraces or other earthworks;
  — the laying out or provision of gardens, courts, squares, water features, sculpture or public art; and
  — the provision of other amenity features.

- **Layout:**

  The way in which buildings, routes and open spaces within the development are provided, situated and orientated in relation to each other and to buildings and spaces outside the development.

- **Scale:**

  The height, width and length of each building proposed within the development in relation to its surroundings.

LPAs do have the power, under the DMPO 2015 art.5(2), to require the submission of some or all of the reserved matters if they are "of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any of the reserved matters". The LPA has one month from

[1] The Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595).
[2] The DMPO 2015 art.5(3) states: "Where access is a reserved matter, the application for outline planning permission must state the area or areas where access points to the development proposed will be situated."

the date of receipt of the application to serve a notice on the applicant requiring some or all of the missing reserved matters to be submitted. To avoid this it is therefore important to discuss the level of detail that is necessary in the pre-application stage.

LPAs generally only require the submission of full details in situations where there is a degree of sensitivity to the particular impacts from that aspect of the development. A typical situation would be a development within a conservation area or Environmental Impact Assessment ("EIA") development. However it is certainly not the case that all planning applications in sensitive areas or with significant impacts have to be made in full. The LPA have a number of options to deal with these situations. The three common approaches are explained below.

Parameter based outlines

These are generally used for large scale developments where an EIA is necessary and you need to understand and assess the potential range of impacts. The parameter plans set out the maximum and minimum limits of a development so that its maximum and minimum impacts can then be quantified and assessed through the EIA. There will be a need to make sure that where this approach is used the EIA is still sound. In sensitive areas, such as affecting the setting of a listed building or within or close to a conservation area, a greater level of detail should be included to enable the LPA to discharge their duties under the Planning (Listed Building and Conservation Area) Act 1990 ss.66 and 72.

The parameters need to be tied into the consent through conditions so that the EIA analysis and conclusions relate to the development that has been approved. When detailed matters are submitted, there will be a need to consider whether further EIA analysis is necessary. This can be a useful technique, but it can get complicated and experience of this approach is not widespread.

In Croydon, this approach was used to deal with the outline proposals from the Croydon Partnership to redevelop the Whitgift Centre. This was a very large scheme (gross total external floorspace of 3.5 million sq ft) close to two Grade I and one Grade II listed buildings and within a conservation area. The parameter plans and the supporting design code defined the extent of development sufficiently to enable impacts to be properly judged from an EIA perspective and a greater level of detail was included both in the parameters and the design code to enable the LPA's duties under ss.66 and 72 to be safely discharged. Whilst the decision was judicially reviewed (unsuccessfully) it was not on these areas.

Masterplan-backed outlines

Masterplan-backed outlines are an alternative to the parameter approach that can be used where it is difficult to define parameters (e.g. a more traditional housing development). In this approach, a masterplan is used to define the necessary details through, for example an overall development strategy backed by a design code to ensure the resulting details achieve the required quality. The development of the masterplan, during the pre-application stage, will need to be handled with care and separated from the application process. Experience of this approach is also not widespread.

A case I was responsible for in Cane Hill, Coulsdon, adopted this approach. It was a circa 700 unit housing development by Barratts on a former psychiatric hospital site in the green belt. The application was in outline as the principle of development needed to be established before land deals between the London Mayor (who now owned the site) and the developer could be concluded. A parameter plan approach does not work with conventional housing estate layouts. A masterplan was prepared between the LPA and the developer to establish the overall development vision for the site to ensure that it both linked into the existing settlement and town centre at Coulsdon and respected the characteristics of the site. These were a small group of historic assets (locally listed) and a mature and important landscape. Landform and surrounding views was another important factor. The masterplan negotiated these elements within a layout

that was functionally successful. Different character areas were identified and a design code produced to define and secure the detailed elements in subsequent reserved matters applications.

Hybrid applications

There will be many circumstances where a hybrid application is desirable or necessary: the usual one is where a multi-phased scheme is in outline with phase one in detail for early implementation. There is a need for clarity as to the approach from an early date as both the application and any resulting planning permission need to be clear. Grouping conditions by phase plus a site-wide set can be a good approach. Community Infrastructure Levy ("CIL") charging and marriage of phases will need careful attention.

Some LPAs are concerned that hybrid applications do not have a statutory basis and are therefore ultra vires. The 1990 Act does not refer to outline planning applications or permissions, they are a creature of the development order (now the DMPO 2015). This is an overly cautious, and in my view erroneous, reading of the legislation. Perhaps it would be helpful if the PPG touched on this issue and made it clear that such an approach is legally sound.

The outline application process is sometimes abused, either to reduce up-front application fees (e.g. all matters submitted except landscaping) or as a cheaper form of pre-app to establish a principle (e.g. all matters reserved for one house).

There has been a lot of discussion recently about the need to go back to so-called simple red line outline applications. This was mentioned in the Lyons Housing Review. The concern is that the whole application process has become too complex and getting the principle of a development established has become prohibitively expensive for small-scale developers trying to carry out small infill housing developments. Whilst there are almost certainly examples of LPAs asking for unnecessary information, the more fundamental problem is that an outline planning application results in a planning permission where all conditions have to be applied at that time. LPAs only get one shot at this. They cannot condition matters afresh in the approval of details stage. They can only conditionally approve matters that are already reserved or already conditioned.

It is this need to cover all matters at the outline stage that drives the level of detail needed because a level of consideration is necessary for all matters that may need to be conditioned. What is needed is a new form of consent that only deals with the principle and leaves the imposition of conditions to a later stage. POS has produced a paper on this setting out our recommendations.[3]

Uses in an application

When applying for planning permission you can apply for a mixture of uses (e.g. A1–A5). An application does not need to specify a specific use. Applying for alternative uses can be a wise precaution as what the market will need when planning permission is implemented can be difficult to predict. You will need to ensure the design of units can cater for multiple end uses.

Consideration of different policy tests for different uses can add to complexity as the LPA needs to consider all possible uses. A condition may be required to set out that only one use can be commenced. The Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO 2015") Pt 3,[4] changes of use, class V (changes of use permitted under a permission granted on an application) does allow some flexibility for 10 years.

[3] See *www.planningofficers.org.uk/POS-Library/POS-Publications/POS-Manifesto_530.htm* [Accessed October 7, 2015].
[4] The Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596).

The extent of the site area

When drawing the red line for the application site you need to make sure that you have included all land that is necessary to contain the development. Where the red line is drawn is a crucial decision that can anticipate future issues: e.g. do you include the highway within the red line on a major scheme where development within the highway (that needs planning permission) may be required? Other matters to think about are construction elements, such as foundations, that may need to go outside of the above-ground application site.

In the Whitgift redevelopment mentioned earlier, we included the highway (Wellesley Road) within the application site area because significant highway works were going to be required. This proved fortuitous because as the structural design of the building advanced, a need emerged to have very large concrete ground anchors under the highway to support the building. Whilst these posed no significant technical impediments, they needed planning permission. If the red line had been drawn tight along the back-edge of the footpath these elements would have fallen outside the application boundary. There would have been a need to address that issue late in the day.

Extending the site after planning permission has been granted can be difficult, other than through a fresh planning application. The fees regulations do not allow a "free go" where the application site is altered except where that is to provide an amended access. This is an area that Government needs to consider revising, commensurate with the LPA receiving any proportionate increase in fees that may arise from a larger site area.

Any land that you do not own will need to be served with the statutory notice. It may also present challenges in completing a s.106 agreement. Often referred to as Arsenal conditions/clauses, where a developer does not yet own all the land (e.g. in a potential CPO scenario), there is a need to draft planning conditions and planning obligations that ensure the whole of the site is effectively bound into the s.106 agreement before the development (or a relevant phase) commences.

Whilst conditions can require off-site works to be carried out, this either needs to be on land within the applicant's control or comply with Grampian principles set out in PPG, i.e. there is at least some prospect of the applicant being able to deliver the pre-required works.

The description of the development

This would seem to be a fairly straightforward matter, but the operation of s.96A or s.73 means that the more generic the description, potentially, the more scope there would be to use those powers. A description cannot be so vague that it does not describe the development, however, it also does not have to describe the development in a high level of detail. So the point here is that a planning application for the "erection of an office building" is likely to give you greater scope to amend its height and floorspace than one that is described as the "erection of a five-storey building containing 10,000m^2 of office floorspace". LPAs should recognise the benefits of this in terms of "downstream" flexibility, when dealing with the description of a development.

The application stage

In this section I look at the options available to change an application once it has been submitted and it makes its way through to the determination stage.

Amending applications

The scope to amend the application once submitted but before it is determined is quite wide. However, it is important to remember that it is up to the LPA whether it accepts any such amendments. The applicant

cannot unilaterally amend a planning application; there is no statutory right to do so. Most LPAs will accept amendments, particularly where they are in response to statutory consultee responses. However, they are likely to be resistant to changes that go too far beyond the scope of the original application, e.g. it would result in a significantly different description or require an additional fee to be paid. Whilst National Planning Policy Framework ("NPPF") paras 186 and 187 require LPAs to be positive and solution-focused, this is generally best achieved through good engagement in the pre-application stage.

It should be remembered that there is no statutory provision to seek an extra planning fee during the determination. The fee is payable on submission of the application (Fees Regulations 2012 reg.3[5]). This is an area where the Department for Communities and Local Government ("DCLG") should include flexibility in the Fees Regulations to enable these changes to be made and any associated uplift in the application fee to be paid to the LPA.

The Local Government Ombudsman/courts have established that re-advertising the scheme will be necessary where there is a material change to the proposals. There is, of course, a conflict here between the desire to provide speedy decisions and to allow flexibility. LPAs will be keen to issue decisions within statutory determination targets, however planning performance agreements are the tool to manage this as they allow for a negotiated determination date. Where this occurs, LPAs are judged on that date rather than the arbitrary 8 or 13 week date set by DCLG.

It is often the case that LPAs will seek amendments themselves to enable a scheme to be supported. Increasingly LPAs are seeking these debates to take place in the pre-application stage so that problems can be ironed out before an application is submitted. This is by far the most efficient way to deal with these matters, as it avoids the LPA and the public having to formally engage with proposals that are unacceptable. Some LPAs say that they will not seek or allow substantive changes to a proposal where the applicant has either not engaged in pre-application discussions or has ignored the advice so received.

There can sometimes be a delay between the point at which the LPA determines the application (either at committee or via an officer delegated decision) and when that decision is issued. Typically that will be to finalise the negotiations on a s.106 agreement, but in London it will also include applications that have to be referred to the Mayor under the stage 2 procedure in the Mayor of London Order 2008. Theoretically the scope to amend the scheme is exactly the same as above, but there is likely to be even greater scope for resistance from a LPA as they have taken a view on the scheme and are proceeding to issue the decision. Where amendments are accepted it will be vital to ensure that the proper procedures are followed and the considerations appropriately documented in a report. If officers decide to accept an amendment without going back to committee, they will need to be able to demonstrate that they were empowered to do this and it was appropriate to take the decision under delegated powers. It is a wise precaution to explicitly make provision for this either in the council's constitution (by making it clear that this is within the delegated powers of the chief planning officer) or by having a specific delegation in the recommendation on the committee report. The former approach is more efficient and consistent. In the Croydon constitution it states:

> "In the event of any changes being needed to the wording of the committee's decision (such as to delete, vary or add conditions/informatives/planning obligations or reasons for approval/refusal) prior to the decision being issued, the Director of Planning is delegated authority to do so, provided that the Director does not exceed the substantive nature of the Committee's decision."

The ability to issue a split decision is a very useful one. This is only really possible where a scheme has two elements that are severable. For example, if there was an application for a single-storey side extension and two-storey rear extension to a house. If the side extension was acceptable and the rear one was not, you could approve the former and refuse the latter. Whilst it is possible for local authorities to

[5] The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 (SI 2012/2920).

issue split decisions, there is no express power to do so. Case law indicates that an authority can grant permission for less than what has been applied for e.g. *Kent CC v Secretary of State for the Environment and Burmah Total Refineries*[6]; in addition the PPG[7] indicates that in exceptional circumstances LPAs may use conditions to grant permission for part of the development applied for but usually with the applicant's agreement. This is less than ideal. LPAs should have a clear power to do this (as the Secretary of State has under the 1990 Act s.79 when dealing with appeals) where the two elements are clearly severable or where the refusal relates to a detailed element that the LPA cannot support, but otherwise the rest of the scheme is satisfactory. This would be a very useful addition to LPA powers and enable positive decisions to be issued wherever possible.

Imposing conditions

LPAs have wide ranging powers to impose conditions. They are governed by the six tests in the NPPF (expanded upon in PPG) and the primacy of the application description and drawings. You cannot approve something (e.g. the drawing says the walls of the extension will be in brick) and then take that approval away by condition (e.g. require the elevations to match the main stone building). If that is required the detail on the drawing would have to be changed. In this example, this could be via an amending letter or email rather than a fresh drawing, which should be referred to in the decision notice alongside the list of approved drawings.

When drafting conditions, LPAs can enable future flexibility. Phrases such as "unless otherwise approved by the LPA" can enable details that are shown on plans or specified by condition to be revisited if the applicant wishes to do so. However, you do have to be mindful of the potential legal pitfalls associated with tailpiece conditions where they allow too much flexibility. There have been a number of court cases on this e.g. *R. (on the application of Midcounties Cooperative Ltd) v Wyre Forest DC*,[8] *R. (on the application of Warley v Wealden DC*[9] and *R. (on the application of Salford Estates (No.2) Ltd) v Durham CC*.[10] A more recent case was *Hubert v Carmarthenshire CC*.[11] Generally tailpiece conditions need to be constrained in such a way that they permit only minor, non-material variations.

Pre-commencement conditions need very careful consideration. LPAs sometimes require elements to be approved "prior to the commencement of the development" when this is unnecessary. For example the approval of bricks, or other elevation materials, is only really required before those elevations are commenced. This may seem unimportant on a house extension where there may only be a short interval between digging footings and construction of the walls taking place. However, on a major development with complex piling and basement levels, a development could be "in the ground" for a year or more before construction of the walls start. Therefore careful thought needs to be given to the trigger events for such conditions. LPAs are now required to give specific reasons for pre-commencement conditions and the PPG contains advice about the imposition and operation of conditions.

Where schemes are multi-phased, careful consideration needs to be given to both the drafting of conditions and how they relate to the individual phases. It is good practice to set out the conditions in groups: a site-wide set and separate sets for each phase. Whilst this produces a longer decision notice with a lot of repetition, it makes dealing with the subsequent discharge of conditions a much more straightforward process. My advice to my case officers when dealing with such large complex developments is to start drafting the conditions in the pre-application stage and use an Excel spreadsheet or table to do so. Also, share it with the applicant. Along the top of the spreadsheet are the development phases and down the

[6] *Kent CC v Secretary of State for the Environment and Burmah Total Refineries* 75 L.G.R. 452; (1977) 33 P. & C.R. 70.
[7] PPG ref.id 21a-013-20140306.
[8] *R. (on the application of Mid-counties Cooperative Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin).
[9] *R. (on the application of Warley) v Wealden DC* [2011] EWHC 2083 (Admin).
[10] *R. (on the application of Salford Estates (No.2) Ltd) v Durham CC* [2012] EWHC 2512 (Admin); [2013] J.P.L. 293.
[11] *Hubert v Carmarthenshire CC* [2015] EWHC 2327 (Admin).

side are the matters to be covered by condition. This enables a systematic and iterative approach to what is a very complex task. Leaving it to when you are drafting your committee report is way too late!

The final category of condition is often the first one that appears on the decision notice: the time limit for beginning the development. It is important to remember that you can vary the statutory default, and that for major strategic developments this will often be necessary.

Government has recently introduced provisions for a default consent on conditions after eight weeks.[12] Historically there has been little discussion about conditions and their requirements prior to submitting material for approval. Given the potential for a deemed consent, LPAs are likely to move to determination rather than discussion. Developers and LPAs need to consider the benefits of pre-submission discussions to avoid this.

Legal agreements

The 1990 Act s.106 enables a LPA to enter into an agreement with the applicant to secure matters that enable it to approve a development that would otherwise be unacceptable. A s.106 agreement has to meet the three tests in the CIL Regulations 2010 s.122(2) where it constitutes "a reason for granting planning permission for the development". Again, similar considerations apply to the drafting of obligations as apply to the drafting of planning conditions, particularly wording that allows alternative approaches can sometimes be helpful.

It is also good practice to draft an agreement so that its terms also bite on any subsequent s.73 amendments. Without so doing, means that a fresh agreement or a variation will be needed; a waste of everyone's time and money.

Careful consideration needs to be given to trigger events. For example, "commencement" would need to be clearly defined. I would suggest that you should avoid using occupation of residential as a trigger event, as it is very hard for the LPA to enforce: preventing Mr and Mrs Smith from moving into their new house because the developer hasn't completed the new junction doesn't play well in the local press! Commencement of a later phase or the "X" residential unit is a much better trigger.

Community Infrastructure Levy ("CIL")

The operation of the CIL Regulations, where authorities are charging CIL, can introduce a significant amount of rigidity into the implementation process as specific events trigger significant CIL payments. Furthermore, failure to follow CIL procedures (such as not submitting the right notices) can trigger liabilities that were unexpected or not enable relief that was expected.

CIL is calculated on the whole development. Part implementation of a planning permission triggers the CIL liability for the whole development. A motorcycle showroom my team dealt with had a significant mezzanine level that, when the development was completed, was not constructed. No planning problem with that, but the CIL was still payable on the mezzanine floorspace. The owner of the business was not pleased!

CIL is payable on commencement (including demolition). An instalment scheme for payment may not always be in place (e.g. London Mayor's CIL), but a LPA can exercise discretion here on individual cases, even if they don't have a formal instalment scheme in place.

The phasing of a development also needs to be understood in the CIL context to enable staged payments and the relationship with the desired planning phases. The mix of uses and differing amounts of uses needs to be considered in the context of the charging schedule and how this impacts on overall CIL liability.

[12] The Infrastructure Act 2015 s.29 inserted s.74A into the Town and Country Planning Act 1990.

Caution is needed that the discharge of conditions doesn't constitute development and represent commencement in CIL terms and trigger the CIL payment.

CIL is an added area of complexity that needs expert advice. The CIL Regulations are very complex and beyond the scope of this paper. It is clear that some LPAs and planning consultants are struggling with them, especially where there are differential rates.

Post-determination options

In this section, I look at the scope to amend planning permissions once they have been issued.

Amending a planning permission

Prior to the introduction of s.96A (power to make non-material changes to planning permission) LPAs operated an informal, pragmatic approach to dealing with minor amendments. The test was along the lines of "no reasonable person could possibly have a different view on the amendment, to that which they had on the original application". LPAs had to consider the cumulative impact of several minor changes. It worked reasonably well and there were not too many formal disputes (Local Government Ombudsman or judicial reviews) that I can recall reading about. It could be argued that, because there is now a power to deal with these amendments (s.96A), an informal approach is no longer available to LPAs. The concept of "de-minimus" clearly still exists and can be a way of dealing with very minor changes through a simple exchange of letters or emails.

Whilst s.96A is a helpful provision, it was not the problem that needed to be solved. That was amendments that went beyond minor/non-material; we needed a mechanism for dealing with those. The s.73 minor material amendments procedure that was introduced is not a properly set up statutory provision, and its shortcomings are discussed below.

Applicants now have two options available to them if they wish to amend their application:

Method	Section 96A non-material amendments.	Section 73 minor material amendments.
Applicability	Changes which are considered to be "non-material".	Changes considered to be "material" but still "minor".
		Can be utilised (through condition requiring plans to be followed) to vary development itself.
Process	Submission of s.96A to LPA.	Submission of application to vary conditions.
	Registered, no publicity, unlikely to be any consultation.	Registered, publicity and consultation likely.
	Formal decision.	Formal decision.
Outcome	Does not result in a new consent.	Results in a new consent.

Considerations around s.96A applications:

- A statutory provision, but "non-material" is not defined.
- Does allow flexibility in a formal manner, not previously allowed.
- Accepted that s.96A will vary with scope of original application, so could potentially be substantial change.
- With lack of publicity, should only be for issues which are unlikely to have a different impact on local area, neighbours etc.

Considerations around s.73 applications:

- Approach endorsed by government: Section 96A could be used to attach a plans condition to then vary development through s.73.
- Scope for changes not formalised: Dependant on LPA consideration which can differ significantly.
- Accepted that s.73 shouldn't change the heart of the material issues with a planning application, but has been used to alter the description.
- Additional/different numbers of residential units can be appropriate, dependant on scale of development.
- Proposals would be publicised, so can be appropriate to allow changes that have a materially different impact on local area, neighbours etc.
- As a s.73 results in a fresh consent, the CIL implications need to be considered, especially if they fall outside of the transitional arrangements and result in additional liability.

Whilst s.96A is a clear legislative provision, s.73 is a sticking-plaster solution to a problem that should have been dealt with clearly through legislation. Section 73 is the use of a legal provision, designed for amending conditions, to vary a planning permission through a condition that specifies the plans and thereby allows the approved plans to be substituted with new plans. The theory behind this approach is that one set of approved plans can be substituted for another. Nobody is saying that a consent for a single storey dwelling house can be changed to a 10-storey office block through this method, so there is clearly a limitation, but where does that limitation come from? It is hard to see how this approach is suitable in law for the purpose that government is promoting.

Appeals

Requests to amend schemes once an appeal has been submitted frequently occur. PINS guidance sets out that new and additional material should not be submitted at the time of an appeal. However, this seems to happen frequently, often with the changes being material, and not just the submission of further information to justify a proposal. In determining whether to consider amendments or additional information, PINS generally asks the LPA, but they are inconsistent in how they deal with this. Most LPAs would object to amendments that would need re-consultation.

New applications

If dealing with changes through amendments is not an option, the developer needs to consider the submission of a fresh planning application. This can either be a whole replacement application or a partial one, often referred to as a "slot-in".

With slot-in applications the case law in *Pilkington*[13] is relevant here. You can apply for as many forms of development on a particular site as you like, but if one permission is implemented and it prevents another one being implemented, unless details of the latter are amended, there is a significant risk that the second permission will become incapable of implementation. Where the impossibility question arises, the proper course is to apply to the LPA for:

- a new permission, relying upon the earlier permission as a material consideration;
- an application under s.96A; or
- a s.73 application.

[13] *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527 CA.

On large, multi-phased, and particularly multi-use, developments a formal procedure to deal with slot-ins is good practice. The Olympic Delivery Authority adopted an excellent model for the 2012 Olympic Park development.[14]

Post-commencement issues

In this section, I consider the options for dealing with changes and amendments retrospectively. In this situation, a material change would have been made to the development as part of its implementation and the question of its regulation arises.

You could hold tight and see if it's noticed and if it is, find out whether the LPA considers it is expedient to take enforcement action. This is a high-risk strategy that could result in enforcement action. The fact that it is retrospective should not alter the LPA's considerations, but in practice it can do, especially where the issues are finely balanced.

The best option is to contact the LPA, discuss the issues and see what the options are for resolution. An application for planning permission can be made retrospectively but this is not available for other forms of planning consent (e.g. tree preservation order ("TPO") consents). In the case of listed building, advertisement and TPO consents, an offence would have been committed for which you could be prosecuted, even if the breach is subsequently approved.

Sections 96A or 73 could also be used to regularise the situation depending on the extent of the departure from the original planning permission. The earlier permission would be a material consideration.

Another option, that might make sense in circumstances where there are acceptable and unacceptable elements, is to serve an enforcement notice that effectively under-enforces. Requiring the removal of the unacceptable element by default authorises the acceptable element. The disadvantage of this approach is that it cannot impose conditions, which may exclude it as an option in some circumstances.

Retrospective applications would have to be deemed commenced and therefore the CIL payment would be due immediately with no scope for applications for relief.

Conclusions and recommendations

As this paper has hopefully demonstrated, there is scope in the planning system to retain flexibility in a planning consent where that is necessary. Some of these opportunities will result in a time penalty (e.g. outline consents result in an additional approval stage) but this may be an acceptable price to pay in the right circumstances. Desirable as flexibility may be, schemes cannot be so vague that LPAs and the community have nothing tangible to consider. There will be a need to strike the right balance.

The legislative provision is far from ideal. The s.96A and s.73 approaches are not as well designed as they could be and a single application process for amendments should be introduced. In such a process, applicants would apply to the LPA for an amendment to be approved. They must indicate whether any previous agreed amendment(s) remain in the design and need to be considered cumulatively. The LPA would issue one of three types of decision:

- Decide that the amendment is not material and confirm this without the need to carry out any publicity or consultation. A new consent should be issued so that any cumulative impact of such amendments can be dealt with.
- Decide that the amendment is material but can be dealt with as an amendment because it does not go to the heart of the consent. The process would involve publicity or consultation where necessary (usually just the neighbours affected) and, if approved, results in a new

[14] Details of this are available at *http://learninglegacy.independent.gov.uk/publications/effective-management-of-masterplan-changes.php* [Accessed October 7, 2015].

planning consent again so that the cumulative impact of such amendments, if any, are dealt with.

- Decide that the change goes beyond what can be considered as an amendment and refuse the application. There would be no need for any publicity or consultation.

There should be a right of appeal against outcomes two and three.

It is hoped that changes along these lines can find their way onto the statute book as the current arrangements, especially the use of s.73, are an unsatisfactory way of dealing with what should be an intrinsic part of the development management process.