Case Name: *Reid v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 3116 (Admin) (06 December 2022)

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Commentary: This case was a successful challenge under section 288 of the Town and Country Planning Act 1990 ("TCPA") of a Planning Inspector's decision to dismiss an appeal in relation to the use of land at Kilvington Lakes, Newark. Newark and Sherwood District Council ("NSDC") was the relevant local planning authority.

The judge noted that there were two questions of interpretation to be considered, as follows:

(1) Did the inspector have the power to consider an appeal against NSDC's refusal of a new section 73 planning permission when the application for the new permission sought changes to conditions in two, separate previous planning permissions?; and

(2) Did she in any event misdirect herself in law by concluding that the appeal could not succeed in so far as section 73 does not permit the removal of conditions in such a way that the new planning permission would give rise to a fundamental change to the use of the land?

There were various planning permissions affecting the site and the site history is set out briefly below:

(1) 2015 permission for 34 holiday units, 25-bed inn building, water sports building (and other development) which was subject to a condition providing that the premises should be used "for the purpose of holiday accommodation only and for no other purpose, including any other purpose within Class C3 of the [Use Classes] Order" (the "Order"). There were also conditions restricting occupation by the same person for a total period exceeding 6 weeks in any calendar year and requiring a register of occupiers for each calendar year to be maintained. The permission was implemented.

(2) 2020 permission under section 73 of the TCPA granted on appeal permitting the removal of the condition restricting occupation of the holiday units by the same person to no more than 6 weeks. The other related conditions noted at (1) were re-imposed in identical form.

(3) The claimant submitted a single application under section 73 of the TCPA in December 2020 seeking the removal of the two further conditions attached to both the 2015 permission and the 2020 permission, detailed at (1). NSDC refused to consider the application on grounds that the removal of the conditions would lead to a change to the description of development which required a fresh application for full planning permission; the application under section 73 was said to be invalid.

(4) The claimant appealed for non-determination of the application and the Planning Inspectorate refused to deal with the appeal, on the basis that the Inspector would have no jurisdiction to determine the appeal as the LPA had said it would not determine the application. In December 2021, the claimant sent a letter before claim to the Secretary of State, the Secretary of State conceded that there was a right of appeal and it proceeded by way of written representations.

The Inspector dismissed the appeal, concluding that the effect of removing the relevant conditions would be to enable the 34 holiday units to be used as permanent residential dwellings. She considered the main issues to be whether it was possible in law to alter the use of the holiday units by removing the conditions attached to the two planning permissions and, if it was possible, whether the various planning implications of this were acceptable. In her reasons for dismissing the appeal, the inspector confined her consideration to the first main issue, namely whether it was "possible in law to alter the use." She considered the judgment of the Court of Appeal in Finney v Welsh Ministers [2019] EWCA Civ 1868, [2020] PTSR 455 which she distinguished on its facts; unlike in Finney, the effect of granting the application in this case would be to remove conditions restricting how the units were used and there would be no condition imposed that was inconsistent with the description of development. However, she concluded that: Nonetheless, if the conditions were to be removed it would enable the 34 units to be used in an unrestricted way. This would cause conflict with the original description of development which specifies that the use of these units is as self-catering holiday units and so clearly sought a restricted use. She also found that the condition restricting occupation of the holiday units by the same person to no more than 6 weeks would be retained if the appeal was allowed and this would also enable the units to be used in an unrestricted way (contrary to the description of development).

The claimant challenged the decision on two grounds, namely:

i) Ground 1: The inspector erred in law in holding that a section 73 planning application could not be made for the grant of planning permission for development of a description within a Use Class without a condition which removes the benefits of the Use Classes Order.

ii) Ground 2: The Inspector erred in law in considering that condition 21 of the 2015 planning permission would remain in force unless omitted by a section 73 permission.

The judge found that the challenge succeeded on ground 1, as follows: Both Finney and Arrowcroft concerned the adding of conditions. That was not the issue before the inspector who had to consider the removal of conditions. It is not inevitable or even clear that the removal of conditions gives rise to the same considerations as their addition. In adding conditions, a decision-maker is not permitted to intrude upon the

operative part of the permission. It is difficult to see how the removal of a condition could give rise to such intrusion. When a condition is removed, the operative part of the permission remains intact, albeit in an unconditioned way. In the present case, the removal of the relevant conditions would and could have had no effect on the description. Even if the reasoning of Finney and Arrowcroft applies to the removal of conditions, there is in the present case nothing in the description that is inconsistent with development permitted by the Order. If the section 73 application were allowed, the way in which the development would change is not because anything in the description would be changed but because the conditions denying the benefit of the Order would be removed.... By law (section 55(2)(f) of the Act and the relevant provisions of the Order), the operational part of the permission allowed a developer to use the land for residential purposes if he or she chose to do so. The only bar to using the land for residential purposes was the imposition of conditions denying the benefit of the Order..... The inspector in effect treated the conditions as having changed the description, taking the view that the description allowed only restricted use (holiday accommodation) and that it precluded development permitted under the Order (which the inspector called "unrestricted use"). In my judgment, she has thereby curtailed the operation of the Order in a way which could not have been intended.

The judge noted that the Inspector's conclusion about condition 21 of the 2015 permission was flawed on account of the same errors of law as Ground 1. The only material difference between the 2015 and 2020 permissions was that the former contained condition 21 (it having already been removed from the 2020 permission). The judge found that it could not be claimed with any degree of realism that anyone had at any time thereafter chosen to rely on the 2015 permission rather than implement the 2020 permission; the 2015 permission was historic and there was no reason to include it in the section 73 application or appeal.

Counsel for the defendant also raised a further 'preliminary point', namely that an application based on two permissions fell outside the scope of section 73 when at least one of those permissions (from 2015) was historic. The judge noted that, while it was otiose to ask the Inspector to consider the 2015 permission, it did not follow that the Inspector lacked jurisdiction to determine the entire appeal.

Case summary prepared by Victoria McKeegan