Non-Material Change

April 2015
Preamble

This Development Management Practice Note is designed to guide planning officers and relevant users through the non-material change mechanism and deals primarily with procedures as well as good practice. It forms part of a series of new practice notes stemming from the Planning Act (Northern Ireland) 2011 [the 2011 Act] and any related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be made clear.

Where appropriate this practice note will therefore highlight:

- Relevant legislation;
- Procedural guidance;
- Definitions;
- Best practice examples / relevant case law

This guidance is not intended to replace the need for judgement by planning officers and those making planning applications. Nor is it intended to be a source of definitive legal advice. Reference should be made to the actual legislation referred to in this document and if any discrepancy or conflict exists between the Practice Note and legislation the provisions of the legislation will prevail.
1.0 Introduction

1.1 Following the grant of planning permission amendments are often required to address unexpected changes in circumstances or site conditions.

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Relevant Case Law

The Sage v Secretary of State [2003] case created increased uncertainty amongst local planning authorities and developers in England and Wales about the level of flexibility that existed to make minor amendments to existing permissions. This case gave rise to the view that developments must be built entirely in accordance with the approved plans and that any deviation from those plans rendered the development unauthorised. As a consequence more local authorities refused to deal with non-material changes to planning permissions and required applicants:

1. to submit a further full planning application to make relatively small changes to their approved development; or
2. to apply for a Certificate of lawfulness to test whether the changes are de-minimis.

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1.2 In order to address this situation, and bring about more flexibility and consistency between planning authorities on this issue, legislation was introduced in both England and Wales.

1.3 Further to the above, the 2011 Act has now introduced a mechanism by which a council will have a formal method of dealing with small changes (‘non-material’) to approved schemes. The introduction of the non-material change procedure under the 2011 Act now replaces the informal process previously used to respond to requests for minor amendments.

1.4 An application for a non-material change removes the need for an entirely new planning application to be submitted where only a very small change is
sought. Such an application, if approved, would form an amendment to the original planning permission and would be subject to the conditions and time limit of the original permission. It would not form a new planning permission and the existing permission will continue to exist and should be read in conjunction with the non-material change decision letter.

2.0 Legislative Context

2.1 **Section 67 of the 2011 Act** confers on a council the power to make a change to any planning application relating to land within its district if it is satisfied that the proposed change is not material.

2.2 **Article 7 of the Planning (General Development Procedure) Order (Northern Ireland) 2015** [referred to hereafter as “the GDPO”] states that any application for a non-material change must be made in writing giving a description of the non-material changes sought and sufficient information to identify the previous planning permission.

3.0 When is a proposed change non-material?

3.1 In deciding whether a change is non-material a council must have regard to the change together with any previous changes which may have been made to the original planning permission.

3.2 **Section 67 (3) of the 2011 Act** allows a council to impose new conditions and remove or alter existing conditions. This section should not however be confused with Section 54 of the 2011 Act which applies to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted. Whilst a council will have the power to impose new conditions, non-material changes by their very nature should generally not require a further restriction to make it acceptable. For example, a request to introduce a window, where the window is only acceptable if it must be kept as obscure glazing, would not be acceptable as a non-material change. Applicants may therefore wish to
contact their council planning office to seek advice on their particular proposals.

3.3 An application for a non-material change can be made to change any planning permission that has not expired (an extant permission). The amendment can be sought:

- before development has started;
- while the development is being implemented; or
- after development is complete.

3.4 It should also be noted that Section 67 cannot be used to make non-material changes to other types of planning consent as this power only applies to non-material changes to planning permission.

3.5 The benefits of the non-material change process are set out below:

- It provides a legal basis for making non-material changes to planning permissions, thus providing greater certainty to both a council and applicants on the ability to make such amendments;
- It provides a more responsive planning system that gives greater flexibility to applicants to take account of changes as the design and development process unfolds. This will allow applicants, such as businesses, to respond and adapt more effectively, quickly and cost effectively where the need to make a non-material change to an existing permission becomes apparent;
- It provides greater certainty and transparency about the process and procedure by which non-material changes can be made to permissions, thus reducing the risk of legal challenge to the approach taken by a council; and
- It provides a more responsive approach between councils to determine these amendments.

3.6 The non-material change process could be utilised in instances where a development scheme is under construction and it becomes necessary to
make some non-material changes to the design specifications. This would avoid the need for submission of a new planning application and the impact of subsequent delays and costs.

3.7 An overview of the mechanisms for determining changes to development proposals is detailed in Annex A. An example of how the non-material change procedure could operate in the context of current mechanisms is also highlighted in Annex A.

4.0 Application Process

4.1 There is no statutory requirement for a form to be used when applying for a non-material change. Article 7 of the GDPO simply requires an application for a non-material change to be made in writing giving a description of the changes sought and sufficient information to identify the previous grant of planning permission. Nonetheless, the use of a form can bring clarity and uniformity to the planning process. Councils may therefore find it beneficial to promote the use of a standard form as part of the non-material change application process. A model application form for a non-material change is contained in Annex B. The use of an application form should capture all relevant information required for the assessment of the proposed change.

4.2 The model application form states that an application for a non-material change should include:

- 3 copies of a completed and dated application form;
- 3 copies of other plans, drawings or information necessary to describe the subject of the application;
- the postal address of the land to which the development relates, or if the land in question has no postal address, a description of the location of the land;
- the name and address of the applicant and, where an agent is acting on behalf of the applicant, the name and address of that agent;
4.3 More than one non-material change can be applied for on the same form provided they all concern the same planning approval and comply with the legislative requirements.

5.0 Fees

5.1 There is currently no provision under the Planning (Fees) Regulations (Northern Ireland) 2015 that prescribes a fee for assessing applications for a non-material change.

6.0 Publicity

6.1 As an application for a non-material change is not an application for planning permission, the existing provisions relating to statutory consultation and publicity will not apply. If consultation and/or notification is considered necessary it is likely that the proposal would not then be acceptable as a non-material change.

7.0 What constitutes a non-material change?

7.1 There is no statutory definition of a non-material change. This is because it depends on a range of factors including the context of the overall scheme, the amendments being sought to the original permission and the site specific circumstances, all of which can vary from one application to another.
7.2 Discretion rests with a council as to whether the amendments constitute a non-material change to a planning permission within the scope of the original permission.

7.3 A judgement on ‘materiality’ in any particular case, is one of fact and degree, along with taking into account the likely impact of the amendment on the local environment. Materiality is considered against the development as a whole, not just part of it. The basis for forming a judgement on materiality is always the original planning permission. The cumulative effects of any previous amendments need also to be assessed against any original permission.

7.4 There cannot be a set of prescriptive rules to what is or is not ‘material’, as each case is different and considered on its individual merit. This is a matter for each council to decide.

7.5 In deciding whether or not a proposed change is non-material, consideration should be given to the effect of the change, together with any previous

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**Relevant Case Law**

In *Lever Finance Ltd v Westminster City Council [1970]* Lord Denning felt it was a sensible practice to decide whether a variation from an approved plan was material or not. Lord Denning highlighted the fact that the need to amend proposals would arise from time to time, unforeseen issues would need to be addressed and these should be considered in an expedient way. He did not consider it appropriate that proposals should have to go back to a planning committee for every immaterial variation. Lord Denning drew a distinction between immaterial minor amendments (non-material changes) and de-minimis. The court judgement effectively said that immaterial minor amendments may go beyond something that is de-minimis as long as they are considered immaterial in the context of the original approval.
changes made to the original permission. A local council may wish to assess whether a proposal change may give rise of any of the following:

1. any potential conflict with planning policy;
2. any alteration to the application site boundary;
3. any potential conflict with any of the conditions on the planning permission;
4. an exacerbation of concerns raised by third parties at the original application stage;
5. an extension to development already approved;
6. an increase in height of the building or extension;
7. any potential overlooking of a neighbouring property;
8. a material change in the design of the building;
9. new works or elements not considered by any environmental statement submitted with the application; and
10. the requirement for any consultations to be undertaken or any public advertising or neighbour notification.

7.6 It should be noted that the criteria above are intended to provide guidance about changes that are likely to be material and therefore not likely to be acceptable as a non-material change. It is not a comprehensive list and each non-material change application must be considered on its own merits. Furthermore, the criteria are designed to prevent changes being accepted that would have a detrimental impact upon neighbours or amenity in the wider public interest.
8.0 Delegation

8.1 Given that the changes sought through the non-material change process should be non-material in nature they are unlikely to raise any significant issues that would merit such applications being referred to Planning Committee for determination. In order to ensure such requests are processed efficiently councils should ensure appropriate delegation arrangements are in place.

9.0 Period for Determining Non-material Change Requests

9.1 There is no statutory timeframe for determining such requests however a council may wish to consider a good practise target of 28 days from receipt of the application\(^1\).

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\(^1\) Currently it is a legislative requirement for councils in England to determine non-material change applications within 28 days of receipt.
10.0 Issuing a Decision Letter

10.1 A council must be satisfied that the amendment sought is non-material in order to grant an application. The decision as to whether or not a non-material change has been accepted should be issued in writing by the relevant council. The decision should only relate to the non-material changes sought and the letter should describe these. The decision letter is not a reissue of the original permission which still stands. It should be read in conjunction with the original permission and a copy of the letter should be placed on the planning register.

10.2 Where a council determines that a non-material change is not acceptable and issues a letter to confirm that the application is refused an applicant may submit a fresh planning application for a revised proposal.
Annex A - Mechanisms for addressing changes to extant permissions

Extant Planning Permission

De-minimis

Application for non-material change under Section 67 of the 2011 Act

Changes beyond de-minimis

Minor works which go beyond de-minimis but are immaterial in context of the original approval

Non-material change

Application for non-material change under Section 67 of the 2011 Act

Material Change

Material change - develop land without compliance with conditions

Application to vary condition under Section 54 of the 2011 Act

Outside scope of conditions or retrospective application

Proposed substantial material change

Full application for proposed development under Section 45 of the 2011 Act

Development not carried out in accordance with planning approval

Full application for retrospective permission under Section 55 of the 2011 Act
Clarification of Annex A: The application of non-material change mechanism

An application made under Article 7 of the GDPO, as detailed in this practice note can be used to address the following:

- immaterial minor changes to approved plans;
- operations considered to be de-minimis; and
- works that do not constitute development.

What constitutes De-minimis works?
In planning terms this is a definition that can mean a usage carried out on such a limited level or so infrequently that no consideration of whether a material change of use has occurred is invoked. It may also describe an operation which is so small that it can be discounted from the definition of development requiring planning permission, or a transgression or a condition or other planning restriction that is so minimal as to not constitute a breach of control.

Consideration of non-material changes
The lever case previously highlighted has confirmed that immaterial minor amendments may go beyond something that is de-minimis provided it is considered immaterial in the context of the original approval.

Develop land without compliance with conditions
Section 54 of the 2011 Act enables a person to submit an application to develop land without compliance with conditions previously attached to planning permission. This is a more significant application than a request to make a non-material change. Article 3 of the GDPO provides for the submission of applications under Section 54 whereby a council can grant such permission unconditionally or subject to different conditions, or they can refuse the application if they decide the original condition(s) should continue. The original planning permission will remain whatever the outcome of the application under Section 54\(^2\).

\(^2\) Guidance on Section 54 is contained within Development Management Practice Note 24
**Relevant Case Law**

**Whether Revised Conditions May Alter the Nature of Development**

It is unlikely that alteration or amendment to a condition which greatly changed the nature of the planning permission would be permissible. This was underlined in a court case where outline planning permission was granted by a council to allow construction of a 40,000 seat multi-purpose arena, a food superstore and a variety store with small retail and community units, multi-leisure complex and PFS. A section 73 (the English equivalent to an application made under Section 54) to vary the terms of some of the conditions was subsequently granted. This had the effect of deleting the variety store, permitting the construction of up to six non-food stores and increasing the floorspace by 18%. This was challenged by city centre developers on the basis that the amendment lay outside the scope of section 73 and moreover it would lead to vitality and viability harm. This was accepted, the High Court concluding that the council had no power to vary the conditions as they did which radically altered the nature of the outline consent *R v Coventry City Council ex parte Arrowcroft Group Plc 21/7/00.*

**Certificate of Lawful Use or Development (CLUD)**

**Article 11 of the GDPO** provides a council with the mechanism for establishing the planning status of land and buildings, i.e. whether an existing use, operation or activity in breach of a planning condition, or a proposed use or operation, is lawful for planning purposes on the date specified. A CLUD could be used for a proposal that is de-minimis on the basis that it can be discounted from the meaning of development or for a non-material change as it is covered by the original permission. However the introduction of the non-material change mechanism now provides councils with a more efficient means of determining these types of requests.
**Annex B - Non-Material Change Model Application Form**

**Application for non-material change following a grant of planning permission**

**Planning Act (Northern Ireland) 2011**

**1a. Applicant’s name and address**

<table>
<thead>
<tr>
<th>Name:</th>
<th>Address:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Town:</td>
<td>Postcode:</td>
</tr>
<tr>
<td>Tel:</td>
<td></td>
</tr>
</tbody>
</table>

**1b. Agent’s name and address (if any)**

<table>
<thead>
<tr>
<th>Name:</th>
<th>Address:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Town:</td>
<td>Postcode:</td>
</tr>
<tr>
<td>Tel:</td>
<td>Ref. No.</td>
</tr>
</tbody>
</table>

**2. Site Address Details**

<table>
<thead>
<tr>
<th>Unit:</th>
<th>House Number:</th>
<th>House Suffix:</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Name:</td>
<td></td>
<td></td>
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<tr>
<td>Address 1:</td>
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<td></td>
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<tr>
<td>Address 2:</td>
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<tr>
<td>Address 3:</td>
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<td>Postcode:</td>
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</table>

**3. Eligibility**

Do you or the person on whose behalf you are making this application, **Yes** ☐ **No** ☐ have an interest in the part of the land to which this change relates

If you have answered No to this question, you cannot apply to make a non-material change.
4. Council Employee / Elected Member Interest

Are you / the applicant / applicant’s spouse or partner, a member of staff within the council or an elected member of the council?  Yes □  No □

Or are you / the applicant / the applicant’s spouse or partner a relative of a member of staff in the council or an elected member of the council?  Yes □  No □

If you have answered yes please provide details (name, relationship and role):


5. Description of Your Proposal

Please provide a description of the approved development as shown on the decision notice, including application reference number and date of decision in the sections below.


Application reference number:  Date of decision (dd/mm/yyyy)


6. Non-Material Change(s) Sought

Please describe the non-material change(s) you are seeking to make:
Are you intending to substitute amended plans or drawings?  Yes  No

If Yes, please complete the following:
Old plan/drawing number(s):

New plan/drawing number(s):

Please state why you wish to make this change:

7. Application Requirements – Checklist

Please read the following checklist to make sure you have sent all the information in support of your proposal. Failure to submit all information required will result in your application not being accepted.

The original and 3 copies of a completed and dated application form: ☐

The original and 3 copies of other plans and drawings or information necessary to describe the subject of the application: ☐

8. Declaration

I/we hereby apply for a non-material change(s) as described in this form and the accompanying plans/drawings and additional information.

Signature of Applicant/Agent ______________________ ____________  Date _______________
Planning Guidance Team

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