

# Finney v Welsh Ministers

## Briefing Note

18/05/2020

Ref No : 322

**In Court of Appeal Judgment, Finney v Welsh Ministers, it has been established that Section 73 Applications for minor material amendments to vary conditions of an existing planning permission cannot vary the description of development. Whilst leave is sought to challenge this decision in the Supreme Court, the decision has the potential to significantly limit the flexibility in planning permissions that may have previously been able to be exercised.**

The Court of Appeal reversed the High Court's decision in *Finney v Welsh Ministers* [2019] EWCA Civ 1868. The effect of the High Court decision had been that Section 73 (S73) of the Town and Country Planning Act 1990 could be used to vary not just the conditions to a planning permission, but also the description of the development itself. The Court of Appeal has, however, ruled that to vary the description of development is outside the remit of S73.

This has been a commonly exploited mechanism which has added flexibility to planning permissions in which S73 applications are a mechanism to vary or remove conditions associated with a planning permission. One of the uses of a S73 application is to seek minor material amendments, where a relevant condition can be varied, which can then facilitate amendments to approved plans.

The S73 route to substitute plans can require a variation of the number of units within a development, or the type of units within a development or indeed ancillary uses which may be provided. Depending on the approved development and subject to positive and pro-active engagement with the Local Planning Authority such a scope of change can be considered acceptable in the context of S73 minor material amendments. It has indeed added flexibility to planning permissions.

The Court of Appeal has, however, ruled that to vary the description of development by way of altering conditions is outside the remit of S73 applications. In disagreeing with the findings of the High Court, it has ruled that when considering a S73 application, a local planning authority "must not, therefore, consider the description of the development to which the conditions are attached. The natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development".

This has significant implications for post permission amendments to developments, particularly where the operational part of the permission makes specific reference to unit types, quantum of development, plan references, dates of submitted plans or building heights.

An alternative approach was suggested in the Judgement to utilise non-material route i.e. "If a proposed change to permitted development is not a material one, then section 96A provides an available route. If, on the other hand, the proposed change is a material one, I do not see the objection to a fresh application being required". This suggests a new application is more likely to be required if any alteration to the description of development is needed. Whilst a 'free go' application within one year of the decision being made may be one opportunity to resolve any changes, this may already have been exercised or over the course of a phased development, this may not be available. The *Finney* judgement therefor has the potential to reduce flexibility in planning permissions.

Going forward it will be important to give careful attention to the description of development at the planning application stage. The Applicant is likely to seek as much flexibility as possible in the description of development, but this must be sufficiently detailed to allow the proposals to be understood for the purposes of consultation, particularly from the public.

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Local Planning Authorities may seek to have more precise terms included in the description of development. Indeed, the National Planning Practice Guidance notes identify that before publicising and consulting on an application, the LPA should be satisfied that the description of development provided is accurate. Essentially though, the LPA should not amend the description of development without first discussing any revised wording with the Applicant or their Agent. This discussion needs to consider the implications of Finney and changes to the wording may need to be resisted.

To allow the certainty required, substantive detail can be controlled by conditions to future planning application which could then be subject to S73 application without amendment to the description of development.

If you have any questions about the above or any other planning related queries, please do not hesitate to contact us for more information using details available on our website [www.dlpconsultants.co.uk](http://www.dlpconsultants.co.uk)