From Concept to Construction: The Law and Practice of Amending Planning Permissions

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Introduction

I struggle to recall working on many, quite possibly any, major development projects whose original planning permissions did not at some point need to be amended. I have never sat down to work it out, but I would be surprised if less than a third of my time is spent dealing with work that relates in some way to variation of existing permissions and legal agreements. Amendment, variation and fine-tuning of planning permissions and legal agreements are important parts of the complex process of turning a consented development proposal into a real development.

It is surprising, then, that there is no clear legislative provision that provides a comprehensive code for handling changes to planning permissions, and only a modicum of case law to guide how to apply in practice the somewhat piecemeal statutory provisions that do exist.

As practitioners, of course, we muddle through and make this particular aspect of the planning system work. However, there is considerable variation between planning authorities as to the extent of their powers and the limits of their discretion around amendments. They can be forgiven for this, since the rules as they stand give them a tremendous amount of discretion as to how amendments are handled. Let me illustrate this with my recent experience.

We recently advised two clients, both developers promoting major development schemes in neighbouring London boroughs. The clients and boroughs must remain nameless, but suffice to say the two developments were situated in the same London Plan Opportunity Area, an area prioritised for regeneration and redevelopment. In neither case was there any objection to the principle of the development: both developments had been judged by the relevant planning committees to be major contributors to regeneration, providing employment and housing (including affordable) and replacing unsightly, redundant buildings with new and vastly better ones. In both cases, certain design changes were needed to bring the scheme to market and get construction underway. Here is how we fared in each case.

Borough A

Our client was promoting a large-scale development for which a "hybrid" planning permission had been granted. Our client had brought successive changes forward through the use of a "chain" of s.73 applications to make a number of key changes, including: altering the disposition of land uses within the development; increasing the amount of retail floorspace in certain phases (retail impact assessments were provided with the relevant applications); extending the outline parameters of phases to accommodate design evolution and removing one phase from the "outline" part of the permission to the "detailed" part (essentially, making the hybrid permission less outline and more detailed). There was no dispute that the changes sought were material. The main question was whether the scope of s.73—which as discussed below is the principal means of amending planning permissions—was sufficiently wide to make these changes or whether a fresh planning application was required.

Our view was that s.73 was sufficiently wide in scope. We approached the borough to explain why the amendments were sought, why we thought that s.73 was applicable, and to discuss how best to proceed.

We jointly instructed leading counsel to advise on the position and on what safeguards should be implemented (mostly around the extent of public consultation) to minimise risk of challenge. Throughout, both sides proceeded from a shared view; that to deliver the development was a good thing, commercially for the developer of course, but also for the regeneration and renewal of the borough.

Borough B

Our client was promoting a tall residential building with affordable housing provided on site in a separate, lower building. They sought relatively minor scheme changes, including a slight rotation of the tower element and shifting its footprint by about 1.5m, making a corresponding shift in the footprint of the lower building, and slightly changing the position and appearance of the vehicular entrance. None of the changes would have been perceived by a casual observer or passer-by as material. Indeed, the client had "before" and "after" verified views prepared, which showed that the changes in the scheme as a whole were actually quite difficult to perceive. However, there was a neighbouring development site whose owner objected to certain aspects of the proposed changes.

These were changes that could have been regarded as non-material in the context of the scheme as a whole. However, the borough was not prepared to take that view and so the client made a s.73 application for the changes. As in the case of Borough A, the client sought to work with the borough and its legal advisers to explain why it was considered that s.73 could be used to effect the changes sought, and provided a leading counsel's opinion to that effect. It was agreed that the owner of the neighbouring site would need to be consulted in relation to the application. The borough, however, after several meetings and discussions, felt unable to agree that the amendments sought were within the scope of s.73. They asked our client to submit an entirely fresh planning application, and informed them that they were minded to refuse the s.73 application.

After concerted attempts to persuade Borough B failed to meet with success, our client applied to the court for a declaration that the scope of s.73 was sufficiently wide to allow variation of the planning permission. As the court application was being made, the borough refused the s.73 application, citing the main reason for refusal that the changes had been invalidly sought under s.73.[1] Having lodged its court application, the client then also appealed the planning refusal.

The case eventually settled through mediation. Our client whittled down the proposed changes to the bare minimum necessary to achieve their objectives and the borough eventually granted s.73 consent for those changes. The court application and planning appeal were both withdrawn.

I make no comment about the rights and wrongs of either of these two cases. The point is that the system delivered vastly different (and in the Borough B case, quite unforeseen) outcomes. It underlines the breadth of a planning authority's discretion in this area. The breadth of that discretion arguably creates an unhelpful lack of predictability in dealing with amendments. In the case of Borough B, there was a delay of the best part of a year while the matter was sorted out. That is a year that could have been spent building out the scheme.

In this paper, I will explain why amendments are often sought, then set out the law and policy around amendments as they currently stand, and how we make use of them in practice.

Why are amendments to permissions typically sought?

There are a host of reasons why amendments to permissions are sought. Often, it is nothing more than a part of the process of design development. The process of designing a building or place is obviously a lengthy and complex one, continuing for a considerable time after planning permission has been granted.

[1] There was some irony in that, having refused to accept that our client's s.73 application was a valid way for the desired scheme amendments to be considered, the borough nevertheless determined it.

The design that is fixed at the planning stage (stages C–D in RIBA terminology) often develops in a direction that departs from the limits of what is consented and requires amendment to the planning permission. This might be, for example, because of unforeseen design issues, engineering and construction issues, occupier or funder requirements, commercial viability imperatives, or simply because the design team find new ways of addressing the requirements of the design brief.

It is fair to say that planning permissions have become less flexible over the years. Older planning permissions can sometimes be astonishingly short and bereft of detail by modern standards, sometimes two or three pages long with a generic description of development and a mere handful of planning conditions. Until the EIA regime was introduced and started to make its force felt in the planning system, it was relatively easy to obtain a "true outline" or "red line" planning permission for development of a certain size on a certain plot, leaving essentially all of the design and assessment work until a later stage.[2] My colleague, Mike Kiely, suggests in his paper that some form of "in principle" red line approval could be usefully re-introduced in our system, and I think he makes a good point.[3]

True, outline permissions are now a thing of the past, at least for major development. Environmental impact assessments ("EIA") and modern planning application requirements nowadays make obtaining planning permission a far more complex and lengthy process than it used to be. A great deal of early expense has to be incurred in designing a scheme to a certain level (even on an outline application), carrying out all the various impact assessments required for an application, carrying out EIA screening and (if EIA screening so indicates), undertaking public consultation and pre-application discussions. This is time-consuming and very expensive, and it is not surprising that where scheme amendments are required, developers are concerned to ensure that the process is as simple and efficient as possible.

The law

The Town and Country Planning Act 1990 ("the 1990 Act") makes provision for amendment of planning permissions in two cases. It is possible to make amendments to planning conditions using the procedure in s.73, and to make "non-material amendments" to a planning permission using the procedure in s.96A.

Section 73

Section 73 of the 1990 Act provides as follows:

> "73 **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

[2] With decisions coming out in the early line of EIA cases, of which the most notable are the Rochdale cases: *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 22; [2001] J.P.L. 229 (Note) and *R. v Rochdale MBC Ex p. Tew* [2000] Env. L.R. 1; [1999] 3 P.L.R. 74; [2000] J.P.L. 54.

[3] It would need to be something that did not constitute a "development consent" for the purposes of the EIA Directive.

(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."

Several things will readily be seen. One is that s.73 was primarily designed to amend planning conditions, rather than amend planning permissions more generally or to facilitate amendments to the scheme of development which the planning permission permits. This does not necessarily prevent s.73 being used for those latter purposes (authorising amendments to schemes), where that can be achieved by amending conditions. That is how it is often used in practice.

Another noteworthy point, flowing from the wording of the section, is that a s.73 application is, in itself, a planning application, a particular kind of planning application (namely an application for development without complying with conditions previously imposed), but a planning application nonetheless.

Moreover, the grant of planning permission pursuant to an application under s.73 results in the grant of an entirely new planning permission which, as the Court of Appeal held in *Powergen UK Plc v Leicester CC*, ("*Powergen*")[4] "leaves the original planning permission intact and un-amended".

The planning authority's jurisdiction in a s.73 application is narrower than a normal planning application, as the Court of Appeal went on to hold in *Powergen*. Nevertheless, the local planning authority may have regard to the full range of planning considerations in making their decision: *Pye v Secretary of State for the Environment* ("*Pye*").[5] Indeed, since a s.73 application is a planning application, local planning authorities are obliged by te Planning and Compulsory Purchase Act 2004 s.38(6) (via the 1990 Act s.70(2)) to have regard to the development plan and material considerations in the usual way.[6]

What is the scope of the power in s.73? This is well illustrated by the case of *R. v Coventry CC Ex p. Arrowcroft Group Plc* ("*Arrowcroft*").[7] In that case, planning permission had been granted for a development comprising a "40,000 seat multi purpose arena, one food supermarket and one variety superstore with associated small retail", subject to a set of conditions inter alia restricting the size and sub-division of the variety store. The developer made a s.73 application, in effect to remove the variety superstore from the permission and replace it with six smaller retail stores. The application was approved by the City Council. Arrowcroft (who had retail investments in the City centre) challenged the approval on the grounds that the revisions were beyond the scope of s.73. The court held that while s.73 "confers a great deal of flexibility" on a local planning authority to make amendments to the conditions of a planning permission, this does not empower authorities to "rewrite the permission entirely". The proposed amendment to the planning permission in this case, so held the court, was outside the scope of s.73 since it led to a fundamental mismatch between the proposed new conditions (requiring six small units) and the original planning permission, which authorised a variety superstore. Sullivan J (as he then was) said this:

> "It is true that the outcome of a successful application under section 73 is a fresh planning permission, but in deciding whether or not to grant that fresh planning permission the local authority '… shall consider only the question of the conditions subject to which planning permission should be granted' … Thus the Council is able to impose different conditions upon a new planning permission, but only if they are conditions 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."

Also:

[4] *Powergen UK Plc v Leicester CC* (2001) 81 P. & C.R. 5; [2000] J.P.L. 1037.
[5] *Pye v Secretary of State for the Environment, Transport and the Regions and North Cornwall DC* (1998) 3 P.L.R. 72.
[6] Planning permission means "permission" granted under the 1990 Act Pt III (see the 1990 Act s.336).
[7] *R. v Coventry CC Ex p. Arrowcroft Group Plc* [2000] P.L.C.R. 7.

> "I am satisfied that the Council had no power under section 73 to vary the conditions in the manner set out above. The variation has the effect that the 'operative' part of the new planning permission gives permission for one variety store with one hand, but the new planning permission by the revised conditions takes that consent away with the other."

Arrowcroft seems to lay down three principles:

- section 73 confers "a great deal of flexibility" upon planning authorities to vary conditions, but it does not enable planning authorities to re-write planning permissions entirely;
- section 73 cannot be used where the new conditions could not have been imposed on the previous permission without there being a fundamental mismatch between them (and, presumably, that s.73 can be used where no such fundamental mismatch would result); and
- section 73 cannot be used where it would result in a fundamental alteration of the previous proposal (although I suggest that this is not entirely clear from the words that Sullivan J used).

It seems to me, however, that *Arrowcroft* may leave a number of questions unanswered.

The court's formulation appears to conflate the question of consistency of the new conditions with the previous permission with the question of whether the proposed scheme changes would make the development itself a fundamentally different one from what is consented. Are these two separate tests, or are they linked? Can s.73 be used, in other words, where:

- The scheme changes do amount to a fundamental alteration, but the proposed new conditions could have been imposed on the original permission? This could occur where the permission is particularly flexibly or loosely drafted.
- The scheme changes do not amount to a fundamental alteration, but the proposed new conditions could not have been imposed on the original permission without giving rise to a fundamental inconsistency. This could occur where the permission is particularly inflexibly drawn or over-specific.

It thus appears that the use of s.73 may crucially depend on how the planning permission is drafted in the first place. Given how much practice in this regard varies between local planning authorities—some seeking to build in flexibility from the off, some seeking to button everything down—it is not surprising the experience of using s.73 can be so varied. Mike Kiely sets out the case for building flexibility into the consenting process very persuasively in his paper.

The question raised becomes (I think) harder still when it is recalled that the court's formulation in *Arrowcroft* does not, as expressed, call for an assessment of whether the proposed new conditions are consistent with the previous permission, but actually whether they are consistent with "the proposal put forward in the previous application".

Another question is how much is "a great deal" of flexibility? Is it flexibility to do *anything* which does not cross the "fundamental alteration" line? There are myriad conceivable kinds of amendment that were not specifically tested in *Arrowcroft*. Can s.73 be used to amend a condition requiring a scheme to be built out "strictly in accordance with" a particular set of drawings so that it bites on a different set of drawings? Can a condition limiting the amount of floorspace in a development be amended to increase the floorspace limit? Can s.73 be used to amend "reserved matter" conditions to make a permission "more outline" or "more detailed"? Section 73 is used in this way quite often in practice.

Case law has addressed other issues arising from s.73 besides its scope. One such issue is how s.73 applications should be determined, and in particular, what the s.73(2) duty on local planning authorities (to consider only the question of the conditions to which the planning permission should be granted) means. Determination of a s.73 application will, of course, involve a more limited exercise than

consideration of the original planning application, although how much more limited will depend on the nature and extent of the amendments. As stated in the *Encyclopaedia of Planning Law and Practice*, the fact that s.73(2) directs the local planning authority to consider only the question of the conditions subject to which planning permission should be granted does not prevent it looking also at wider considerations affecting the original grant of permission: the words simply make it clear that whatever decision is reached on the condition, the permission itself should be left intact.[8]

The issue arose in *Pye*.[9] Per Sullivan J:

> "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."

Of course, it is not open to the planning authority to refuse permission on the grounds that it objects to the development in principle if there is no material reason why the development should not be permitted subject to the new conditions, as opposed to the existing conditions. As the Court of Appeal held in *Powergen*:

> "If it does not now matter from a planning point of view whether the future development of the site is governed by condition x as imposed on the old permission or condition y as suggested by an applicant, then the authority would be wrong to refuse permission just because they objected to the development in principle."

The court did not specify what it meant when it referred to a proposed change "mattering" from a planning point of view. It seems that whether or not a proposed change of condition matters is a question of fact and degree depending on all the circumstances, including the nature of the development. The local planning authority is thus required to take into account planning policy and the facts as they exist at the date of its decision on the s.73 application.

The correct approach for a local planning authority on a s.73 application therefore seems to be to ask whether the effect of a new condition "matters" from a planning point of view, on the basis of present planning policy and the facts as they stand at the date of the decision and, if the answer is that it does matter, whether planning permission should be granted for the development subject to those proposed new conditions, having regard to the development plan and all material considerations.

The application of s.73 to time conditions is worthy of note. JPLC attendees of a certain vintage will remember the days when it was possible to vary the time implementation condition on successive planning permissions, so effectively banking the consent to develop indefinitely. It is now more than a decade since the ability to use s.73 to extend time conditions was abolished, with the intention of propelling developers into building out their consented developments.[10] The timing of the abolition was very unfortunate, coming as it did just before the credit crunch and recession, in which values were severely hit and development finance was all but non-existent. The Coalition Government was alive to this problem and sought to prevent valuable planning permissions from expiring by introducing a once-and-for-all right to renew unimplemented planning permissions granted before October 2009 (later extended to October 2010). This right remains in force in the form of art.20 of the new Development Management Procedure Order 2015,[11]

[8] *Encyclopaedia of Planning Law and Practice* (Sweet and Maxwell), Vol.2 P73.05.
[9] See *Pye v Secretary of State for the Environment, Transport and the Regions and North Cornwall DC* (1998) 3 P.L.R. 72.
[10] By means of the Planning and Compulsory Purchase Act 2004 s.53(3).
[11] The Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595).

though given the 2010 cut-off date for the number of permissions capable of being renewed in this way must now be dwindling.

Planning permissions already renewed once and planning permissions granted after October 1, 2010 are subject to s.73(4), which prevents variation of a time condition.

Section 96A: Non-material amendments

The 1990 Act s.96A provides as follows:

> "96A **Power to make non-material changes to planning permission**
>
> (1) A local planning authority in England may make a change to any planning permission relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission as originally granted.
>
> (3) The power conferred by subsection (1) includes power (a) to impose new conditions; and (b) to remove or alter existing conditions.
>
> (4) The power conferred by subsection (1) may be exercised only on an application made by or on behalf of a person with an interest in the land to which the planning permission relates.
>
> (5) An application under subsection (4) must be made in the form and manner expressed by development order.
>
> …"

This provides a formal process for obtaining consent to non-material changes to planning permissions, replacing the old system of non-binding letters from planning authorities or "changes in the course of construction".

This formal procedure still feels relatively informal. The local planning authority has to be satisfied that the proposed change is not material. This is a planning judgement entirely within their discretion, subject only to *Wednesbury* principles. There is no statutory definition of what is material and non-material. It is left to Government guidance to explain that materiality in each case will depend on the nature of the planning permission and the change proposed to it in the context of "the overall scheme".[12] A June 2010 Inspector's decision provides some assistance in determining what is "material":

> "It must be of significance, of substance and of consequence. Put simply, it has to matter. That does not mean that is has to be harmful. However, an obvious lack of harm in planning terms may point to a lack of consequence and in turn of materiality, even possibly where the changes may themselves be extensive and/or numerous."[13]

In the context of development consent orders under the Planning Act 2008, the "Government response to the consultation on making changes to Development Consent Orders" (November 2014) makes the following points:

- First, it is not possible to set out precise, comprehensive and exhaustive guidance on whether a proposed change is material or non-material.

[12] Now, the National Planning Practice Guidance.
[13] APP/5450/A/09/2119243, June 25, 2010.

- Secondly, that there are three matters which in many instances would provide a good indication of whether a proposed change would be more likely to be a material change, namely: (a) whether a change would be required to the Environmental Statement to take account of likely significant effects on the environment; (b) whether there would be a need for a Habitats Regulation Assessment or a need for a new or additional licence in respect of European Protected Species; and (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing DCO.
- Thirdly, that although the above matters were capable of being good indicators of the position, none of them (either alone or cumulatively) would be determinative of the material/non material issue. Each case must depend on a thorough consideration of its own facts.

This guidance was recently applied in an application for a non-material change to the DCO for Hinkley Point C nuclear power station under the Planning Act 2008 Sch.6 para.2 (which is analogous to s.96A). The developer applied for a change to the DCO to allow changes to a number of service buildings, including increases in size, changes in location and deletion from the scheme. The developer had provided further environmental information and found no changes to the significance of any environmental impacts. There were changes to landscape/visual impacts, but the Secretary of State concluded that these were not material in terms of their significance, and granted consent for the non-material scheme changes.[14]

Despite its relative informality, the power in s.96A is actually very wide:

- It takes effect as a variation of a planning permission in the true sense, i.e. it does not leave the previous permission intact as s.73 does.
- Like s.73, it includes power to impose, delete and amend planning conditions. However, it is not limited to conditions and includes power to vary the planning permission in other respects (presumably including amending the description of development).
- There is some debate about whether it applies to reserved matters approvals. Section 96A allows non-material changes to "planning permissions". Planning permission means a "permission" under Pt III of the 1990 Act Pt III. Machinery for giving reserved matters "approval" is contained in Pt III. The questions seem to be whether "approval" can be equated with "permission" so making a reserved matters approval a permission in its own right; or whether a reserved matter approval is to be regarded as a constituent part of a planning permission. There does not seem to be any authority on the point. It would certainly be useful if reserved matters approvals (and for that matter, ordinary condition approvals) could be amended using this procedure since it would avoid the necessity to re-submit revised details under reserved matters (or ordinary conditions) to deal with scheme changes. In our experience, different local planning authorities are taking different approaches to this, with developers taking the line of least resistance.

The power in s.96A can only be exercised pursuant to an application from a person who has an interest in the land to which the planning permission relates. In that, it is unlike the general position under the planning legislation, which does not require an applicant for planning permission (including under s.73) to have any interest in the land to which the application relates.

The procedure for making a s.96A application is contained in art.10 of the Development Management Procedure Order. The applicant is required to give notice of the application to other owners of the site and the local planning authority must take account of any representations from the owners in making its

[14] Department of Energy and Climate Change decision letter dated September 9, 2015. I am indebted to Harry Phillpot QC for drawing my attention to this decision.

decision.[15] Beyond that, however, there are no wider publicity or consultation requirements. The time period for determination is 28 days, or a longer period if that has been agreed between the parties.

There is no standard form of decision notice. Furthermore, (and surprisingly given that the effect of s.96A is to vary planning permissions) the decision notice stands alongside the original planning permission and the two documents should be read together.[16]

There is no right of appeal in the event of a refusal of an application under s.96A, since a decision on an application under s.96A is not an "approval of the local planning authority" for the purposes of the 1990 Act s.78.

Government guidance and "minor material amendments"

I have made no mention so far of so-called "minor material amendments". It has become commonplace that the s.73 procedure described above can only be used for making "minor material amendments" to planning permissions. I deliberately left this out of the discussion of the legal scope of s.73 above because the concept of the minor material amendment is entirely a creature of policy. The scope of s.73 as a matter of law is in no way limited to making minor material amendments. In some of the discussions we have had with local planning authorities (and *Borough B* is an example) there has been a palpable reluctance to accept use of s.73 for anything more than minor amendments. This, I would suggest, is over-cautious and a product of confusion of government guidance with the law.

The procedure around minor material amendments and non-material amendments (s.96A) were introduced at the same time. They had their origin in the recommendation of the 2008 Killian Pretty review that there should be a more proportionate approach to amending development proposals after permission has been granted. The recommendations of the review were picked up by the Government in a guidance note entitled "Greater Flexibility for Planning Permissions"[17] and by amendments to secondary legislation then in force. The guidance explained that in the absence of a legislative vehicle for making changes to primary legislation (which is what introducing a new power to vary planning permissions would have entailed) the existing route under s.73 "should be streamlined and clarified … as the best short-term solution". Therefore, rather than introduce a new specific power to vary planning permissions as such, the Government piggy-backed s.73 and introduced slimmed down application and consultation procedures for s.73 applications.[18]

The policy is now set out in the Planning Practice Guidance ("PPG") in the section entitled "Flexible options for planning permissions".[19] The guidance states as follows:

- Where modifications are fundamental or substantial, a new planning application will need to be submitted. Where less substantial changes are proposed, the two options are making a non-material amendment under s.96A or amending the conditions under s.73 (including seeking minor material amendments).[20]
- There is no statutory definition of a "minor material amendment" but it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved.[21]

[15] The Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) art.10(2).
[16] NPPG para.11 Reference ID: 17a-011-20140306.
[17] "Greater Flexibility for Planning Permissions" (November 2009 and updated in October 2010).
[18] Town and Country Planning (General Development Procedure Order) 1995 (SI 1995/419), repealed. The slimmed down procedures are now contained in the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595). Section 73 applications are not subject to the requirements of art.7(c), requiring plans and drawings and a certain number of copies thereof, or the requirement of art.9 for a DAS; and under art.20(2) local planning authorities are given discretion about the extent of statutory consultation they undertake.
[19] NPPG Reference ID: 17a-001-20140306.
[20] The guidance itself thus recognises that minor material amendments are but a subset of the amendments that can be achieved through s.73.
[21] It is not clear whether anything turns on the reference to "substantial", as opposed to "fundamental", difference.

- Section 73 cannot be used to make minor material amendments if there is no relevant condition in the permission listing the originally approved plans. It is possible to seek the addition of a condition listing plans under s.96A.[22]
- Section 73 cannot be used to change time conditions.
- Approval of a s.73 application results in the grant of a new planning permission, and therefore advises planning authorities, so as "to assist with clarity", to carry over any original conditions (unless they have already been discharged) in the new decision notice. In regard to time conditions, however, the PPG states that as a s.73 application cannot be used to vary the time limit for implementation, the original time condition "must" remain unchanged from the original permission.

Informal amendments

A question that I am sometimes asked is whether the introduction of the above provisions should be taken to mean that the general discretion that planning authorities supposedly have to allow minor changes (which was purportedly exercised quite frequently in practice) no longer exists. The answer to this does not seem to me to be particularly clear. There are a number of points arising.

It was considered by some that the Lords' decision in *Sage v Secretary of State for the Environment, Transport and the Regions* ("*Sage*") [23] cast doubt on whether authorities did indeed have the ability to consent informally to variations. Thus, in *Singh v Secretary of State for Communities and Local Government*[24] it was stated:

> "On application by a person with an interest in the relevant land, section 96A of the 1990 Act (enacted in the light of the decision in *Sage*) gives a planning authority express power to change a planning permission if they are satisfied that that change is not material. Such a provision would be otiose if they could make such (immaterial) changes in any event."

I confess that I struggle to discern this principle from *Sage*. However, in practice, the question is academic since the market no longer really has any need for informal variations. What used to happen in practice was that a local planning authority would give "consent" to a development scheme as proposed to be constructed and (often in the course of construction) to depart slightly from its planning permission, such "consent" being expressed in correspondence. This is essentially now what happens on a s.96A application, except that s.96A operates to formally amend the planning permission. Compared to the informal variation route, this greatly facilitates dealings in relation to the development such as selling, letting and obtaining finance.

Practical issues

What issues do we commonly encounter in practice when dealing with scheme amendments?

EIA

An issue that often arises on s.73 applications in practice is whether an EIA should be carried out or revised in relation to the scheme changes and, if so, how the EIA should be presented. It is well established that

[22] I am not sure this is right. It is not clear why such a condition could not be introduced into the permission using the s.73 application itself, with the new drawings being submitted for approval as part of it.

[23] *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22.

[24] *Singh v Secretary of State for Communities and Local Government* (2010) EWHC 1621 (Admin).

a s.73 permission is a development consent for the purposes of the EIA Directive[25] and that EIA is engaged.[26] The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 Regulations")[27] require that, when an application for an amendment to a consented scheme is made, consideration should be given to whether any significant environmental effects would result from the development being changed or extended. The 2011 Regulations make it clear that it is the entire development scheme *as changed or extended* that is to be assessed, not just the change or extension.

How the environmental statement ("ES") is presented as a key practical concern. There are a number of different approaches that may be followed, but in practice they essentially boil down to a choice between preparing a revised ES and producing some sort of ES addendum or update note. What is chosen in practice depends on a number of factors. Cost will always be a significant one—producing an ES involves a tremendous amount of work and is time-consuming and very expensive—pointing toward the addendum option. There are circumstances however, particularly where a series of scheme changes has resulted in a "chain" of s.73 permissions, where continuing with the addendum approach may result in an ES comprising numerous addenda and updates. Here, the risk is that the ES become unclear and confusing, the kind of "paper chase" that the Court of Appeal disapproved of in *Berkeley v Secretary of State for the Environment*,[28] and thus a legal risk. At some point along the "chain" of s.73 consents, it is advisable to bite the bullet and produce a refreshed and consolidated ES.

We are sometimes asked whether a s.96A consent is a development consent for the purposes of the EIA Directive and Regulations. There is no direct authority on that point, but it seems to me that where an EIA development project is proposed to be changed or extended using s.96A, EIA issues are engaged. If it is considered that the development as changed or extended will not have significantly different impacts from those already assessed, as would be expected on a s.96A application which, by definition, is for non-material changes, then no ES addendum would be required.[29] If it is considered that the development as changed or extended will have different significant environmental impacts, then s.96A is arguably by definition not the correct procedure to use to effect the amendments.

Application and consultation

A related point arises in regard to the form of applications and the extent of consultation. I have already pointed to the slimmed-down application and consultation requirements that apply in relation to s.73 applications under the Development Management Procedure Order.[30] On major schemes (or smaller schemes at known risk of legal challenge) it is usually advisable for the developer and local planning authority not to avail themselves of the slimmed-down procedures, but to prepare application materials and carry out consultation as if the application was a "normal" planning application. That way, the risk of any consultee or member of the public being denied the opportunity to make representations (and so the risk of legal challenge) is minimised. Of course, where the scheme is EIA development, the consultation requirements of the 2011 Regulations will apply.

[25] Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [1992] OJ L26/1. "Development consent" is defined in art.2(c) as "the decision of the competent authority or authorities which entitles the developer to proceed with the project".

[26] *R. (on the application of Prokopp) v London Underground Ltd* [2003] EWCA Civ 961 and *R. (on the application of Hautot) v Wandsworth LBC* [2003] EWHC 900 (Admin).

[27] The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824).

[28] *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603.

[29] Sometimes in these circumstances, the EIA consultants prepare a technical note for submission with the application describing the work that has been carried out to determine whether the project as changed or extended entails different significant environmental impacts.

[30] See the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) art.10(2).

Section 106 and the Community Infrastructure Levy ("CIL")

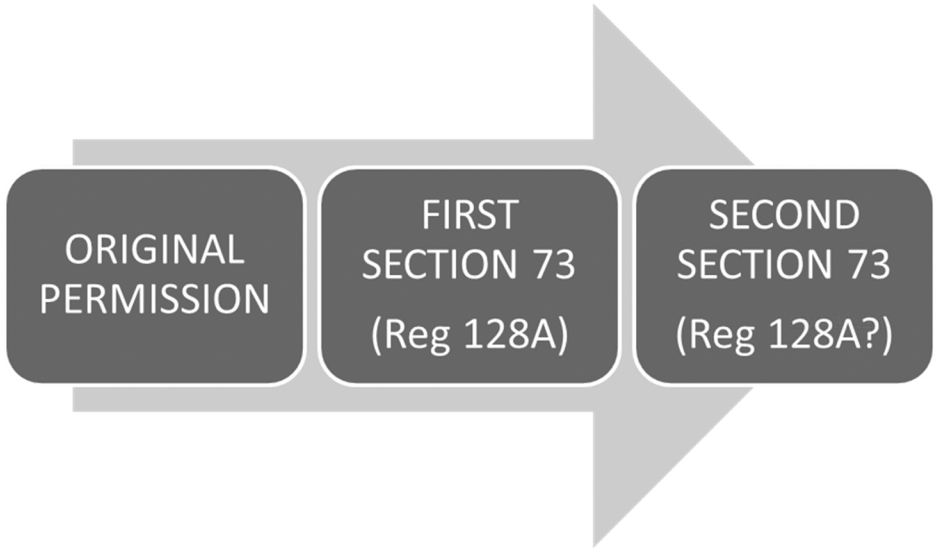
Section 106 agreements are almost always tied to a particular planning permission. Given that a s.73 consent is a planning permission in its own right, it is usually necessary to revise a s.106 agreement to apply it to the new s.73 planning permission. If this is not done, the s.73 permission would be able to be implemented without complying with the s.106 obligations. Some authorities (for example, Southwark LBC) are prepared to entertain more flexible wording in their s.106 agreements which binds the obligations in an agreement to any s.73 consent granted after the original permission. This is helpful, although of course if an amended development proposal required substantive changes to the planning obligations, the agreement would need to be amended.

Developers are often quite nervous at the prospect of re-opening s.106 agreements. For one thing it adds considerable time and often unnecessary "process" to securing amendments efficiently.[31] It can take considerable time and effort to corral the signatories to the s.106 agreement again so that a deed of variation can be validly executed. More importantly, it can entail a fresh look at what developers tend to see as an agreed deal, and it brings back into play issues of financial viability and a potential re-opening of the viability assessment process. Where there is a significant amendment of the scheme necessitating revised planning obligations, this may be understandable; however, this re-opening of viability issues can happen even when the amendments to the scheme are relatively minor in nature.

Development under a s.73 permission is a "chargeable development" for the purposes of the Community Infrastructure Levy Regulations 2010 ("CIL Regulations"),[32] and so attracts CIL. An issue we have encountered recently is how the amount of CIL falls to be calculated under reg.128(A) in the transitional scenario where the original planning permission was granted before, and the s.73 variation was granted after, the adoption of a CIL charging schedule. In essence, the CIL liability under reg.128A is the difference between the amount of CIL (calculated in the normal way) for the s.73 development and the amount of CIL that would have been chargeable on the development as originally permitted.

The issue we have faced is how that regulation should be applied where there is a "chain" of s.73 permissions for successive scheme amendments. Clearly, reg.128A applies to the first s.73 permission, but does it apply to the second and subsequent ones? See the diagram below.

[31] The "process" is not always unnecessary, in some cases scheme amendments are such as to require substantive changes to planning obligations.
[32] Community Infrastructure Levy Regulations 2010 (SI 2010/948).



We reached the view, with planning consultants and leading counsel, that reg.128A does indeed apply to the second and subsequent s.73 permission in this scenario. This interpretation was aired with the Department for Communities and Local Government ("DCLG"), who agreed it, and were prepared to issue clarification in the PPG to that effect:

> "The Government's intention is that the provisions set out in regulation 128A should apply to all subsequent section 73 permissions granted in respect of [a development] where these transitional circumstances have arisen."[33]

I understand that this interpretation is actively being contested by a central London planning authority, and it will be interesting to see what transpires. Doubtless there will be many more CIL issues to grapple with in the years to come.

Three suggestions for change

I will conclude by making three suggestions for reform. The first two could be easily achieved through Government guidance; the third would require development under a s.73 permission to be treated as a "chargeable development" for the purposes of the CIL Regulations and attract CIL. The amount of CIL falls to be calculated under CIL Regulations reg.128(A).

- First, I believe there needs to be stronger guidance to planning authorities around the wording of planning permissions and the need to retain sufficient flexibility to allow reasonable amendments to be made. It is very unhelpful when planning authorities seek to button down the description of development so tightly as to make any kind of amendment difficult.
- Secondly, local planning authorities should be encouraged to adopt mechanisms in their s.106 agreements so that they are capable of applying to subsequent s.73 consents (except where substantive revisions to planning obligations are required).
- Thirdly, I agree with the suggestion made by Mike Kiely in his paper that a single consolidated provision for amending planning permissions should be introduced.

[33] NPPG Reference ID: 25-007-20140612.

Until then, no doubt we will all continue make the system work as best we can.