Case Name: *Atwill, R (On the Application Of) v New Forest National Park Authority* [2023] EWHC 625 (Admin) (22 March 2023)

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Commentary:
This was a judicial review challenge of the decision to grant an application, made under s73 of the Town and Country Planning Act 1990 ("TCPA"), for planning permission to vary a condition on an earlier (2018) planning permission for "dwelling, detached garage with office over; sewage treatment plant; details of lighting; demolition of existing dwelling and outbuilding to allow minor material amendments (AMENDED PLANS)".

There were seven grounds of challenge:

1. The 2018 permission was not lawfully implemented within the requisite 3-year period;
2. The defendant failed to take into account the inability to implement and complete the 2018 permission due to discrepancies between the plans and works that had already been undertaken;
3. A condition limiting the use of the outbuilding/garage to "purposes incidental to the dwelling on the site" and prohibited use "for habitable accommodation" was wrongfully omitted or removed;
4. The defendant wrongfully imposed conditions which relate specifically to an unlawful building;
5. The defendant "unreasonably concluded" that the amendments were "minor material";
6. The defendant failed to comply with its duty under s72 of the Listed Building Act by not consulting with its Building Design and Conservation Officer ("the BDCO"); and
7. The conditions relating to the lighting scheme are unclear, unreasonable, unenforceable and thus unlawful.

The claimant's challenge succeeded on all grounds apart from ground 6.

In relation to ground 1, Mr Justice Lane cited the decision in East Dunbartonshire Council v Secretary of State for Scotland and another [1998] Scot CS 46 and concluded that the defendant's reliance on demolition works alone implementing the 2018 permission was unlawful. As a starting point when determining if development has commenced, the operations relied on must be ones which can properly be said to be undertaken pursuant to the grant of the planning permission in question. As the 2018 permission was not lawfully implemented, it was unlawful of the defendant to impose a condition upon the 2021 variation extending the implementation period by a further 2 years as this is contrary to s73(5) TCPA.

Ground 2 was predicated on the assumption that the 2018 permission had not lapsed but Mr Justice Lane nevertheless addressed it and concluded that the claimant's evidence that any dwelling (as constructed) would differ materially from the plans attached to the 2018 permission overwhelming enough to establish irrationality and a failure to have regard to relevant considerations.

The defendant sought to rely on class E Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 in response to ground 3 and argued that, even though a condition limiting the use of the outbuilding/garage was not included on the s73 variation, it was included on a separate 2019 permission. However, class E Part 1 would apply only if the garage had been built as a consequence of permitted development rights and once the s73 variation is implemented the condition on the 2019 permission cannot be relied upon. Ground 3 accordingly succeeded.

The claimant submitted that conditions 1 and 3 were wrongfully imposed on the s73 variation because they refer to unlawful "as built" development rather than the development the subject of the 2018 permission. Mr Justice Lane agreed and Ground 4 succeeded on this basis.

Ground 5 challenged the defendant's conclusion that the s73 application sought "minor material amendments". The defendant sought to rely on the High Court decision in *Armstrong v Secretary of State for Levelling Up, Housing and Communities and another* [2023] EWHC 176 (Admin) to justify utilising s73 TCPA. Mr Justice Lane summarised the relevant law in light of this recent case as follows:

"An application under s73 will not founder merely because the proposed change involved more than a 'minor material amendment'. Nor will it necessarily founder if the proposed change involves a 'fundamental variation to the design of [a] single dwelling on the Site that is otherwise permitted by the operative part of the planning permission' [...] However, in the light of the judgment of the Court of Appeal in *Finney v Welsh Ministers and others* [2019] EWCA Civ 1868, s73 cannot be deployed if the result would be to change the 'operative part' or the 'grant' of permission; that is to say, the description of the development contained in the grant."

Mr Justice Lane noted that, unlike the "operative part" of the 2018 permission, the wording of the s73 variation refers to "details of lighting". There is, therefore, a difference in the "operative parts" or descriptions of development that Mr Justice Lane did not consider to be de minimis or otherwise immaterial, and lighting is a matter of significance. Accordingly, the defendant could not rely on Armstrong and ground 5 succeeded.

Mr Justice Lane rejected ground 6 on the basis that, despite the BDCO expressing

concerns in respect of the 2018 scheme being "at the limits of acceptability in terms of its size, scale, form and siting, as well as impacts in its wider setting", it was a matter of planning judgment whether the BDCO should have been consulted in relation to the application for the s73 variation and the defendant considered that the amended proposals comprised in the application for the s73 variation discharged the previous concerns raised by the BDCO.

Finally, ground 7 succeeded on the basis that there was a significant degree of confusion such that there is, as the claimant submitted, an unresolved tension between condition 9 which says that "all external lighting" is to be "removed" and "details of all external lighting [are] to be the subject of an approved scheme", and condition 1 which requires accordance with a plan (SGA-143-104N) that contains details and specifications in respect of lighting.

Case summary prepared by Nikita Sellers