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Winter 2024

Richard Harwood KC

**Planning conditions
and section 73 permissions**

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in X
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#39Events

Scope of change and fairness of change

- Two *separate* issues
- (i) whether the change is permissible (or whether the scale of the change is too great);
- (ii) whether the change is made fairly

  R(Holborn Studios Ltd) v Hackney LBC (No1) [2017] EWHC 2823 (Admin)

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The powers to impose planning conditions

- Town and Country Planning Act 1990, s 70(1):
  - "may grant planning permission … subject to such conditions as they think fit'
  - S 72(1) "conditions may be imposed … for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land"
  - So may require works which are not in the application

Lawfulness of conditions

- *Newbury District Council v Secretary of State for the Environment* [1981] AC 578

(1) the conditions must be imposed for a planning purpose and not for an ulterior one,

(2) they must fairly and reasonably relate to the permitted development, and

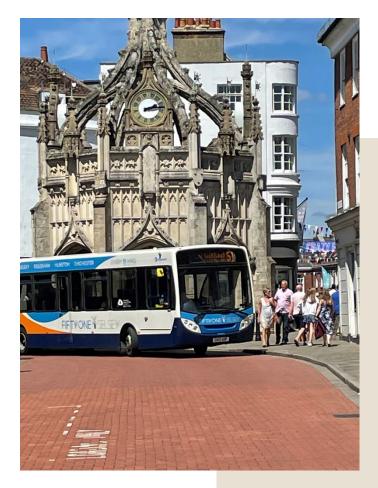(3) they must not be so unreasonable that no reasonable planning authority could have imposed them.

(endorsed in *D B Symmetry* at para 51)

Unrelated benefits – community contributions – *Wright v Forest of Dean Council* [2019] UKSC 53

Hard-edged 'rules' within *Newbury*

- Works and activities off site – *Davenport*; *Friends of Hethel*

- Dedication of highways – *Hall v Shoreham UDC*; *D B Symmetry*

- Access over the application site – *Hall v Shoreham*

- Prohibition on payments – *Wilts United Dairies*; Bill of Rights

How far can a condition change a scheme?

Conditions can require works on land under control (s 72) – so necessarily not in the application.

Severability

- *Kent CC v SoS* (1977) 33 P&CR 70

- *Bernard Wheatcroft v SoS* (1982) 43 P&CR 233 – SoS refused, but Court said could have conditioned a smaller scheme even if not severable, provided not 'in substance not that for which permission had been applied for'

What is the operative part of a permission?

- Description of development?
- **Outline planning permission examples:**
- 'Residential development'
- 'Residential development' with application form saying 50 houses
- '50 houses'
- '50 houses' with approved parameters plans
- '50 houses' with conditioned parameters plans
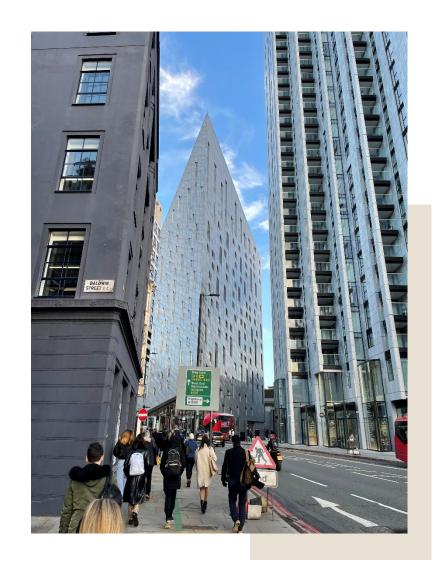- See *Milne-Skillman v Horsham DC* [2023] EWHC 2919 (Admin)

Operative part

- Full planning permission examples:

- 'Residential development' with drawings

- '50 houses' with drawings

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Section 73

- Same development, different conditions

- Q whether a condition could have been imposed originally

- Not possible to <u>change</u> the description of development *Finney*

- But question of what a condition can do

The fundamental alteration cases

- 'It is established law that a condition on a planning permission will not be valid if it alters the extent or indeed the nature of the development permitted': *Cadogan v Secretary of State for the Environment* (1993) 65 P & CR 410 at 413 Glidewell LJ

- A condition may not cause a fundamental alteration in the development approved by the permission (but may scale down or approve in part): *R v Coventry City Council, ex p Arrowcroft Group plc* [2001] PLCR 113 per Sullivan J, followed in *Vue Entertainment v City of York Council* [2017] EWHC 588 (Admin) per Collins J.

- The effect of a conditional planning permission must not be to allow development that was in substance not that for which permission had been applied for: *Granada Hospitality* [2001] PLCR 81 per Collins J.

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Finney v Welsh Ministers

- [2019] EWCA Civ 1868 permission for 100m tall wind turbines
- S 73 application for 125m turbines unlawful. Followed *Vue* where Collins J said:

"Thus, *Arrowcroft* (supra) in my judgment does no more than make the clear point that it is not open to the council to vary conditions if the variation means that the grant (and one has therefore to look at the precise terms of grant) are themselves varied."

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Other points

- *Parkview* Homes v Chichester DC [2021] EWHC 59 (Admin)
- Condition could not be imposed on s 73 permission to restrict a A3/A4 use to A4 only at ground floor
- *Reid v SoSLUHC* [2022] EWHC 3116 (Admin)
- Section 73 application may be made for the omission of a condition which was imposed on the original permission
- *Redrow Homes v SoSLUHC* [2023] EWHC 879 (Admin)
- Replacement planning obligation to omit requirement to build bridge, or water down trigger, inadequate
- Query, effect of s 73 on existing planning obligations which have arisen

Armstrong v SoSLUHC

- [2023] EWHC 176 (Admin) (James Strachan KC)
- Full planning permission for 'one dwelling'
- S 73 could be used to change condition to substitute new plans
- Agreed position that no conflict with operative part (Judge notes could have been an issue on the plans)
- Rejects 'minor material amendments' and 'non-fundamental' limitations
- Cannot be 'inherently inconsistent with the operative part of the planning permission; that would also involve effective variation of the operative part of the planning permission' (para 75)

Fiske v Test Valley BC

- [2023] EWHC 2221 (Admin)
- Section 73 permission removing a 33kV substation from a solar farm permission
- Held cannot conflict with operative wording and cannot be fundamental alteration
- Proposed development cases (*Kent*, *Wheatcroft*) are different to changing a condition on an existing grant under section 73

James Burton for the Claimant

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R(Atwill) v New Forest Park Authority

- [2023] EWHC 625 (Admin)

- Followed *Armstrong*

- Agreed that minor material amendment not the test

- S 73 description of development added 'details of lighting' so inconsistent with original permission

- Celina Colquhoun for the Claimant

And finally …

- What is the operative part of the permission?

- Fundamental alteration has been part of the language for a long time

- If the test is consistency with the operative part, where does that leave omissions or changes from the application – *Kent* etc?

- Or is the power to impose conditions on a s 73 permission *narrower* than imposing conditions on the original application?

- If the condition can be inconsistent, are we back to fundamental?