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When Conditions Turn Foul: recent dilemma in the courts 8 June 2020

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OVERVIEW

- Precedent/Pre-commencement conditions
- Interpreting conditions
- Discharging conditions
- Amending permissions

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PRECEDENT / PRE-COMMENCEMENT CONDITIONS

Line of cases dealing with the distinction (the Whitley principle) between:

- A condition which merely stipulates that something must be done before the time when the development commences (pre-commencement); and
- A condition which in truth goes further and stipulates that the development cannot commence unless the condition is fulfilled (condition precedent).

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Is it just about the wording or do you take a holistic view as to whether the condition goes to 'the heart of the permission' (Hart Aggregates)?

Source: freesvg.org

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Source: commons.Wikimedia.org

R (Howell) v Waveney DC [2018] EWHC 3388

Condition required written details of the turbine's exact height and position and lighting to be submitted three months before development started.

NOT a condition precedent because it did not require approval of the details, but only their notification, and the Ministry of Defence was content that the turbines would pose no danger to aviation.

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Source: Flickr.com

Meisels v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1987 (Admin)

- The planning conditions included that full details and samples of the materials to be used would be submitted to and approved by the local authority before any work on the site began

- The inspector found that the condition requiring approval of the materials went to the heart of the planning permission because it fundamentally controlled the final appearance of the building and its relationship to its surroundings.
- The question whether a condition went to the heart of the planning permission could be answered only by a fact-sensitive inquiry into the terms of the condition in the context of the permission. That question was therefore a matter of planning judgment for the inspector, not the court, and unless the inspector's decision on the issue was at fault in a *Wednesbury* sense, the court would not intervene.

Good practice in England and Wales

- Many authorities in England now identify on PPs the conditions they believe to be true conditions precedent.
- Charles Mynors Law Commission Report suggests this could become routine in Wales, with an express power in the Planning Bill to do so (however not followed forward in Recommendations).
- In England it is now a requirement that an applicant agrees to pre-commencement conditions before they can be imposed (The Town and Country Planning (Pre-commencement Conditions) Regulations 2018) but this is not in force in Wales.

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INTERPRETING CONDITIONS

UBB Waste Essex Ltd v Essex CC [2019] EWHC 1924 (Admin)

- Whether conditions permitted green waste to be processed at a waste treatment facility
- Argued that the conditions, and the documents incorporated, showed the facility was constructed to treat residual waste that could not be composted i.e. not green waste

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- Condition stated that no waste other than 416,955 tpa of those waste materials defined in the application details shall enter the site.

Lieven J:

- Permission should be interpreted by a reasonable reader and with common sense looking at the planning purpose
- Legitimate to consider the planning purpose where it was reflected in the reasons for the condition and / or the documents incorporated into the permission (reasons first, policies second, documents incorporated third)

- The very large number of documents incorporated by reference required a holistic view to try to understand the nature of the development and its conditions (NB ES, DAS, Planning Statement etc. all incorporated)
- Court should be extremely slow to consider documents that had not been incorporated into the permission (should be able to rely on the face of the permission and the documents expressly referred to)

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- Words of the condition and incorporated documents meant that the facility was aimed at the treatment of residual waste, not green waste
- That did not mean that no green waste would go to the facility, but taking a holistic view of those incorporated documents, it was highly relevant that they focussed entirely on residual waste
- Also contrary to waste policy and common sense if all the carefully segregated waste could be taken to the facility and processed further down the waste hierarchy

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DISCHARGING CONDITIONS

R (Smith-Ryland) v Warwick DC [2018] EWHC 3123 (Admin)

- Condition requiring approval and implementation of a noise mitigation scheme for an agricultural dryer
- Discharged on basis that, with an acoustic fence, noise levels would be no worse than living next to a road

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- S-R argued that LPA failed to have regard to fact that applicable objective noise standards would be breached, even with the fence
- Held: issue of acceptability was a contextual one involving planning judgement
- EHO must have had noise levels in mind and it was not irrational

- Lesson: give reasons for discharging conditions
  R (Newey) v South Hams DC [2018] EWHC 1872

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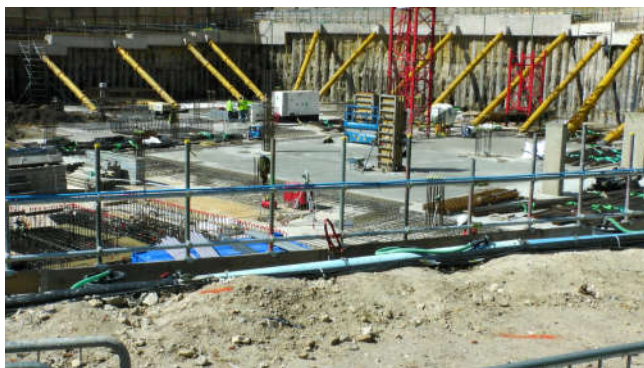
AMENDING PERMISSIONS



Source: publicdomainpictures.net

Introduction

- S73 of the TCPA 1990.
- Issue 1: scope of s73:
  - Can a fundamental alteration be made?
  - Can the “operative part” be amended?
- Issue 2: the effect of s73 – will conditions on the old consent lapse if not re-stated?

Scope of s73

<u>R v Coventry City Council, Ex p Arrowcroft Group plc</u> [2001] PLCR 7

- Planning permission for "1 foodstore and 1 variety superstore"
- S. 73 consent: new condition for 1 foodstore and 6 non-food retail units.
- <u>Unlawful</u>: new conditions must be those which the council could lawfully have imposed upon the original planning permission "in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application"
- New condition here fell outside s. 73. 6 non-retail units fundamentally different from 1 variety superstore.

<u>Regina (Wet Finishing Works Ltd) v Taunton Deane Borough Council</u> [2017] EWHC 1837 Admin

•Planning permission for 84 dwellings

•S73 consent varies condition to allow 90 dwellings

•<u>Lawful</u>: court rejects argument that a condition cannot increase the development

•Test: would the condition allow development that was fundamentally different from what was permitted? Question of fact and degree and planning judgment. Court will intervene only if irrational.

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Finney in the High Court [2018] EWHC 3073 (Admin)

- Planning permission for two wind turbines of up to 100m height (stated in operative part)
- S73 application varied to up to 125m height (on appeal)
- Lawful: applying Wet Finishing, issue was whether the proposal was a fundamental alteration to the original permission. Judge inferred that the Inspector must have concluded it was not fundamentally different
- In any event, judge said he would have withheld discretion to quash

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Finney reversed by Court of Appeal: [2019] EWCA Civ 1868

- Held that: s.73 may not be used to obtain a varied planning permission when the change sought would require a variation to the terms of the “operative” part of the permission
- Reasoning was that on receipt of a s.73 application s.73(2) indicated that a planning authority had to "consider only the question of conditions". It could not, therefore, consider the description of the development to which the conditions were attached. The natural inference was that the planning authority could not use s.73 to change the description of the development
- Wet Finishing to the extent it is inconsistent.

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Will conditions on the old consent lapse if not re-stated

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Lambeth v Secretary of State for Communities and Local Government [2019] UKSC 33

Source Geograph.org.uk

Summary: Planning permission granted by s. 73 of the TCPA 1990 should be interpreted to include a condition restricting retail sales to non-food goods even though no such condition was not incorporated.

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Facts

- Planning permission granted in 1985 for the construction of a large retail store subject to a condition restricting the range of goods to DIY (not food) that could be sold.

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- The permitted categories were extended by later consents under s. 73 including in 2014.
- The description of the development said that the retail unit "shall be used for the sale and display of non-food goods only and… for no other goods".
- However, there was no condition to restrict the sale of food goods and no conditions had been expressly carried over from the previous permissions.
- CLEUD granted on appeal for sale of food goods.

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HC and CoA judgments

- CLEUD upheld by the HC and CA on the basis that there was no operative restriction since the description of development does not operate as a condition (see I'm Your Man etc.) (Council's mistake, owner's windfall) and the selling of food goods would not amount to a material change of use given that this all fell under retail use class (A1).

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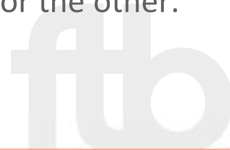
- Supreme Court allowed appeal. Some commentators say judgment is a 'fudge'
- The power under s73 permits the simple variation of one condition. So not always necessary for all previous conditions to be repeated.
- The only natural interpretation of this permission is that Lambeth was approving what was applied for: that is, the "variation" of one condition from the original wording to the proposed wording, in effect substituting one for the other.



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- Conditions in older permission (i.e. on food sales, waste) remain valid and binding unless discharged by performance or further grant that is inconsistent.
- Nothing in 2014 permission was inconsistent with the continued operation of the conditions in the 2010 permission.

Not implication

- Distinct from the principle of implying conditions considered in the case of Trump. "It is difficult to envisage circumstances under Trump International Golf Club Ltd [2015] UKSC 74 in which it would be appropriate to use implication for the purpose of supplying a wholly new condition, as opposed to interpretation of an existing condition."

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Comments

- Previous cases have stressed the importance of a planning permission operating as a stand-alone/discrete document which can be easily understood by members of the public.
- Lambeth is authority that conditions in a s73 permission can be additional to conditions in older permissions.
- Now, we have a situation when considering any s. 73 permission, previous consents may need to be considered and previous conditions reviewed to see whether they have been discharged or are still in effect.
- Ensure s73 is clear on whether it supplants all previous conditions or whether it merely varies one or more conditions.

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