Landmark Chambers

Finney v Welsh Ministers

Alternatives to s.73

Robert Walton QC

Introduction

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- Amendment on grant of permission:
  - LPA power to amend the description of development;
  - LPA power to amend the scheme using conditions.

- Amendment after grant of permission:
  - S.96A;
  - s.96A then s.73;
  - “Drop in” applications;
  - s.97 Modification Order.

LPA power to amend description of development

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70.— Determination of applications: general considerations.

(1) Where an application is made to a local planning authority for planning permission—

(a) …. they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) they may refuse planning permission.

NPPG

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Can a local planning authority amend the description of development?

Before publicising and consulting on an application, the local planning authority should be satisfied that the description of development provided by the applicant is accurate. The local planning authority should not amend the description of development without first discussing any revised wording with the applicant or their agent.

Paragraph: 046 Reference ID: 14-046-20140306

- Adding (e.g.) number of units to description of development would deprive Application of ability to make a s.73 application
- Unit numbers already controlled by condition – so amending description of development does not change anything in terms of what it consented
- Developers should therefore resist such changes.

Using conditions to amend the scheme

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Bernard Wheatcroft Ltd v Sec State for the Environment (1982) 43 P & CR 233.

- Application submitted for 420 houses on 35 acres
- Revised scheme introduced on appeal: 250 houses on 25 acres
- SS held he had no power to grant pp for reduced scheme

Wheatcroft cont.

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Forbes J:

- SS could impose conditions that have the effect of reducing the permitted development below the development applied for;
- Power could not be exercised where the conditional planning permission would allow development that was not “in substance” that which was applied for;
- The main criterion was whether the development is so changed as to deprive those who should have been consulted the opportunity of being consulted
- [Did not decide SS had power to grant permission for more development was sought – see *Finney*]

Wheatcroft test flawed?

Holborn Studios Ltd v Camden LBC [2017] EWHC 2823 (Admin)

"**In my judgment this conflation of the substantive and procedural constraints on the powers of the local planning authority is flawed**. It is quite possible for a person to be deprived of an opportunity of consultation on a change which would not result in a permission for a development that is in substance not that which was applied for."

"In considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended".

Amendments post permission: s.96A

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"(1) A local planning authority may make a change to any planning permission …if they are satisfied that the change is not material.

(2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission … as originally granted.

(3) The power conferred by subsection (1) includes power to make a change to a planning permission—

(a) to impose new conditions;

(b) to remove or alter existing conditions".

s.96A - procedure

- Procedure governed by article 10 of the T&CP (Development Management Procedure) Order 2015:
  - Notification must be given to landowners;
  - LPA must take into account reps received within 14 days of notification
  - 28 day time limit for decision (unless extension agreed in writing).

Section 96A – how different to s.73?

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- Only available to a person with an interest in the land to which the application relates;
- Not limited to amending conditions – i.e. allows non material changes to the description of development too;
- LPA discretion as to scope of consultation;
- No statutory requirement to consider development plan;
- EIA unlikely given change must be non-material;
- Decision within 28 days (or such longer period as agreed in writing);
- Decision issued in writing (cf new permission under s.73);
- Amends the existing permission – does not result in the grant of a new pp;
- No right of appeal under s.78 - JR only.

s.96A: In practice (1)

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Remedying deficient or unintelligible conditions

In *R (Hill) v Cornwall Council* [2016] EWHC 1264, a JR against a planning permission succeeded solely on the ground that one of the conditions, as drafted, was unintelligible and thus unenforceable. The High Court postponed the giving of final judgment to allow an application to be made under s.96A to amend the condition.

s.96A in practice (2)

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Inserting an additional condition as a precursor to a s.73 application

In *R (Daniel) v East Devon DC* [2013] EWHC 4114 (Admin) permission had been granted for development to take place in part on land not within the ownership or control of the developer. It was unable to acquire the land or secure consent from the landowners. This made it impossible to carry out the development. The original permission did not include a condition setting out the approved plans. The developer therefore used s.96A to impose an additional condition listing those plans and then applied under s.73 to vary that condition so that the development would take place on a reduced footprint (excluding the land outside of the developer's control). The court upheld the LPA's decision to grant the s.73 application.

Section 96A plus Section 73

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- E.g. the description of development in *Vue Entertainments Ltd*:

"The demolition of existing structures and the erection of an 8,000 seat community stadium, leisure centre, multi-screen cinema, retail units, outdoor football pitches, community facilities and other ancillary uses, together with associated vehicular access, car parking, public realm, and hard and soft landscaping".

Use s.96A application to change description of development to:

Section 96A plus Section 73

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"The demolition of existing structures and the erection of a ~~an 8,000~~ seat community stadium …."

- No changes to condition requiring scheme to be built in accordance with plans, so change is not material.

- Then use s.73 to amend conditions – substituting revised plans – cf increase from 2000 to 2400 seater cinema.

- Simultaneous application / back to back determination by the LPA.

“Drop in” applications

Planning permission granted in February 2017 for the “erection of 53 care apartments within Class C2, parking, access, footpath, landscaping & other associated works”.

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Permission then secured in 2019 for “demolition and erection of 70 bed care home within Use Class C2 (replacing building 4 approved by A27/16/PL) …”

Drop in applications cont.

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Legal - Advice in relation to red edge of application site.
The application can proceed to be determined. However if approved the applicant is not legally entitled to implement both permissions as implementation of this latest application (if approved) would prevent full implementation of the existing permission and this application does not incorporate the existing permission.

COMMENTS ON CONSULTATION RESPONSES:

Comments noted and relevant conditions included.
With regard to the legal advice it was suggested to the agent that this application was withdrawn and resubmitted with an amended scheme relating to the whole of the application site approved under A/114/18/PL. However they have not chosen to pursue this option. Therefore approval of this application will result in two permissions one of which can't be fully implemented. In addition this application requires a section 106 Agreement to secure contributions and these would be additional to those secured under planning permission A/14/18/PL.

- Certificate of lawfulness application showing combined schemes refused – now at appeal.

- LPA arguing that the two permissions are inconsistent with each other.

- NB: *Pilkington v Sec State* [1973] 1 WLR 1527: "special cases will arise where one application deliberately and expressly refers to or incorporates another" – per Lord Widgery at [1531]

- Key points:
  - Drop in application should refer expressly to the original permission and all documentation must show how the two schemes fit together.

s.97 Modification Orders

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- Key features
  - In exercising the power the LPA shall have regard to the development plan and any other material considerations;
  - May be exercised at any time before the building operations to which the permission relates have been completed or the change of use permitted has taken place;
  - Revocation or modification does not impact any building or other operations that have already been carried out under the permission;
  - LPA liable to pay compensation in respect of expenditure that has been wasted as a result of the order: see s.107;
  - Order subject to statutory review under s.288: see s.284(2)(a).

Extensions of time

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- Urgent need for planning permissions to be extended
- 12 month extension granted in Scotland: see s.38(3A) of the Town and Country Planning (Scotland) Act, as inserted by paragraph 9 of schedule 7 to the Coronavirus (Scotland) Act 2020
- Extension would have to be prospective – otherwise equivalent to the grant of a fresh permission
- Not possible on s.73 application. What about s.96A or s.97?

Thank you for listening

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