



SOCIETY OF ANTIQUARIES OF LONDON

Burlington House

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London W1J 0BE

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Dear Mr Prescott,

Consultation on improving the use of planning conditions

Thank you for the opportunity to comment on these proposals.

The Society of Antiquaries of London is Britain's oldest independent learned society concerned with the study of the material culture of the past. Founded in 1707, its Royal Charter of 1751 defines the Society's aim as 'the encouragement, advancement and furtherance of the study and knowledge of the antiquities and history of this and other countries'. The Fellowship today engages in conservation and research, and in communicating knowledge of the past to the widest possible audience. The range of the Society's interests thus covers a wide field, from the archaeology of all periods and all countries to heraldry and art history, architectural history and other subjects based on the material remains of the past. The Society recognizes that understanding the past is relevant to present and future generations, and that the tasks of safeguarding, protecting and disseminating knowledge about heritage are important for the world of today.

General

The Society supports the general thrust of the consultation's objectives to reduce the number of unnecessary conditions and to ensure that pre-commencement conditions are only used when they are genuinely necessary. However, we have some concerns regarding the impact on the historic environment in respect of archaeology (heritage assets with archaeological interest) of the specific proposed measure (question 1 below) to restrict the use of pre-commencement conditions.

Since the publication of PPG 16 in 1990, the planning system has provided the principal means of protecting and managing the 95-98% of the nation's archaeological heritage that is not nationally designated, and it is widely regarded by all parties as having been highly successful. In particular, the twin planning tools of pre-application assessment and the use of pre-commencement conditions has enabled the protection or investigation of many thousands of archaeological sites



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and has served to minimize the risk of unexpected costs and delays to development.

The Society therefore very much welcomes the statement in paragraph 11 of the consultation document: *'this measure will not restrict the ability of LPAs to propose –pre-commencement conditions that may be necessary, for example conditions in relation to archaeological investigations . . .'* and its recent reiteration in Parliament by the Secretary of State for Communities and Local Government on the second reading of the Neighbourhood Planning Bill.

We nonetheless remain concerned that, in the absence of any formal recognition within the Bill that archaeological pre-commencement conditions are often necessary where there is archaeological interest, a consequence of the proposed measure – in effect to make this necessity open to agreement or challenge – could be to reduce the level of protection that current planning policy in the NPPF affords to heritage assets with archaeological interest.

Public as well as academic interests value archaeology, expect it to be treated as a public interest and understand that the benefits outweigh the costs. The NPPF, at paras 126-141, articulates the steps to be taken to ensure that the vulnerability of the historic environment in general is properly taken into account when decisions on planning matters are taken. This includes requiring developers to research and reveal to the decision-making authority, so far as possible, the impact of the development on any archaeological remains and deposits on the site affected. (Para 128). The natural follow-through from this is for the planning authority to require proper remedial steps, which must include pre-commencement archaeology where appropriate, as a *sine qua non* of granting planning permission. This is in line with NPPF 141 which states: *'Local Planning Authorities . . . should also require developers to record and advance understanding of the significance of any heritage assets to be lost (wholly or in part) in a manner proportionate to their importance and the impact, . . .'*

Pre-commencement conditions are invariably necessary where it is known that the development will have a significant impact on heritage assets with archaeological interest. In such circumstances archaeological excavation needs to take place before the development commences in order to ensure that the archaeological interest is protected and/or investigated if heritage assets are to be lost. The use of pre-commencement conditions is also invariably the most efficient and cost effective means of mitigating the impact of the development on archaeological interest. For example, they can allow for small changes to the design of proposals to protect valuable heritage assets while at the same time significantly reducing the costs of archaeological excavation.

Specific Questions

Question 1 – Do you have any comments about the proposed process for prohibiting pre-commencement conditions from being imposed where the local authority do not have the written agreement of the applicant?



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1.1 The summary case been made above for the importance of pre-commencement conditions for the management and protection of heritage assets with archaeological interest. In addition to this vital reason, the Society would also like to make several points concerning the likely impact of the proposed measure on the ability of the planning system generally to deliver sustainable development where there is archaeological interest. We believe that these points reinforce the case for pre-commencement conditions being necessary where archaeological interest will be harmed by development.

1.2 An increased risk of unexpected archaeological discoveries increasing costs and causing delays to development

The use of pre-commencement conditions is necessary to ensure that the presence of archaeological interest on a development site does not result in any additional burdens to developers as a consequence of unexpected archaeological discoveries made whilst development is in progress. Such discoveries invariably result in additional costs and can cause delays to the development programme. Indeed, the original Government guidance in PPG 16 which recommended the use of pre-commencement conditions to LPAs was made in response to a series of high profile archaeological discoveries in the late 1980s whose significance was only revealed after the development had commenced. These caused significant delays and considerable additional expense to both developers and the public purse, the most notable being Shakespeare's Rose theatre.

Since 1990, the pre-determination assessment of archaeological interest and the use of pre-commencement conditions that allow for archaeological investigation to take place before the commencement of the development have been the principle reasons why archaeology has not been a problematic issue for development. For developments with archaeological interest, problems caused by unexpected discoveries during the construction phase of development have largely disappeared. When such problems do occasionally occur during pre-commencement archaeological investigations they are invariably be dealt with by alterations to the archaeological work programme without increasing development costs significantly or affecting the development timetable.

Any increase in the instances of unexpected and important archaeological discoveries made during the course of construction is also likely to result in significant issues for developers in protecting the heritage assets and dealing with consequent Health and Safety matters. At this stage, it can be extremely difficult to accommodate archaeological excavation: measures to fence off and protect heritage assets during their excavation can be awkward, time-consuming and costly and, more importantly, the presence archaeologists on construction sites presents additional hazards requiring complex Health and Safety measures for those discharging the CDM Regulations. It is far safer for everyone, and more cost-effective, for archaeological work to have been undertaken in advance of development.



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Any significant reduction in the ability of LPAs to include conditions that require archaeological investigation to take place before the commencement of development will therefore increase significantly the risk that unexpected archaeological discoveries, including nationally important archaeological remains and human remains, will be made that result in an increase in the burden on developers.

1.3 An increase in the number of refusals citing archaeology as a reason

It is likely that the proposed measure will result in an increase in the number of planning applications that are refused on archaeological grounds, leading to a consequent increase in 'planning by appeal'.

Currently (and consistently over the past 20 years) the proportion of refusals that cite archaeology as one of the reasons is less than 2% of the number of planning applications that have archaeological implications (E.g. evidence from Association of Local Government Archaeological Officers: Planning & Conservation Casework Survey 1997-99; Staffing & Casework Survey 2010-11). This is because archaeological interest that might otherwise cause delays or be a material constraint on the development (such as nationally important remains or human remains) can invariably be accommodated by agreed alterations to the design or to the programme of the development either (preferably) at the pre-determination stage, or post-determination, but prior to commencement of the development.

The options to LPAs outlined in paragraph 13 if a developer does not agree to the imposition of a pre-commencement condition (changing the condition, allowing the developer to comply after the development is underway or removing the condition altogether) are unlikely to be feasible (for the reasons stated above) if significant archaeological remains will be damaged or destroyed by the development. In such circumstances, the LPA will have to decide whether to allow the development to go ahead with consequent harm to the archaeological interest and to public benefit, or to refuse the application. Even if, as is hoped, only a small proportion (5-10%) of applicants refuse to agree to imposition of a pre-commencement archaeological condition, the number of planning applications that are refused on archaeological grounds is therefore likely to increase significantly.

1.4 In conclusion, the Society considers that:

- An unintended consequence of the proposed measure would be to cast doubt on the value of a full and proper archaeological investigation of a proposed development site prior to works commencing – a provision in the present system which has served developers and archaeologists well since the 1990s.
- The failure by applicants to agree to pre-commencement conditions is also likely to lead to the refusal of more planning applications than at present on the grounds of their impact on



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archaeological interest and a consequent increase in the strain on the Appeals System.

- There is little to be gained in getting applicants to give their written consent to any “necessary” conditions, where the implication surely is that, where it is known that there will be significant harm to archaeological interest, applicants must agree to pre-commencement work to comply with the NPPF.
- Since the focus of this Government reform is explicitly not archaeological pre-commencement, the simplest way to allay the above concerns would be to prescribe archaeological pre-commencement conditions as conditions to which the requirement in section 100ZA(5) does not apply and to expressly confirm this in Parliament before the enactment of the Bill.
- There could be other mechanisms to tackle any perceived problems with the operation of pre-commencement conditions. Although there is no suggestion that the operation of archaeological pre-commencement conditions is causing problems in practice, further consideration could be given to the wording of conditions to address any issues. For example, the greater use of phased discharge in relation to archaeological requirements to ensure that sustainable development is delivered as promptly as possible whilst ensuring that the historic environment is properly protected and managed.

Question 2 – Do you think it would be necessary to set out a default period, after which an applicant’s agreement would be deemed to be given? If so, what do you think the default period should be?

2.1 Subject to the comments under question 1 above, yes.

2.2 A relatively short period should be stipulated, perhaps 21 or 28 days.

Question 3 – Do you consider that any of the conditions referred to in Table 1 should be expressly prohibited in legislation? Please specify which type of conditions you are referring to and give reasons for your views.

3.1 No. There is already clear guidance in the National Planning Policy Framework (paragraphs 203-206) and National Planning Policy Guidance. A broad list of proscribed conditions such as that contained in Table 1 of the consultation document is still open to interpretation when applied to specific cases and would ultimately have to be scrutinized by the Courts (as occurs at present).

3.2 Furthermore, care needs to be taken to avoid any implication that permission has to be granted where a proscribed condition cannot be applied. Where a requirement is necessary to overcome a legitimate and substantial planning objection, but a condition or obligation cannot be secured,



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permission should be refused. Thus, for instance, where the measures necessary to overcome a legitimate planning objection call into doubt the viability of a project (see the first type of condition identified in Table 1 - '*Conditions which unreasonably impact on the deliverability of a development – eg disproportionate financial burden*') that should not invalidate the objection.

Question 4 – Are there other types of conditions, beyond those listed in Table 1, that should be prohibited? Please provide reasons for your views.

4.1 No. It is not suggested (and rightly so) that the conditions frequently used in relation to archaeological issues are objectionable.

**Question 5 – (i) Do you have any views about the impact of our proposed changes on people with protected characteristics as defined in section 149 of the Equality Act 2010?
(ii) What evidence do you have on this matter?
(iii) If any such impact is negative, is there anything that could be done to mitigate it?**

5.1 No comment.

**Question 6 – (i) Do you have any views about the impact of our proposed changes on businesses or local planning authorities?
(ii) What evidence do you have on this matter?
(iii) If any such impact is negative, is there anything that could be done to mitigate it?**

6.1 No, save that any perceived cost-saving through reducing the number of conditions can only be justified where the conditions in question do not contribute to the delivery of sustainable development.

The Society would be happy further to discuss the issues raised in this consultation insofar as they affect the historic environment. In the meantime, if there is anything further that we can do to assist please do not hesitate to contact us.

Yours sincerely

John S.C. Lewis FSA
General Secretary

On behalf of the Policy Committee of the Society of Antiquaries of London