

London City Airport

Appeal Reference: APP/G5750/W/23/3326646

Note by the Appellant and London Borough of Newham on Draft Condition 1

1. Background

- 1.1 This is an appeal ("the Appeal") against refusal of an application for planning permission made under Section 73 of the Town and Country Planning Act 1990 ("1990 Act"). The Appeal concerns the variation of conditions attached to the planning permission granted by the Secretaries of State for the City Airport Development Programme ("the CADP Permission"), on 26 July 2016 (appeal reference APP/G5750/W/15/3035673).
- 1.2 The CADP Permission included the following condition which imposed a time limit on commencement of development:

1 Time Limit

The Development shall begin not later than three years from the date of this decision.

Reason: To comply with the requirements of Section 91 of the Town and Country Planning Act 1990.

In compliance with this condition, the development was begun pursuant to the CADP Permission in 2017.

- 1.3 In the event that the Appeal were to be successful and planning permission granted, whilst certain conditions attached to the CADP Permission would be varied, there would be no change to the description of development.

2. Draft Condition 1

- 2.1 As part of the Statement of Common Ground and in subsequent iterations of the draft conditions submitted to the inquiry the Appellant and London Borough of Newham ("LBN") had suggested the following draft condition 1:

The development shall begin not later than three years from 26 July 2016.

- 2.2 The effect of this condition was to leave the time limit condition on the CADP Permission unchanged. An alternative way of expressing this would have been to specify that the development must begin no later than 25 July 2019.
- 2.3 The Inspectors have questioned the inclusion of this condition. The purpose of this note is to set out the options available to the Inspectors and the Secretaries of State when they consider the appropriate time limit for commencement of development and the up-to-date positions of the Appellant and LBN in relation to each option.

3. Options available for the time limit on commencement of development

- 3.1 The Appellant's legal team has searched for appeal decisions concerning applications made under Section 73 of the 1990 Act, where development under the original planning permission had commenced and where inspectors expressly considered the time limit that should be imposed on the resulting planning permission. These decisions are summarised in the **Appendix** to this note.

- 3.2 The selection of appeal decisions in the Appendix is not exhaustive but it illustrates the three options that have been considered by the inspectors in those decisions:
- (a) Reimpose the same time limit on commencement of development which was included in the original permission.
 - (b) Not impose any time limit on commencement of development.
 - (c) Impose a new (3 year) time limit on commencement of development with effect from the date of the appeal decision.

4. Legal Background

- 4.1 Although the application which is the subject of the Appeal is for variation of conditions attached to the CADP Permission, if the Appeal were to be successful, this would result in the grant of a new planning permission. This would sit alongside the CADP Permission, which would remain intact and unamended. The Appellant would then have a choice of planning permissions under which it could continue to operate the Airport.
- 4.2 The legal context for the imposition of a condition on a planning permission which regulates the time within which development must commence is set out below.
- 4.3 Section 91(1) of the Town and Country Planning Act 1990 provides that every planning permission must be granted subject to the condition that the development to which it relates must be begun not later than the expiry of 3 years beginning with the date on which the permission is granted or such other period (beginning with the same date and either longer or shorter) as may be considered appropriate having regard to the provisions of the development plan and to any other material considerations.
- 4.4 Section 91(3) of the Town and Country Planning Act 1990 deals with the situation where planning permission is granted without a condition specifying the time limit for commencement of development. In such circumstances permission is deemed to have been granted subject to the condition that the development must be begun not later than 3 years beginning with the date on which the permission is granted.
- 4.5 Under Section 73 of the Town and Country Planning Act 1990 provision is made for the determination of applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted. This includes Section 73(5) which provides that planning permission must not be granted under Section 73 for the development of land in England if it has effect of extending the time within which development must begin in a condition on the previous planning permission.
- 4.6 In summary:
- (a) If the Appeal were to be successful this would result in a new planning permission.
 - (b) Section 91 requires every planning permission to be granted subject to a condition which includes a time limit for commencement of development beginning with the date of the permission.
 - (c) If no such condition is imposed on a planning permission, Section 91 provides that the permission is deemed to be granted subject to a condition specifying a 3 year time limit.
 - (d) However, Section 73 provides that if planning permission is granted under this provision, it must not have the effect of extending the time limit specified in a condition on the previous planning permission.

5. Guidance

- 5.1 Advice on the determination of applications under Section 73 of the 1990 Act is included in National Planning Practice Guidance.
- 5.2 This includes the following extracts which deal with the time limit on commencement of development:

Are there any restrictions on what section 73 can be used for?

Planning permission cannot be granted under section 73 to extend the time limit within which a development must be started or an application for approval of reserved matters must be made. Section 73 cannot be used to change the description of the development.

[Paragraph: 014 Reference ID: 17a-014-20140306]

What is the effect of a grant of permission under section 73?

Permission granted under section 73 takes effect as a new, independent permission to carry out the same development as previously permitted subject to new or amended conditions. The new permission sits alongside the original permission, which remains intact and unamended. It is open to the applicant to decide whether to implement the new permission or the one originally granted.

A decision notice describing the new permission should clearly express that it is made under section 73. It should set out all of the conditions imposed on the new permission, and, for the purpose of clarity restate the conditions imposed on earlier permissions that continue to have effect. Further information about conditions can be found in the [guidance for use of planning conditions](#).

As a section 73 application cannot be used to vary the time limit for implementation, this condition must remain unchanged from the original permission. If the original permission was subject to a planning obligation then this may need to be the subject of a deed of variation.

[Paragraph: 015 Reference ID: 17a-015-20140306]

6. Position of the Appellant and LBN

- 6.1 If the Appeal were to be successful and planning permission granted:
- (a) The Appellant would prefer the reimposition of the same time limit on commencement of development as appeared in the CADP Permission (in the form of draft condition 1 or similar) as opposed to any of the other options, in order to ensure compliance with Section 73(5) of the 1990 Act. LBN does not think this is appropriate.
 - (b) LBN would prefer the imposition of a new 3 year time limit on commencement of development as opposed to any of the other options to ensure compliance with Section 91 of the 1990 Act. The Appellant does not think this is appropriate.
 - (c) Both LBN and the Appellant consider that omission of any time limit on commencement of development would be sub-optimal but would be acceptable for different reasons –
 - (i) LBN considers this would trigger a deemed 3 year time limit condition under Section 91(3) of the Act and therefore the planning permission would be subject to a new time limit running from the date of the permission.
 - (ii) The Appellant acknowledges that the sample of appeal cases included in the Appendix include a number of decisions where inspectors (including the recent call-in decision of the Secretaries of State relating to the increase in the annual passenger limit at London Luton Airport to 19 million) have

deliberately omitted a time limit on the basis that development has already begun (as here). Those cases do not appear to have considered the implications of the deemed time limit provided by Section 91(3) of the 1990 Act; despite this, it could be argued that if no new time limit is expressly imposed by the Secretaries of State, then the actual terms of the planning permission would not be extending the time limit that was imposed on the CADP permission and could be considered to be compliant with Section 73(5).

6.2 The views of the Appellant and LBN in relation to each option are summarised in the table below.

Option	Views of Appellant	Views of LBN
Reimpose CADP time limit	Ensures compliance with Section 73(5) of the 1990 Act Complies with NPPG Time limit is immediately satisfied on the date the Appeal decision is issued; reconciles Section 73(5) with Section 91(1) of the 1990 Act	Contrary to Section 91(1) of the 1990 Act since this would not be a new time limit effective from the date of the decision
Omit any time limit	Better to reimpose the CADP time limit but if there is no time limit, it can be argued that the new permission does not – on its terms - extend the time limit on the CDAP Permission	Better to impose a time limit under Section 91(1) of the 1990 Act but, in its absence, a 3 year time limit will be deemed to be imposed under Section 91(3) of the 1990 Act in any event
Impose new 3 year time limit	Contrary to Section 73(5) of the 1990 Act because it would expressly extend the time limit for commencement of development as specified in the CADP Permission	Ensures compliance with Section 91(1) of the 1990 Act

6.3 The Appellant and LBN are content to leave it to the Inspectors and the Secretaries of State to identify which of these options they prefer, taking into account the views expressed in this note.

1 February 2024

APPENDIX: SAMPLE APPEAL DECISIONS

Appeal Ref and Date	Appeal site	Relevant commentary	Time limit condition
APP/B0230/V/22/3296455 13 October 2023 (Call-In)	London Luton Airport, Airport Way, Luton, LU2 9LY	<p>[DL] <i>The Secretaries of State have given consideration to the Panel's analysis at IR15.239-15.249, the recommended conditions set out at the end of the IR and the reasons for them, and to national policy in paragraph 56 of the NPPF and the relevant Guidance. They are satisfied that the conditions recommended by the Panel comply with the policy test set out at paragraph 56 of the NPPF and that the conditions set out at Annex B should form part of their decision.</i></p> <p>[IR] <i>In the interests of clarity, PPG advises that any planning permission under s73 of the TCPA should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. This current proposal does not include any operational development and development in Phases 1 and 2 of the original and subsequent permissions have been implemented and conditions relating to them discharged. it is not necessary to repeat conditions relating to landscaping, construction details, piling and foul drainage associated with phase 1, car park drainage, highway improvements, and renewable energy to which the 2017 permission was subject.</i></p>	None imposed
APP/P1045/W/22/3295248 5 December 2022	Beechmount, Pinfold Lane, Bradley DE6 1PN	<p><i>In addition to the disputed condition, two other conditions were placed on the original planning permission (ASR/770/17) in respect of commencement and materials. However, as the construction of the bungalow has already been completed on site, I do not consider it necessary to re-impose those conditions. Therefore, I conclude that the appeal is allowed.</i></p>	None imposed

<p>APP/A1910/W/21/3281296 7 March 2022</p>	<p>Former Wagon & Horses Site, London Road, Flamstead AL3 8HG</p>	<p><i>By allowing this appeal a new planning permission is created. The national Planning Practice Guidance advises that, for clarity, decision notices for the grant of planning permission under section 73 should restate the conditions imposed on earlier permissions that continue to have effect, unless they have already been discharged.</i></p> <p><i>As the development has already started it is unnecessary for me to attach the commencement of development condition. As the only other condition on the original consent to be restated relates to the approved plans, I have simply phrased the decision so that it includes reference to those plans.</i></p>	<p>None imposed</p>
<p>APP/H2265/W/20/3264915 4 June 2021</p>	<p>Southfields, St Vincents Lane, Addington, West Malling ME19 5BW</p>	<p><i>The replacement dwelling has been constructed. Therefore, I have removed the time limit for commencement. I have amended conditions requiring the submission and implementation of details of car parking and refuse stores to refer to the retention of these details only. I have also removed the requirement to demolish the outbuildings, and for materials to be in accordance with the plans as these have taken place.</i></p>	<p>None imposed</p>
<p>APP/K1935/W/20/3262084 18 May 2021</p>	<p>8A Magellan Close, Stevenage SG2 0NF</p>	<p><i>The PPG makes clear that decision notices for the grant of permission under Section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. Whilst the officer's report suggests that details may have been approved for some of the conditions imposed originally, I cannot be sure as to the status of the conditions based on the parties' submissions. Accordingly, I shall impose those conditions that I consider remain relevant, with editing to ensure compliance with the tests for conditions set out at paragraph 55 of the Framework. If some of the conditions have in fact been discharged, that is a matter which can be addressed by the parties..... Construction of the development is underway and thus a time condition is unnecessary.</i></p>	<p>None imposed</p>

APP/L3245/W/20/3253848 11 February 2021	Mount View, Lockley Wood, Market Drayton, TF9 2LS	<i>Planning Practice Guidance states that decision notices for the grant of planning permission under section 73 should set out all of the conditions imposed on the new permission, and restate those imposed on earlier permissions that continue to have effect. In this regard, the Council has confirmed that previously imposed conditions 5-7, which were pre-commencement in nature, were discharged under permission Ref13/02279/DIS. Accordingly, I have not re-attached conditions 6 and 7, and have amended condition 5 to reflect the approved materials.</i>	None imposed
APP/Q1153/W/20/3255052 13 October 2020	The Milking Parlour, Higher Wilminstone, Road Past Wilminstone Farm, Wilminstone, PL19 0JT	<i>The guidance in the Planning Practice Guidance (PPG) makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission. The exception to this is the condition relating to the time limit for the commencement of development, which cannot be extended through an application made under section 73. Accordingly, I shall amend this condition to run from the date of the original permission.</i>	Reimposed time limit: <i>The development must be begun not later than 11 July 2022</i>
APP/X1925/W/20/3251399 8 October 2020	53-55 Benslow Rise, Hitchin SG4 9QY	<i>As this appeal relates to revisions to the wording of a condition; the implementation condition also needs to be amended in order not to increase the timeframe for implementation of the planning permission</i>	Reimposed time limit: <i>The development hereby permitted shall be begun before the 26 April 2022</i>
APP/U2370/W/19/3241233 1 April 2020	Land off Holts Lane, Poulton- le-Fylde	<i>The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under Section 73 of the Town and Country Planning Act 1990 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged.</i> <i>I have amended the condition relating to the time to implement the permission to accord with the original planning permission.....</i>	Reimposed time limit: <i>(a) In the case of any reserved matter, namely appearance, landscaping, layout and scale of the buildings, application for approval must be made not later than the expiration of three years beginning on the 12 April 2017;</i>

			<i>(b) the development to which the permission relates must be begun not later than the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last matter to be approved</i>
APP/N2535/W/19/3223625 3 July 2019	5 Fleets Road, Sturton by Stow, Lincoln LN1 2BU	<p><i>Turning to the other conditions, the PPG explains that Decision Notices for the grant of planning permission under section 73 should also repeat relevant conditions from the original planning permission, unless they have already been discharged.....</i></p> <p><i>An application for reserved matters has already been submitted, and so a time restriction relating to this is unnecessary. However, I have retained a time limitation for commencement. The Council has indicated that as no further reserved matters can be submitted, commencement of the development must be before 2 years of the date of the last approved reserved matter, which is 18 April 2020. However, I have imposed a standard 3 year time constraint to enable adequate time for negotiation and agreement between the parties on the proposed flooding scheme.</i></p>	<p>New time limit:</p> <p><i>The development hereby permitted shall be begun before the expiration of 3 years from the date of this Decision</i></p>
APP/A1910/W/19/3221620 11 June 2019	Land R/O 76-78 Belswains Lane, Hemel Hempstead HP3 9PP	<i>The Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission unless they have already been discharged. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all that I consider remain relevant, making modifications where required as set out below. In the event that any conditions</i>	<p>New time limit:</p> <p><i>The development hereby permitted shall begin not later than 3 years from the date of this decision</i></p>

		<p><i>have in fact already been cleared this will be matter that can be addressed between the parties.</i></p> <p><i>Condition 1 sets out the time limit for commencement of the development, and Condition 2 identifies the approved plans for sake of certainty.</i></p>	
<p>APP/R3325/W/18/3202355 23 November 2018</p>	<p>Land Opposite Autumn Leaves, Pibsbury, Langport, Somerset TA10 9EJ</p>	<p><i>The effect of allowing the appeal is the grant of a new planning permission. The Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties. I have amended the Council's suggested time limit condition to reflect the date of the original planning permission and altered the timing in the landscaping condition as it does not need to be pre-commencement. I have also made slight revisions to the wording in the interests of clarity.</i></p>	<p>Reimposed time limit:</p> <p><i>The development hereby permitted shall begin not later than 3 years from 22 March 2017</i></p>
<p>APP/J2373/W/17/3179445 11 January 2018</p>	<p>29 Cocker Street, Blackpool, Lancs FY1 2BZ</p>	<p><i>The guidance in the PPG makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties.</i></p>	<p>None imposed</p>

		<i>As the development has commenced, a condition limiting the time for commencement is unnecessary because the development has already begun.</i>	
APP/B9506/D/16/3147286 5 July 2016	Little Mead, Balmer Lawn Road, Brockenhurst, Hampshire SO42 7TT	It should be noted that in accordance with Section 73(5) the time limit for the commencement of the development specified in condition No 1 of the original planning permission still applies. Therefore, the development permitted by my decision on this appeal must be commenced within three years of the date of the original planning permission Ref 15/00430, which was granted on 31 July 2015.	Reimposed time limit: <i>The development hereby permitted shall be begun within three years of 31 July 2015</i>