1.0 Introduction: the nature of a non-material amendment application

1.1 On 15 April 2020 there was an exchange of emails with the Planning Officer for Camden Council regarding a series of issues on the s96A application (ref: 2020/1438/P) to amend a planning permission (ref: 2015/3605/P) including the provision of drawings illustrating the proposals for 208 rooms as set out in the applicant's covering letter.

1.2 The Planning Officer's response stated:

"This application is purely to amend the development description of the original scheme to remove reference to the number of rooms of the proposed hotel. This application does not propose to increase the number of rooms, nor does it propose to amend any previously approved plans.

The recent Finney (2019) Judgment confirms that S73 (i.e. an application for a minor material amendment to vary the 'approved plans' condition on a previous consent) cannot be used to amend a description of development.

As such, this S96A (non-material amendment) application is simply to remove reference to '166 rooms' from within the description of development. If granted, planning permission would still exist for 166 rooms only, and in the same layout as already approved – that would remain controlled by Condition 2 of the previous consent which requires the development to be carried out in accordance with the approved plans (which show 166 rooms). This is why it could be considered appropriate for a non-material amendment application. An application to amend the plans to increase the number of rooms would require a S73 (minor material amendment).

The need for this S96A application arises simply to allow the future S73 application, for a 208-room scheme, to be determined lawfully (i.e. avoiding an internal conflict between the approved plans (showing 208 rooms) and the description of development (referring to 166 rooms)). It does not propose any alterations bar the change to the development description, nor does it represent an indication as to an approval of any future scheme to increase the number of rooms to 208".

1.3 There was a similar exchange of emails with the Bloomsbury Association on 17 April 2020.

1.4 I believe there are some fundamental flaws in the Planning Officer's understanding of the s96A/73 process. I refer to the wording of Act and its purpose: i.e. to consider non-material amendments to a previous planning permission. The NPPG confirms this purpose and the principal constraint being non-material, i.e. of minimal significance, de minimus.

1.5 Turning to the current s96a application, it must be considered on its own merits, since it is a stand-alone proposal and the Act does not permit its consideration subject to another application or scheme. Moreover, and in any event, no other application has been submitted. Therefore, the LPA must consider only what is before them and its ultimate planning 'effect' (see paragraph 5.1(b) below). No reliance can be placed on the details of another application that may, or may not come sometime in the future, perhaps never.

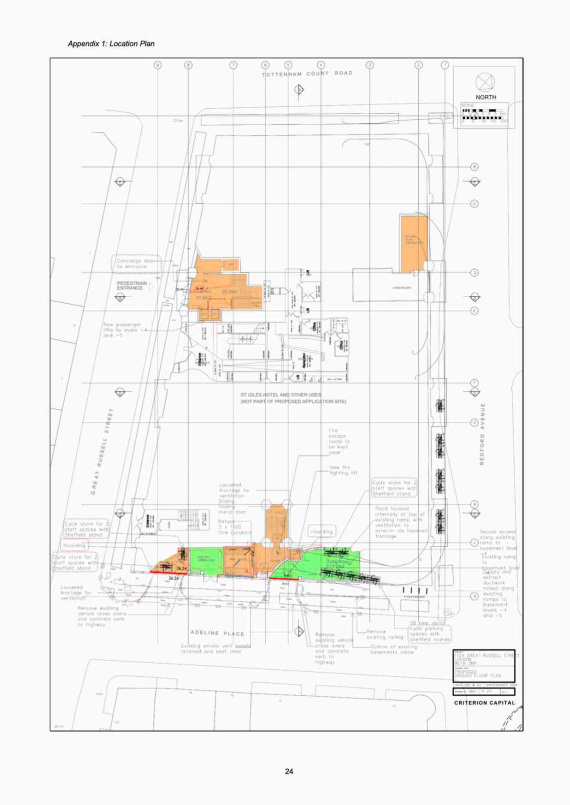
1.6 I refer to section 4.5 of my Report (ref: 672-2020-1438-P BloomsburyAss Comments-090420) on this application and the fundamental and only issue to be resolved by the LPA in consideration of the s96A application: **Is this a non-material amendment?**

1.7 In order to answer this, due diligence demands that the nature and scope of the amendment is fully revealed and considered. Not only is it relevant, it is essential. To determine the application simply on a change of 'an administrative description' would give no more than a cursory, superficial examination of the substantive issue but would open the flood-gates to a scheme of unlimited scope, (potentially more than 208 rooms) and as far removed from 'non-

material' as the imagination could stretch. Such a superficial examination would give no consideration to the effect of the change. (See paragraph 5.1(b) below)

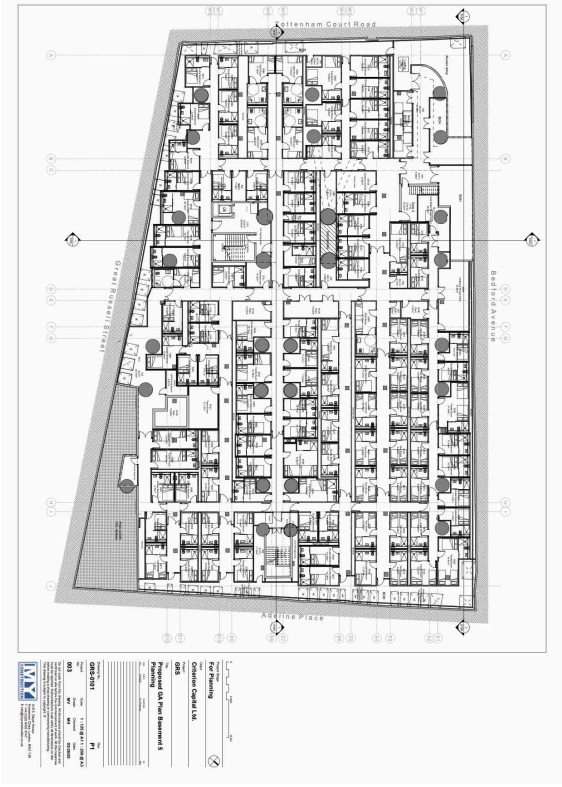
1.8 To accept this application on those terms and to believe this approach is benign is hardly credible. The developers, with the full knowledge of the LPA, have already created the 208 rooms; they have indicated in the accompanying letter that they wish to increase the number of bedrooms to 208 (25% extra) and from the drawings my clients have seen, some of which are shown below, an increase in the potential occupation by about 36%, so this cannot reasonably be described as non-material. Neither can it reasonably be described as an 'administrative oversight' that now requires regularisation in law. If the proposed amendment was simply an innocent and benign change of description, then one might question why the developer has chosen not to submit the drawings for consideration.

1.9 In order to demonstrate the scale and scope of those changes, I show below the plans for the approved development (left hand picture) at Ground level, Level -4 and Level -5 and a comparison for what has already been constructed (right hand picture) and for which an amended permission is now sought:



Ground Floor level: It will be clear that at Ground level, the uses and facilities on Adeline Place are significantly altered with consequential changes to operations, access and mechanical air-handling plant, refuse storage and fire accessibility and escape route. These all bring consequential changed impacts that need to be assessed and managed.

Level -4 shows a significant increase in bedrooms and bedspaces, many set out as family rooms.



Level -5 shows a significant increase in bedrooms and bedspaces, many set out as family rooms.

1.10 In the circumstances of what has already been built and in the full knowledge of the Council, the current application has only arisen in order to legitimise a far larger scheme than was granted planning permission in November 2016.

2.0 The Finney case

2.1 Reference has been made to a legal case from 2019: Finney v Welsh Ministers [2019] EWCA Civ 186, as justification for the present s96A application. This dealt with s73:Determination of applications to develop land without compliance with conditions previously attached.

2.2 There have been varying approaches which have been tested in the courts: firstly, by Sir Wyn Williams (Finney v Welsh Ministers). The point was a narrow one: can s73 be used to obtain planning permission not just with conditions differing from those on the original permission, but with a changed description of development?

2.3 Sir Wyn Williams decreed the answer was Yes, following a previous High Court ruling in R (Wet Finishing Works) Ltd v Taunton Deane Borough Council (Singh J, 20 July 2017): secondly, that decision was overturned at the Court of Appeal in a straight-forward judgment by Lindblom LJ (5 November 2019) who found that the answer to the question is in fact "no":

"The question is one of statutory interpretation. Section 73 (1) is on its face limited to permission for the development of land "without complying with conditions" subject to which a previous planning permission has been granted. In other words, the purpose of such an application is to avoid committing a breach of planning control of the second type referred to in section 171A. As circular 19/86 explained, its purpose is to give the developer "relief" against one or more conditions. On receipt of such an application section 73 (2) says that the planning authority must "consider only the question of conditions". It must not, therefore, consider the description of the development to which the conditions are attached."

2.4 Lindblom LJ states that Wet Finishing Works was wrongly decided, the judge on that case not having been referred to another High Court judgment, R (Vue Entertainment) v City of York Council (Collins J, 18 January 2017).

2.5 In Vue Entertainment, Collins J had referred to another High Court ruling, R (Arrowcroft) v Coventry City Council (Sullivan J, 2001) as doing no more than making *"the clear point that it is not open to the council to vary conditions if the variation means that the grant (and one has therefore to look at the precise terms of the grant) are themselves varied."* By 'the grant', Lindblom LJ understood Collins J to be referring to the 'operative part' of the permission i.e. the description of the development itself.

2.6 In response to submissions as to what might be the implications of his ruling, Lindblom LJ said this:

*"Nor do I consider that the predicament for developers is as dire as Mr Hardy suggested. If a proposed change to permitted development **is not a material one** (my emphasis), 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"**.* (my emphasis).

2.7 Subject to the proposed change being within the scope of the description of development, the ruling does not change the principle that the relevant test for whether section 73 is available is whether the proposed change is less than a "fundamental alteration" to the approved scheme. The test set out by Sullivan J in Arrowcroft still applies:

"… 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."

2.8 A recent Court of Appeal decision (Finney v Welsh Ministers [2019] EWCA Civ 1868) has held that it is not lawful to use the powers under section 73 of the Town and Country Planning Act 1990 ("the Act") to amend the description of development on a planning permission.

(a) Objector John Finney brought the case over the permitted height of turbines at a site in Carmarthenshire. Carmarthenshire County Council had given planning permission to Energiekontor (UK) Ltd for two wind turbines, with a tip height of up to 100m.

(b) One of the conditions required that the development was to be carried out in accordance with the approved plans and documents.

(c) Energiekontor then applied under section 73 of the Act for the removal or variation of this condition so that a turbine of up to 125 metres could be built.

(d) Carmarthenshire refused and Energiekontor appealed to the Welsh Ministers, whose inspector allowed the appeal. This was appealed to the High Court and then Court of Appeal.

(e) The Court of Appeal considered it was a question of statutory interpretation and that when considering an application under section 73 a planning authority must only consider the question of conditions. Lewison LJ ruled that 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****" (my emphasis).*

2.9 So we now have a clear position: any section 73 application is constrained by the scope of the description of development on the existing planning permission - to amend the description of development by section 96A, but only if the change to the description of development in itself can be shown to be non-material, before then making a section 73 application.

3.0 The s96A/73 Two-Step

3.1 What is perverse about the current two-step process proposed by the developer, is that their consultant appears to be trying to use the Finney case as the modus operandi to change the description of the development to allow an easy passage for a subsequent s73 application, but without the need to reveal the full extent of the amendments.

3.2 However, the flaw in this approach is to ignore the fundamental requirement that such amendment(s) must still be non-material in nature and scope. It is not sufficient to rely on the worded description of the development set out in the application form. This is not an end in itself, it is simply a summary for the administrative purposes of the LPA. The 'development description' is the contents of the application: the drawings, details and other submissions. Lindblom LJ and other commentators on the law made this quite clear.

4.0 Comparison of development descriptions.

4.1 The current Planning permission is for (1):

"The development proposed is change of use of part ground floor and basement levels -4 and -5 from car park (sui generis) to 166 bedroom hotel (Class C1), including alterations to openings, walls and fascia on ground floor elevations on Great Russell Street and Adeline Place".

4.2 The developer has now submitted a s96A application (2) for:

"The development proposed is change of use of part ground floor and basement levels -4 and -5 from car park (sui generis) to ~~166 bedroom~~ hotel (Class C1), including alterations to openings, walls and fascia on ground floor elevations on Great Russell Street and Adeline Place".

In other words, it is seeking the omission of reference to the '166' rooms, leaving it open-ended.

4.3 We now have Camden Council's worded description of the s96A application (3) as:

"...alter the development description to omit the number of hotel rooms and to insert a planning condition to secure 166 rooms".

4.4 The meaning and interpretation of these descriptions can be summarised as follows:
(1) was accompanied by a raft of drawings and details, many superseding original submissions, but in all, the Planning Inspector has tied the permission to those drawings by a condition he imposed, requiring compliance with them.

(2) was not accompanied by any drawings, but it did include an accompanying letter describing the proposals as an increase to 208 rooms. There was also a statement from the developer:

….."To be clear, if the amendment is granted, the consented development would still relate to the 166 room scheme (as controlled by the already consented drawings). This NMA application is merely a technical step, necessary in advance of the applicant's intended substantive amendment for the reorganisation of the consented floorplans to deliver 208 bedrooms. The need for this pre-step has arisen following case law in November 2019 (Finney v Welsh Ministers & Ors Case Number C1/2018/2922) last year.

Accordingly, the application comprises copies of the following:

- *Completed Application Form*
- *Site Location Plan*
- *This Letter*

…….

Clearly, there is incompatibility here but it is designed to appear benign while at the same time paving the way for a raft of new drawings describing a 208-bedroom scheme for approval under a revised condition from the s73 application process.

(3) The Planning Officer in re-writing the application description only confuses the issue by re-inserting reference to 166 rooms as a pre-condition. This, he justifies on the basis of it being Camden Council's 'House Style', though it is not clear from where the power for this action is derived. Nor is it appropriate or lawful to add a pre-condition to the description. But the confusion does not end there: *'to secure 166 rooms'* the implication is that this is a minimum not a maximum. This places the drawings referred to in condition 2 at odds with the proposal. Moreover, if the application is so benign as to be non-material, no significant change to the application wording from what was permitted by the Planning Inspector (as is proposed here) would be required.

4.5 If either (2) or (3) were approved without reference to the drawings, one might wonder what had been amended. However, from the developer's perspective it would have an amended planning permission that the LPA considered to be 'non-material' - for that is what the s96A process is about. It would then argue for a s73 approval for a 208-room scheme that was implicit (if not explicit) within the s96A application. If the developer was not seeking retrospective planning permission for a larger scheme that has already been built, then a s96A application would not be required.

4.6 From the Council's perspective, it would, perhaps naively, believe it was granting a benign change of words on a planning form in expectation of a further s73 application describing a far larger scheme. While it may have misgivings now about the nature and scope of this larger scheme, its hands would be tied by its prior approval of the s96A application, which by

definition was for a non-material amendment. By such means, the developer wins retrospective approval for a scheme that was his intention from the start of works on site.

4.7 I return to the case law and the implications to be drawn from it…

i. S96A must be for non-material amendments only. The description on a planning application form alone does not define the development, but is simply a summary for administrative purposes. The description of a development is not an operative part of a permission and can therefore neither restrict such a development nor impose limitations on it. [1]

ii. There is clear authority from the courts that any limits on a planning permission can only be expressed via a planning condition, and not within the description of development (see I'm Your Man v Secretary of State for the Environment and R (Altunkaynak) v Northampton Magistrates). This approach was confirmed again this year in London Borough of Lambeth v Secretary of State for Communities and Local Government, a case which concerned the use of the land, and which serves as an important reminder for LPAs that an express planning condition is needed if the development is to be restricted in some way. The description of the development itself is not sufficient to impose a restriction.

iii. In considering this current s96A application, it should be noted that the description on the original planning permission including the reference to 166 bedrooms is entirely consistent with the conditions imposed that included drawings describing a 166-bedroom scheme.

iv. S73 applications can only deal with minor material amendments and by reference to a 'development' (as defined by its content rather than its description) that has planning permission.

5.0 The implications for considering the s96A application.

5.1 These can be summarised as:

(a) The LPA must review all the details of the s96A application, not just the worded description on the application form.

(b) The proposed amendment to the development should satisfy a range of criteria as to its non-material nature and scope. Of relevance to this application:

(i) it must be within the scope of the original permission and must not result in a materially different scheme, with differing impact. In deciding whether a change is material, a local planning authority must have regard to the effect of the change(s) made under this section on the planning permission as originally granted. The word 'effect' is crucial in this respect because the planning effect, through the stepping stone of a subsequent s73 application, would be to significantly intensify the development which, in turn, increases its impact;
(ii) it must not amount to changes that alter the description of development;[2]
(iii) it should not be in conflict with any conditions on the original planning permission;
(iv) it should not exacerbate concerns raised by third parties at original planning application stage. This is also crucial, as the process is not required to give public notification and response;[3]
(v) it must not result in a fundamental change in the design of the building; and

[1] WSLaw as legal commentator
[2] Legal Commentator
[3] Legal Commentator

(vi) it should not amount to new works or elements not considered by any environmental statement submitted with the application. There are environmental issues here, e.g. noise and air quality, transport, servicing etc that would be affected by an increase in occupation.

(c) The current s96A application is devoid of enough detail to adequately consider whether it is non-material and/or meets the criteria set out above. The change to the worded description does not define the change in the actual development and its effect, which are the critical aspects. Thus, the Planning Officer should seek the supporting drawings and other details in order to do 'due diligence' on the application.

(d) The making of the application has only been necessitated by a designed and constructed scheme far larger than that approved by the Planning Inspector in November 2016. Neither, judging by the drawings given to my client, is it simply an administrative oversight or inclusion of additional rooms from Back-of-House space – it is a totally different layout of which the LPA has been aware for some time. The inference is that the LPA cannot hide behind a front of ignorance in deciding whether the s96A application is non-material when it has more than enough proof on the ground that it is not.

(e) The accompanying letter to the s96A application is part of the application. Not only does it say so in its conclusion, the reference to the 208-room scheme makes it clear that the changes sought are substantive, and therefore not non-material, a defining characteristic of a s96A application.

5.2 ……and then the implications for any subsequent s73 application are:

(a) Such an application must relate wholly to the planning permission and any subsequent approved amendments that have been made, provided that such amendments are non-material.

(b) Such an application can only consider the conditions that applied, not the nature and scope of the development.

(c) The natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development.

(d) the principle that the relevant test for whether section 73 is available is whether the proposed change is less than a "fundamental alteration" to the approved scheme. The test set out by Sullivan J in Arrowcroft still applies:

"… 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."

6.0 Conclusions

6.1 A s96A application that simply changes the wording description on an administrative form does not of itself define an amended scheme.

6.2 Due diligence requires the LPA to fully examine the proposals that <u>do</u> define the amendments, i.e. the drawings and other details. This is especially important in this case because Camden Council is fully aware of what has been built and the purpose of the s96A application.

6.3 The LPA can consider only whether the amendment(s) and/or their effects are non-material as required by the Act (see paragraph 5.1(b) above). It cannot consider the merits of them or whether it would have granted planning permission had they been the original scheme.

6.4 The worded description in an application form must accurately and adequately describe, though it cannot necessarily define, the development. This is pertinent in this case, because there are fundamental differences between that proposed by the developer and the Camden-changed wording.

6.5 There is no lawful way in which pre-conditions can be imposed on an application.

6.6 A s73 application must refer back to an approved scheme either to the original planning permission or a subsequent amended scheme (under s96A). It cannot change or omit conditions that would amount to a fundamental alteration.

6.7 If Camden Council approve the application under s96A, whether or not it had sight of the drawings and other details, it would be tacitly accepting the changes from 166 to 208 bedrooms, which any reasonably-minded person would acknowledge as significant, to be 'non-material'. This would open the door to a subsequent s73 application for a 'fait accompli' approval on the basis that the Council had already granted permission for the changes as non-material.

6.8 Applying the criteria for what can legitimately be described as non-material amendments (paragraph 5.1(b) above), the only reasonable conclusion to be drawn is that the application does not meet them and therefore permission should be refused. If the applicant wishes to pursue the scale of changes he has already executed, he has the option to apply for retrospective planning permission under s70.

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