SQUIRE PATTON BOGGS

The Scope of a Section 73 Application

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The High Court has ruled that an application made under section 73 of the Town and Country Planning Act 1990 (the Act) should not be limited to "minor material amendments."

On 27 January 2023, James Strachan KC in *Mikael Armstrong v Secretary of State for Levelling Up, Housing and Communities, Cornwall Council* [2023] EWHC 176 (Admin), considered the scope of an application made under section 73 of the Act.

The case concerned a planning permission granted for the construction of a single dwelling. An application had been made under section 73 of the Act to substitute the approved plans referenced in a planning condition. This would alter the architectural style of the dwelling. The application was refused by the local planning authority and by an inspector at appeal, on the premise that the nature of the development proposed was substantially different from that of the planning permission. This meant the amendments to the planning permission went beyond the parameters of a "minor material amendment" and could not be considered under section 73 of the Act.

The case was appealed and went to the High Court. James Strachan KC concluded that any or all of the following principles meant that the inspector's decision was not lawful:

- There is nothing in the language used within section 73 of the Act that restricts an application to vary or remove a condition to "minor material amendments", or to what a decisionmaker considers to be a "non-fundamental variation". Provided an application was limited to non-compliance with a condition, it fell within the scope of section 73 of the Act.
- There is no obvious need, justification or statutory purpose for reading in additional restrictions that are not expressed on the face of the statute. One cannot use section 73 of the Act to vary or impose a condition where the resulting condition would be inherently inconsistent with the operative part of the planning permission.
- Any variation application will be subject to the necessary procedural requirements for its consideration that, for example, enable representations to be received. Any such application would then fall to be determined on its planning merits.

The wording of section 96A of the Act is informative. Section 73 of the Act limits its application to conditions, while section 96A of the Act is limited to "non-material" amendments. This is yet a further indication that if Parliament had wished to limit the power under section 73 of the Act to "minor material amendments" or so prevent "fundamental variations" to conditions, it would have done so expressly.

In this case, the form of architectural style of the proposed dwelling was not specified in the description of development. The development description (being the operative part of the permission) was for the construction of a single dwelling. Being different in style did not conflict with that. The outcome may have been different had the operative part of the permission used words that were more prescriptive of the form of the building permitted – for example, permitting construction of a single bungalow only.

The lessons learned from this decision are that, provided the variation to the planning conditions will not conflict with the development description, then there should be no limitation on the scope of the change. This does mean that current planning practice guidance is somewhat misleading, given that it refers to "minor material amendments" in the context of applications under section 73 of the Act. This further emphasises the need to keep development descriptions as broad as possible in order to avoid conflicts and allow flexibility in the use of applications under section 73 of the Act.

A word of caution is that this decision has been made at the High Court and therefore could be open to appeal.

Should you have any queries arising from this case or any other planning issues, please don't hesitate to contact our Planning team.

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