

Dealing with Deemed Discharge of Conditions provisions in the DMPO 2015

The Development Management Procedure Order (DMPO) 2015 came into force on 15 April. This briefing note summarises the deemed consent provisions and includes notes that are intended to help LPAs to understand the new provisions and challenge whether their processes are fit to deal with these.

Discharging conditions as quickly and efficiently as possible is important. Delays at this stage can jeopardise the capacity of developers to bring forward development due to delays in ordering materials, additional finance costs etc. Lack of priority and clear processes in dealing effectively with conditions can cause confusion about what has been approved and consequent problems with enforcement for the council.

The Infrastructure Act 2015 gave primary legislative powers that provide a back stop to the time it takes to discharge conditions on most planning permissions. The DMPO sets out the procedures for applicants to gain deemed consent if an application for consent, agreement or approval on a planning condition has not been determined by the LPA within 8 weeks or an agreed extended period. There are exemptions to the deemed consent provisions for some types of development or for some types of conditions. The deemed discharge provisions will apply to applications for discharge submitted after that date.

The deemed consent provisions set a challenge to LPAs. Conditions, properly applied (i.e. meeting the test of necessity), are an essential part of the approval process, and as such, the LPA will want to consider proposals and determine the application rather than allow determination through the deemed consent provisions.

Communication between the case officer and the applicant is important. Keeping the applicant up to date on what is happening with his/her application helps to defuse tensions in the application process and provides an opportunity for necessary additional information to be exchanged. Keeping in touch also means it's less likely that applicants will need to resort to the deemed discharge provisions.

In order to manage the new provisions, LPAs will need to ensure that they have sufficiently robust procedures in place to record and manage the process. It will also be important to make sure that the consultees whose views you rely on to discharge some conditions are informed of the new provisions and that you build relationships and streamlined processes that avoid unnecessary delays.

The relevant provision in the Infrastructure Act 2015 is s29 (inserting s74A into the Town and Country Planning Act 1990). The DMPO 2015 provisions are in part 5 of the Order (Articles 27-30). Schedule 6 of the DMPO sets out the exemptions to the deemed consent provisions. Regulation 16(2) of the Fees Regulations 2012 allows for the return of the fee for a discharge of conditions application.

The provisions

The application

The applicant submits an application for any consent, agreement or approval required by a condition or limitation attached to a planning permission.

The application must be:

- in writing;
- give sufficient information to identify the permission;
- and include particulars, plans and drawings (as necessary) to deal with the application.

Extension of time agreements

The LPA must give notice of their decision on the application within 8 weeks beginning with the day after receipt of the application.

Or, within an extended period as agreed in writing between the applicant and the authority.

LPA considerations for processing

Good record keeping is essential. The LPA will need to consider how the application is registered. A single application may seek approval for several conditions; some of which will be determined ahead of others, or some may be granted and some refused. Does your system for registering applications allow for good record keeping to make this clear?

Most management systems will allow the recording of a 'linked application' Not all LPAs currently register the number of the "parent" permission, making it difficult to track workload and performance against the type of development. As LPAs work towards more effective use of conditions and to use their resources more effectively, it will help to be able to measure your workload and effectiveness in dealing with conditions relating to various types of development.

Given the requirement to give notice of a decision within 8 weeks of receipt, how will you let the applicant know if you consider that the information submitted is insufficient to deal with the application?

Where conditions are likely to take longer than 8 weeks to discharge, an early conversation with the applicant provides an option to agree an alternative date by for determination. The latter may be through an PPA established to provide an agreed timetable for discharging all the conditions on a planning permission; or could be through a simple exchange of letters similar to an extension of time agreement.

Deemed Discharge Notices

At any time after 6 weeks following the receipt of the application, the applicant can serve a “deemed discharge notice” to the LPA (although a shorter time may be agreed).

The deemed discharge notice must:

- provide details of the application and identify the condition.
- confirm that no appeal has been lodged (if more than 8 weeks).

Specify the date on which the deemed consent will take effect (either the 8 week date or 14 days after the notice is received, whichever is later).

Art 2(6) defines the received date for electronic communications which are received outside the working day as being the following working day.

There is no specific provision for non-electronic communication.

There is no specified form for the Deemed Discharge Notice (DDN). LPAs might consider creating a notice template available on their website to help ensure that the correct/necessary information is provided and provide a monitored email address for these to be sent to. While the wording of the Order suggests that a notice may be required for each condition, as an application may seek approval of several conditions at one time, it is foreseeable that an applicant may include more than one condition on a DDN. A robust process for receipting the notice, conditions identified and registering the date, then passing this on quickly to the case officer will be essential.

The deemed discharge notice sets a timetable from the day following the date on which the council receives the notice, so long as (for electronically submitted notices) this is within working hours. Otherwise the received day is the following working day. In most cases the deemed consent will take effect 14 days after the notice is received unless, the council has determined the application before then. It should be noted that this timetable takes no account of weekends or bank holidays: a notice received on Friday will be at day 3 by Monday.

As the applicant is responsible for filling in the date on which the notice comes into effect, there is some room for a sticky situation to result if conventional mail is used to serve the notice. If the applicant fails to account adequately for the delay in posting effect date may be set sooner than the 14 days after the received date. Would this make the notice invalid? Best advice for the LPA must be to contact the applicant in such cases and have the notice resent (preferably by electronic communication) with the correct date.

The legislation makes no provision for the applicant to withdraw the deemed decision notice with the inference that once the notice is served it is too late to agree an extension of time. If this is the case, LPAs might find it useful to have a trigger point at 5 weeks in order to prompt a conversation.

Exemptions

The deemed consent provisions do not apply to all planning permissions or all types of conditions. The exemptions are set out in article 30 and schedule 6 of the DMPO.

Where there is a written agreement between the applicant and the LPA, as to an extension of time, the condition is also exempt

Registration of the notice should include a check to ensure that the notice doesn't relate to an exempt condition.

Return of the Fee

The Fees Regulations 2012 provide that councils must return the application fee where the LPA fails to give the written confirmation requested in an application within 12 weeks of receipt.

This provision has been in place for some time, so it can be assumed that councils already have in place a process for managing the refund of fees in these circumstances. But, it is worth noting that the 12 week deadline is irrespective of whether there has been an agreement to extend the period for determination.

In the government's response to the consultation on deemed consent for fees, it was indicated that secondary legislation will be brought forward to make the refund available if the application is not determined within 8 weeks rather than 12. This amendment has not yet come forward.

In the hiatus between now and any change to the fees regulations, councils will have to ensure that even if the deemed consent provisions have taken effect, a written confirmation is sent out before 12 weeks. Otherwise, the refund provisions will apply.

In any event, it would seem to be good practice for tracking the approved details for any development for an LPA to confirm the relevant approval, agreement or consent in writing; whether the application has been determined by the council or by deemed consent.

Measuring performance

There is no statutory requirement for an LPA to track performance in regard to the discharge of conditions. However responsive LPAs will be keen to understand how well their service is doing in terms of discharging conditions to ensure:

- that conditions are being used appropriately,
- that they are providing a good timely customer focused service,
- that where conditions are necessary to make a proposed development acceptable, the subsequent submission of details is given proper consideration,
- that resources are not wasted by having to refund fees where the timetables are not kept to.

Appropriate back office systems for registration of details of the application, receipt of a notice and determination route (decision or deemed consent) will provide a record to help these challenges. By ensuring that the back office records also record a link to the "parent" application performance management systems (such as the PQF) will give information to show whether problems are occurring in respect of a particular kind of development, whether relationships with bodies whose expertise is required to consider applications is supporting timely consideration of conditioned details. This, in turn, will help with reviewing the form of conditions and how they are used.