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AMENDING PLANNING PERMISSIONS: SECTION 73 UNDER THE SPOTLIGHT AGAIN

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SUMMARY

The recent High Court judgment in *Armstrong v Secretary of State [2023]* is a useful reminder of the scope of amendments that can be made to planning permissions under s.73 TCPA and that this power is not limited to the approval of 'minor-material amendments'.

The planning regime has been adapted over time to accommodate the commercial realities of development, with statutory mechanisms introduced to enable the approval of amendments to existing planning permissions to various degrees. Regardless of which mechanism is used, amendments can only be made within the statutory limits of the power used. In practice, sometimes scheme amendments are sought that push and test these limits and the Courts are required to intervene.

Section 73 applications are one such mechanism, and the scope of this power has been scrutinised by the Courts on a number of occasions. The recent case of *Armstrong v Secretary of State*[1] brought s.73 applications under the spotlight again, when a Planning Inspector unlawfully imposed narrower limits on the use of this power than is prescribed by statute. The judgment provides helpful clarification on when s.73 applications can be made.

BACKGROUND TO S.73 APPLICATIONS AND PLANNING GUIDANCE ON ITS USE

Section 73 TCPA confers a power on planning authorities to amend or remove planning conditions (other than those specifying the time for implementation) attached to a planning permission, but not the description of development. This power has been available since the original enactment of the TCPA in 1990 and it is commonly used to authorise scheme changes by varying the planning conditions that list approved plans.

In determining s.73 applications, planning authorities can only consider the question of the planning conditions. They must consider whether to permit the same development but subject to different conditions whilst taking into account any wider considerations, such as the current development plan, as a successful s.73 application results in a new permission.

The Government did not publish any formal guidance on the use of s.73 applications until 2009, when it published its Planning Practice Guidance on 'Flexible options for planning permission' (the "PPG") following an independent review of the planning application system in England[2] which recommended a more proportionate approach should be allowed for minor material changes after the grant of planning permission.

As a result of this review, some changes were made to the procedure for s.73 applications[3], along with publication of the PPG which introduced the concept of using s.73 to make "minor material amendments" to existing permissions. This PPG states that if the proposed modifications are "fundamental or substantial" a new planning application is required. Notably, this requirement is not mirrored in the s.73 statutory provision.

SUMMARY OF *ARMSTRONG*

This case involved a planning permission for a new house, designed in a contemporary architectural style at a coastal site in Portwrinkle, Cornwall. A s.73 application was submitted to vary a planning condition that required the development to be carried out in accordance with approved plans, to substitute the plans to a new design in the style of an "alpine lodge", but with a similar footprint to the originally approved design.

The s.73 application was first refused by the planning authority because it would "result in a development that would differ materially from the approved permission" and as such, the authority was of the view the application went beyond the scope of s.73 TCPA and a fresh planning application should be submitted. The s.73 application was then refused on appeal, on grounds that the new plans for the redesigned house would result in a development "of a substantially different nature than the one originally approved" and this was a "fundamental variation" of the planning permission, even though it didn't conflict with the description of the development permitted. The Inspector said this went beyond the parameters of a minor material amendment and therefore could not be considered under s.73.

The subsequent statutory challenge succeeded, and the Court found the Inspector's approach to the interpretation of s.73 and the application of the PPG was wrong and as a result, the decision to refuse the appeal was unlawful and should be quashed.

The case confirms that provided a s.73 application is limited to the non-compliance with any planning condition which is not in conflict with the operative part of permission (ie the description of the development permitted), it is within the scope of s.73 and can be entertained. There is no

statutory limitation on the use of s.73 to applications for minor material amendments only, nor are s.73 applications available solely for amendments that are non-fundamental. The PPG should not be interpreted otherwise.

Importantly, s.73 does not dictate the outcome of an application, this is a matter for planning judgment. The decision-maker must assess the changes proposed and decide whether or not they are acceptable in planning terms, taking account of material considerations. Whether or not the amendments proposed in a s.73 application are minor or non-fundamental is irrelevant in deciding whether or not a s.73 application is within scope.

COMMENT

Armstrong provides instructive commentary on the scope of applications that can be made under s.73 and the status of the PPG in relation to legislation and case law. It is a helpful reminder that if an application is made to amend an approved scheme by varying the planning conditions (rather than the operative part) on an existing planning permission, such an application would fall within the scope of s.73. Importantly, s.73 applications are not limited to applications for 'minor material amendments', as might be inferred from the PPG. Whether or not proposed amendments submitted using the s.73 mechanism are approved is another matter, and one of planning judgement for the decision-maker to determine on the planning merits. But an application that is within scope must at least be considered by the planning authority.

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[1] [2023] EWHC 176 (Admin)

[2] The Killian Pretty review in 2008 was an independent review, commissioned by the Government, of the planning application system in England and how it could be improved.

[3] Amendments to what is now the Development Management Procedure Order 2015 were introduced to give local authorities a discretion on which statutory consultees to consult when considering s.73 applications.

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