



HERBERT
SMITH
FREEHILLS

Section 73 post *Finney*

Practical Implications for Developers, Landlords, Tenants and Funders

3 February 2021

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Recap - *Finney*

- Section 73 only allows changes to conditions – not the description of development
- If a change of conditions would render the consented development inconsistent with the description of development – section 73 can't be used
- cf the previous position – simple test: would this change be a fundamental alteration to the consented development (***Arrowcroft***)

Recap - *Finney*

- Implications of *Finney* clear and profound
- Illustrative example

“Comprehensive redevelopment of site to provide 3 new buildings of up to 12 storeys, comprising 156 residential units, 4500 sqm retail, 3000sqm office, 500sqm leisure and 1000sqm educational use”

Recap - *Finney*

- Illustrative example

“Comprehensive redevelopment of site to provide 5 new buildings of up to 12 storeys, comprising 156 residential units, 4500 sqm retail, 3000 sqm office, 500 sqm leisure and 1000 sqm educational use”

Proposed change	Arrowcroft only	Arrowcroft + Finney
+ 2 storeys on tallest building	Yes	No
+250sqm retail	Yes	No (possibly 96A?)
Change in site layout (no floorspace change)	Yes	Yes
New substation	Yes	Yes (probably). 96A may be available
Change office space to co-working	Yes	No

Recap - *Finney*

- Observations
 - Use Class E may assist going forward – but not a panacea
 - Differing local authority approaches
 - *“If, on the other hand, the proposed change is a material one, I do not see the objection to a fresh application being required.”* (Lewison LJ, *Finney*)

Recap - *Finney*



“And don't go whining to some higher court.”

Section 73 – what it says

Determination of applications to develop land without compliance with conditions previously attached.

- 1) This section applies...to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
- 2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
 - a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
 - b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

....

Section 73 – what it doesn't say

- The word “minor”
- The word “material”
- The word “amendment”

Joint Circular from Department of Environment No:19/86

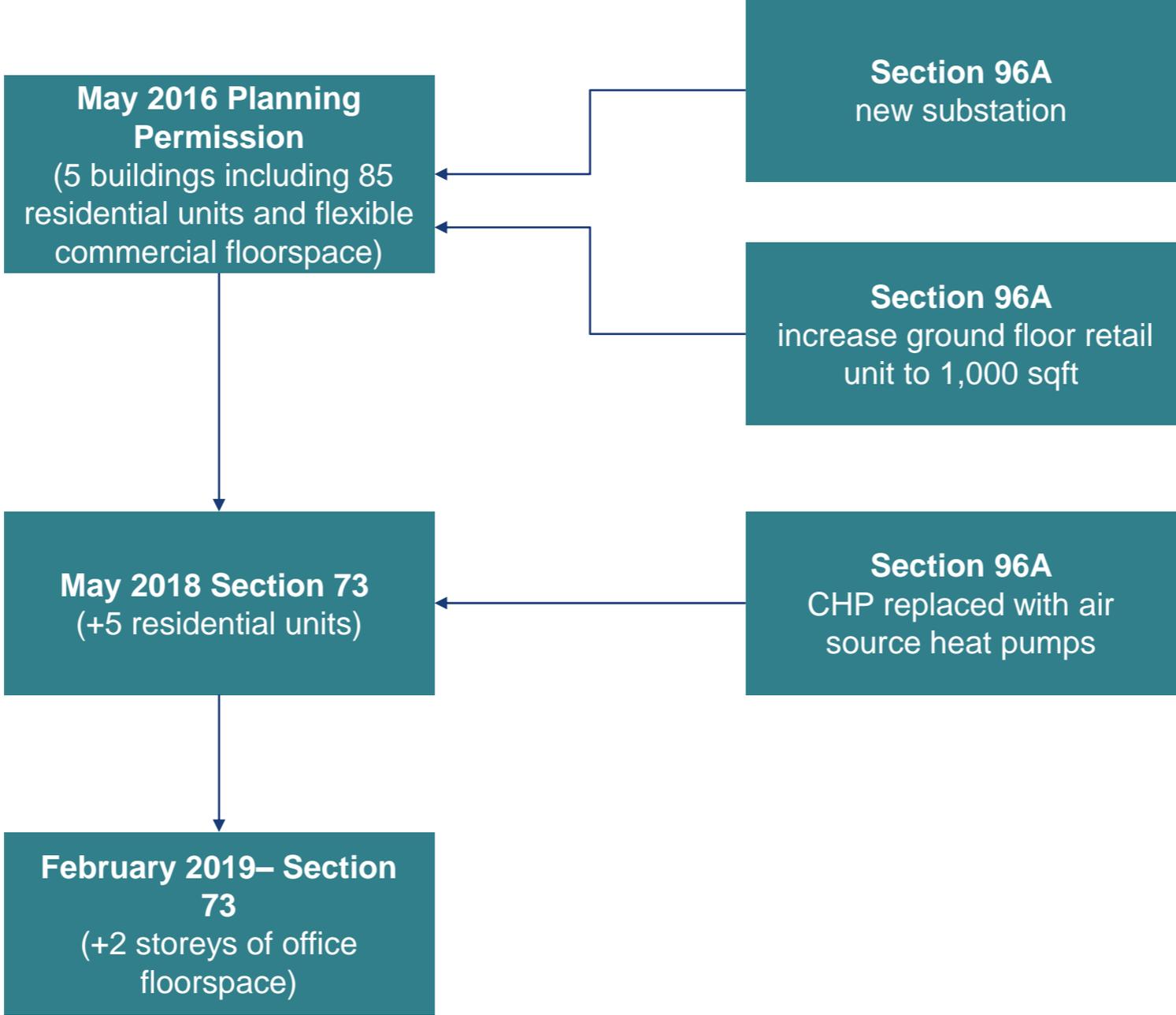
Paragraph 4 of Schedule 11: Applications to vary or revoke conditions attached to planning permission

13. This paragraph introduces a new section 31A into the 1971 Act to provide that in the case of land with an extant planning permission granted subject to conditions, an applicant may apply to the local planning authority for relief from any or all of those conditions. It may be seen as complementing the power in section 32(1)(b) which provides that applications for planning permission may relate to development already undertaken if they are for permission to retain buildings or works, or to continue a use of land, without complying with some conditions subject to which a previous permission was granted. This new section will provide an applicant with an alternative to appealing against the original permission. It will also enable him (after the expiry of the 6 month period during which an appeal must be lodged) or any subsequent owner of the land (who does not have the right to appeal) to obtain relief from conditions without the need to submit a second full application. On receipt of an application under

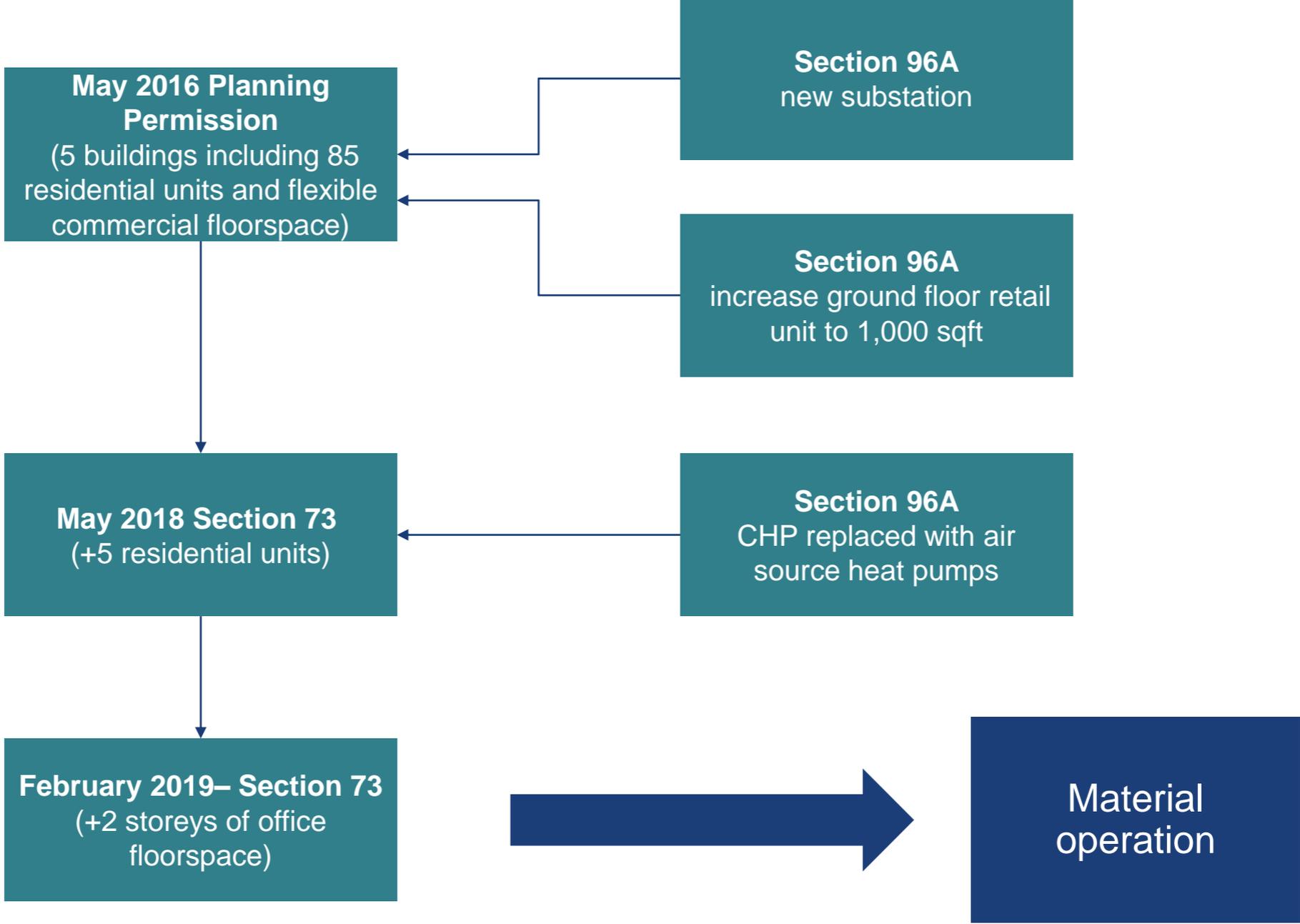
Joint Circular from Department of Environment No:19/86 (Cont)

section 31A (the form and content of which will not be prescribed until new regulations are made in Spring 1987) the local planning authority may consider only the conditions to which the planning permission ought to be subject and may not go back on their original decision to grant permission. If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted. Regulations to govern the fee payable for applications under section 31A will be introduced early in 1987.

Amending the wrong permission



Implementing the wrong permission



Conditions

- Imposing conditions on the new consent

“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” (NPPG).

- What about conditions that have already been discharged?

The development plan and other material considerations

Section 38(6): If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.

The development plan and other material considerations

“Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a “normal” application for planning permission under section 70 , but ...how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the particular materials to be employed in the construction of the building, the local planning authority's consideration will be confined within a very narrow compass.”

..the local planning authority looking at the practical consequences of imposing a different condition, as to hours or materials, will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated.”

(Sullivan J, Pye)

The development plan and other material considerations

“The local planning authority has to have regard to the factual circumstances as they exist at the time and to have regard to the facts that exist at the time of its decision...

Much less do I see any justification for requiring the local planning authority to base its decision upon a hypothesis: comparing the merits of development proceeding now with the merits of its having proceeded at some time in the past, when it is known that the hypothesis does not accord with reality.”

(Sullivan J, Pye)



"I mean, he does have a point."