Cornerstone Leisure Newsletter

May 2017

Contents

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Welcome to the second edition of the Cornerstone Barristers Leisure Newsletter

Welcome to the second edition of the Cornerstone Barristers Leisure Newsletter. Thanks for the positive feedback on the first, which seems to have been well-received.

This quarter sees Matt Lewin and Richard Hanstock deliver a comprehensive and fascinating view of the licensing implications of Uber, the increasingly popular and seemingly dominant taxi operator (or is it?). Ben du Feu provides some insight into a recent case involving a s.73 application to disapply a planning condition, in this case concerning the size of a cinema in a new leisure complex outside York, and tops it off with a groansome pun; Martin Edwards brings us up to date with two recent planning appeal decisions concerning leisure uses in the Green Belt (and paragraph 89 of the NPPF); and I have a look at some of the less headline-grabbing recommendations made by the House of Lords Select Committee on the Licensing Act 2003. I'm also very grateful to Tony

Bowhill, of the Bowhill Planning Partnership, who provides a 'guest article' examining the present situation for pubs in a world of high alternative use values, and asks what the future might hold in planning terms for those owning or running pubs (or those that use them and might prefer that they stay, rather than being converted to more flats).

Happy reading; as ever I would be delighted to receive feedback, suggestions and comments on the contents.

Josef Cannon
Editor

Leisure development in the Green Belt – not all fun and games?

Two recent planning appeal decisions demonstrate the obstacles that some leisure developments face when trying to gain planning permission in the Green Belt, even though they may be related to already established leisure facilities.

On 11 April 2017 an inspector dismissed an appeal [APP/N1920/W/16/3164487] by Adventure Experience Ltd against the refusal by Hertsmere Borough Council of an application for planning permission for a Sky Trail High ropes adventure course on a site that is part of an area already containing a golf driving range and a dinosaur themed adventure golf facility. The development was to involve a series of steel lattice elements with interconnecting platforms, with a height of about 10 metres and covering a fairly extensive ground area. The structure was also to be surrounded by a new 2.4-metre-high mesh fence. It was acknowledged by the inspector that although there would be views through and between its different parts, these would be interrupted to a substantial degree by a staircase and other elements.

Significantly, he acknowledged that other local planning authorities had found similar proposals not to be inappropriate Green Belt development. Nevertheless, he concluded that this proposal would not preserve the openness of the Green Belt and was therefore excluded from the exception to inappropriate development in the Green Belt in bullet point 2 of paragraph 89 of the National Planning Policy Framework. That paragraph establishes that the construction of new buildings is inappropriate in the Green Belt unless one of a limited number of specific exceptions applies. One of those, bullet point 2, excepts the "provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it".

The inspector concluded that the development would not preserve the openness of the Green Belt and therefore did not fall within the exception. It was therefore inappropriate development which, by definition, is harmful to the Green Belt and should not be approved except in very special circumstances. There were none, so the appeal was dismissed.

The following day an inspector dismissed an appeal [APP/X0360/W/16/3160591] by Hobbs of Henley Limited against a refusal by Wokingham Borough Council of an application for planning permission to install six floating landing stages at a commercial boatyard facility which currently

includes a substantial building containing workshops and an area of external hardstanding located on the banks of the River Thames.

There was disagreement between the parties as to whether six floating landing stages in the river for the mooring of up to twelve boats constituted a "building" for the purposes of paragraph 89 of the Framework. The inspector concluded that as a "building" is defined in section 336 of the Town and Country Planning Act 1990 as "any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building" and, having regard to the fixed nature of the proposed structures to both the land and river bed, and their substantial dimensions, the proposed landing stages would undoubtedly fall within that definition of a building. As such they would constitute new buildings in the Green Belt.

Despite the appellant arguing that a core part of its business related to recreational boating, the inspector considered that the functions at the facility principally related to providing boatyard services such as the maintenance, servicing and storage of craft and was more akin to an industrial and/or storage use.

The inspector therefore considered that the proposed development would not constitute the provision of appropriate facilities for outdoor recreation in the sense of paragraph 89 and also could not be considered as an appropriate outdoor recreation use in the context of paragraph 89 given the adverse impact of the proposed six floating landing stages on the openness of the Green Belt. In that regard the inspector noted that the landing stages would sit only 1 metre above water level but that they would be of considerable length (8 metres) protruding perceptibly into the river and would span about two thirds of the total river frontage of the site. The steel piles would protrude about 3.5 metres above the average water level. Overall these would constitute man made incursions into what is otherwise an area of natural appearance.

These two written representations appeals show just how unpredictable the planning system can be in relation to leisure development in the Green Belt. As the inspector in the Hertsmere appeal acknowledged, similar development had been permitted elsewhere in the Green Belt. Furthermore this was an appeal in relation to an existing leisure facility. However he took a different stance. Sometimes, however, such inconsistency can be found within the same planning authority. I acted in an appeal in relation to a proposed tennis court with fencing to be located outside the residential curtilage of a property in the Metropolitan Green Belt where the reason for refusal flew in the face of previous decisions taken by the same authority for near identical facilities. Some might say that the planning system is a form of leisure because there are times when it resembles a lottery!

Martin Edwards

Licensing Uber: Better the devil you know?

The legal controversy surrounding Uber continues to be global in scale. This article offers a short summary of the three decided cases in this jurisdiction, and a fourth upcoming case in the European Court of Justice, which indicate that the degree of control that Uber retains over the service provided through its platform means

that its business model is one of a PHV operator under the 1976 Act. We conclude by identifying some likely areas of future controversy.

(1) Does Uber use taximeters?

It is a crime for a PHV to be equipped with a taximeter: s.11(2) Private Hire Vehicles (London) Act 1998. In Transport for London v Uber London Ltd [2015] EWHC 2918 (Admin), the High Court ruled that—

(a) the driver's smartphone app was not a "taximeter" for the purposes of section 11 of the 1998 Act; and

(b) Uber vehicles are not 'equipped' with the driver's smartphone.

Ouseley J was persuaded that it was not essential to confine the definition of 'taximeter' to that prescribed for fitting in a black cab: reg. 2(1) of SI 2006/2304 a taximeter as a device working with a signal generator to calculate distance, calculating and displaying the fare based on distance and/or duration. This meant that it did not matter whether the smartphone app had the all the same features or components as a black cab taximeter: rather, Ouseley J was concerned to give the prohibition an "always speaking" meaning, in order to cover changes in technology, ruling that the prohibition "is intended to catch all devices used for the calculation of fares" (at [32]).

Nevertheless, the court went on to find that although the driver's app provides time and distance data essential for the calculation of the fare, that calculation was in fact carried out by an Uber server, and not by the driver's smartphone. To hold otherwise, the court found (at [21]), would risk bringing the odometer and clock within the definition of taximeter, with absurd consequences. This meant that the smartphone (even with the driver's app) was not a prohibited taximeter.

Furthermore, the court found (at [45]) that it is the driver, not the vehicle, that is 'equipped with' the smartphone, given its portability, meaning that there was no breach of section 11 in either case.

(2) Are Uber drivers employed or self-employed?

In October 2016, the Employment Tribunal found that Uber drivers were employees: Aslam and others v Uber B.V. and others (Case No. 2202550/2015). This meant that they were entitled to various protections, including payment of the minimum wage, sick pay, and paid holidays. Uber is understood to be pursuing an appeal.

The Employment Tribunal criticised what it called "fictions" and "twisted language" deployed by Uber in support of its case – in particular, the reference in its then Terms to drivers as 'customers' of the Uber platform. Uber's terms sought to express the possibility of 'control' exerted over arrangements made through its platform between drivers and riders, despite the fact that section 56 of the 1976 Act deems that

contracts for the hire of a PHV are made with the licensed operator that accepted the booking, whether or not he himself provided the vehicle. By contrast, the Tribunal found that the terms and service levels are set by Uber, which sets a default route, imposes conditions on drivers and their vehicles, fixes the fare, and exclusively handles passenger complaints. This degree of control led the Tribunal to conclude that the "true relationship" between Uber and its drivers is one of employer and employee.

Uber has run a similar argument in a Spanish case awaiting judgment before the European Court of Justice: Asociación Profesional Elite Taxi v Uber Systems Spain, SL (C-434/15). This relates to the controversial UberPOP service in Barcelona, marketed as a ride-sharing platform said to be outside the licensing system altogether. Uber sought the protections of EU law to argue that a requirement to obtain a licence was an undue restriction on its right to provide 'IT services' through its platform. Although the CJEU has yet to give its ruling, the opinion of the Advocate General reflects the resounding criticism made by the Employment Tribunal above: Uber does not offer merely an IT platform for connecting riders and drivers, but "amounts to the organisation and management of a comprehensive system for on-demand urban transport", having regard to the level of control that Uber exerts over the transportation service provided. Consequently, it is not unlawful for EU states to require Uber to obtain a licence, as it provides transportation services and not merely IT services. A formal ruling is expected later this year.

At least in England and Wales Uber appears to acknowledge that it requires an operator's licence before it can put vehicles on the road!

(3) The English language test

The case of R (Uber London Ltd) v Transport for London (Administrative Court, unreported, 3 March 2017) concerned three requirements imposed by TfL upon PHV drivers, operators and vehicles respectively: (1) all drivers must demonstrate that they can read and write in English to a minimum prescribed level; (2) all PHV operators must provide a round-the-clock telephone service; and (3) all PHVs must be continuously insured for hire and reward.

The headline-grabbing finding was that the English language requirement was proportionate: as well as needing to be able to communicate with passengers about their requirements, explain safety issues, and discuss a route or fare, drivers also needed to understand regulatory requirements and other communications with TfL. In the absence of a specific language test catering to the taxi industry, TfL was entitled to rely on the generic test that it had adopted. An appeal by Uber is understood to be outstanding.

As to the second requirement, this was held to go beyond what was necessary to achieve the aim of passenger protection, the court noting that the Uber app already had an impressive customer contact facility, which allowed staff to speak with passengers where necessary, typically in an emergency.

TfL conceded the challenge to the third requirement, as it had wrongly assumed that passengers injured in circumstances of no insurance would not be protected but for this blanket requirement, whereas in fact there was a legal requirement that either the insurer or the Motor Insurance Bureau would step in: see Bristol Alliance Partnership v Williams [2013] RTR 9.

Future areas of controversy

Cross-border hiring

It has long been established that it is lawful for a licensed PHV operator to accept bookings that start and end outside the operator's licensing district, and that a PHV driver can undertake journeys starting anywhere in England and Wales: Adur District Council v Fry [1997] RTR 257.

However, Uber being an increasingly national phenomenon, authorities that do not licence Uber in their area are now seeing a huge influx of drivers carrying out Uber bookings under their noses without the power to enforce licensing standards against them, because the driver and operator are regulated by a different authority.

In January 2017, two drivers whose licences had been revoked by Southend-on-Sea Borough Council were found to be driving in Southend, using Uber, under licences issued by TfL. Nasser Hussain and Nisar Abbas had been convicted of 10 counts of perverting the course of justice, by operating an illicit penalty points sharing scheme. They were each jailed for 12 months.

There is no indication that legislation to address this loophole is being contemplated.

'Greyballing'

In March 2017, the New York Times reported that Uber was using 'greyball' software in some locations which at least in part appeared to be designed to frustrate local regulation. The software would 'greyball' certain users identified as linked to law enforcement or local authorities, manipulating the app on users' smartphones to the effect that no (or only 'ghost') cars appeared to be available. There are no reports yet that this software has been deployed in the UK, though authorities would be wise to be vigilant to this possibility, perhaps through the use of conditions.

Plying for hire

A further area of controversy could lie in the rather fuzzy definition of 'plying for hire' at common law: see Cogley v Sherwood [1959] 2 QB 311. If users are able to see real-time locations of Uber vehicles available for immediate bookings, is this materially different to the 'for hire' roof light on a Hackney carriage? Does it matter that a driver can refuse to accept a booking offered to him by the Uber platform, rather than observing the 'cab rank rule'? There has yet to be a decided case on this point in relation to Uber.

Conclusion

The disruptive effects of Uber on the licensed hire marketplace are far from resolved, posing ongoing challenges for licensing practitioners. Authorities should keep an open mind about a business model that stretches the scope of established regulatory models, taking care not to confuse innovation with unlawfulness, and

thereby lose an opportunity to bring a new phenomenon within the scope of regulation for the ultimate benefit of the travelling public. After all, the global demand for Uber's services is undeniable: the travelling public seem to love it.

Richard Hanstock & Matt Lewin

Cheers!
Do pubs have a future?

Some like to take their leisure in the gym; others prefer to prop up the bar alongside drinking companions.

Scale of the Problem

The Campaign for Real Ale shows that there were 52,750 UK pubs at the end of 2015 with a rate of decline of 27 closures a week for the second half of the year compared with 29 in the first half and 45 in 2009 – the worst year.

Why this decline of a very British Institution? The smoking ban; tougher drink drive laws; cheap alcohol in supermarkets; changing social habits with more home entertainment; rising expenses such as rates; and alternative use values which often far exceed a pub's worth.

The Fight Back Starts

Simply closing the pub saves overheads at a time of falling revenues. Alternative uses require planning permission which can lead to debate on its potential loss and future viability.

The Localism Act 2011 introduced a new provision whereby Assets of Community Value can be listed and local people given the chance to purchase the asset. Application is made to the local authority who then have to consider whether it is suitable for such listing. The owner can appeal but so far few have succeeded in turning away the designation.

Once the designation is confirmed then the local group have the opportunity of purchasing. The difficulty is what value should be ascribed to it.
Is it the existing use, or an enhanced value to reflect the potential for change of use or development?

Community Pubs

If the purchase is successful then the group can run the pub, serving the local community.

An alternative procedure is to challenge a planning application/appeal for changing the use of a pub or its demolition. In respect of a pub at Cold Norton, near Maldon in Essex, an Inspector dismissed the appeal in respect of housing on the site and subsequently the community purchased the building and are running it successfully.

In perhaps the most notorious case the Carlton Tavern, in Maida Vale, NW6 - in a Conservation Area - was demolished without consent in a few days. Following an enforcement appeal for its re-instatement the Inspector upheld the notice – requiring the building to be rebuilt – and effectively negating any plans for residential development on the site.

Changes of Use

Currently pubs are able to change use without obtaining planning permission under permitted development rights: from A4 use (drinking establishments) to A1 (retail), as well as to A2 (financial and professional services) and A3 (restaurants and cafes) uses.

Some local authorities, notably Wandsworth and Southwark, have made Article A4 directions within their area, whereby these permitted development rights are removed.

The Government has now agreed, in the Neighbourhood Planning Act 2017, that this move should apply nationwide. In other words, a change of use of a pub to any other use will require planning permission.

This raises the question as to whether a change from an old-style pub to a family restaurant/pub (A3) will now be possible without planning permission. Often the food offering is the saviour of a pub and can often be a significant proportion of turnover. Is a pub a pub in these circumstances?

Where Now?

Councils through local designations have taken away permitted development rights from pubs and made them apply for planning permission if a change of use is desired. This requirement to apply for planning permission will now apply nationwide, and local planning authorities and the public will have the opportunity of debating whether such changes should be permitted or resisted in the best interests of the particular pub (and the area in which it sits).

It still leaves the question of ancillary car parks (often quite large), pub gardens and surplus floorspace to be debated: can they be used independently or do they form part of the planning unit, therefore, requiring permission for any change alongside the pub?

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Below the line

Some of the less attention-grabbing recommendations of the recent Select Committee Report on the Licensing Act 2003

The recent (April 2017) Report of the House of Lords Select Committee on the Licensing Act 2003 sets out a comprehensive suite of observations on the that Act, its changing form since its enactment, and some suggestions – a few genuinely radical - on how it might be improved. The headlines were captured by the big game: licensing committees and sub-committees should be abolished; licensing decisions should be taken by planning committees instead; appeals against those decisions should be given to planning inspectors rather than taken by magistrates; and the fabled 'separation' of the planning and licensing regimes should be done away with, each regime's decisions to be taken into account by its counterpart. No new licensing objectives were recommended for adoption – despite consideration of three potential new ones – and the last rites were read for EMROs and the Late Night Levy. Perhaps most intriguing was the recommendation that the Agent of Change principle – which says that a new use introduced into an area should be held responsible for any effects – and is highly topical, as more and more residential developments spring up alongside

long-established entertainment venues (see, for example, the ongoing litigation involving flats proposed to be built alongside the George pub in Stepney (Forster v SSCLG [2016] EWCA Civ 609) - should be incorporated into both the National Planning Policy Framework (NPPF) and the statutory s.182 Guidance for licensing.

Alongside these big beasts, less visible in the undergrowth, were a raft of other suggestions and recommendations that I daresay may attract fewer column inches in the e-flashes and scholarly articles reflecting on the Report. This short piece attempts to flush a few of them, blinking, out into the light.

Procedural

Skittering along under the hooves of the suggestion that licensing committees should be culled into extinction and their function handed to planning committees (which recommendation may be less of a big beast than its approaching footsteps suggest: as recognised by the Report, many local members already sit on both licensing and planning committees presently) comes the welcome suggestion that a minimum level of training must be undertaken by those who sit on committees making decisions under the Act. This is obviously sensible: there does seem to be a worrying inconsistency in the quality of those who sit presently, from the exemplary and obviously highly well-informed to the considerably – and just as obviously - less so. The Report does not express a view on how much training, or how often, but recommends that no councillor should be permitted to sit on a decision-making body until they have received training 'to the standard set out in the Guidance'. The devil here will be in the detail: my view is that annual training (at least) is essential, and without some way of testing engagement by attendees, defining a minimum 'standard' will be hard.

In terms of the conduct of hearings themselves, there is a much-needed acknowledgment of the potentially ludicrous (and highly unsatisfactory) impact of the practice in some authorities to strictly limit the time in which a party may make her case. Licensing hearings deal with a very broad range of matters – from the relatively innocuous removal of a condition for a small country pub through to a new application for a large nightclub, and all points between. The idea that a uniform 'maximum time' for a party to set out their case might be appropriate – in some authorities as little as three minutes is allowed - is obvious nonsense and can cause real injustice. In that light – albeit recognising that there does need to be some ability to run hearings efficiently – the recommendation that parties should be allowed 'sufficient time to make their representations' is obviously sensible. Time allowed should be on a bespoke, 'horses for courses' basis, the test being fairness, whilst retaining the entirely proper requirement – again rooted in fairness, rather than efficiency - that each side should have an equal maximum time. This does not mean that each side needs to take up that maximum allocation – just that they be entitled to if they need it.

One note of caution: aligning licensing and planning in this respect may point the other way. I have attended meetings of planning committees where a strict three minutes – the expiry of which is denoted by a loud buzzer – is observed; and a ticking countdown attracts attention away from what scant submissions can be managed in that time anyway. Planning committees don't get everything right.

Lastly in this category, the Report suggests the deletion of the oft-quoted paragraph 9.12 of the s.182 Guidance, which says (and I paraphrase) that evidence given by the Police should be taken seriously unless it can be shown not to be worthy of being taken seriously. Quite rightly the Report says that such a formulation applies to any evidence given by anybody – and no 'special approach' is or should be required for police evidence. If it's good, cogent and robust, it should be taken seriously and given weight. If it isn't, it shouldn't.

MUP

I have written a number of times (see, for example, the Journal of Licensing issues XV and XVII) about the evolving story of minimum unit pricing of alcohol - the idea (embraced by the Scottish Government) that a minimum price per unit of alcohol might deter those 'problem drinkers' who binge on cheap cider while leaving unaffected those of us who 'drink responsibly'. The Select Committee Report comes out strongly in favour of such a move, subject to the outcome of the impending Supreme Court case on the matter – due for hearing in late July. If the Scotch Whisky Association are successful before the Supreme Court, says the Report, Brexit may allow the UK government (whether that includes Scotland or not!) to implement MUP anyway.

Disabled Access and Facilities Statement

Hidden amongst the weeds of a failed attempt to include 'securing access for disabled persons' (or words to that effect) as a new licensing objective is the recommendation that every application for a premises licence must include a statement containing information about:

- provision made for access by disabled persons;
- facilities provided for use by disabled persons; and
- any other provision made in connection with disabled persons.

This is borrowed (as much in the Report is) from Scots law, and an as-yet unimplemented provision from the Criminal Justice and Licensing (Scotland) Act 2010. The Report points out that there is little or no risk in requiring such a statement to be included in an application and that it is largely a requirement of existing law (principally the Equality Act 2010). This seems to be a reasonable recommendation – and to some extent chimes with the theme of aligning licensing and planning, which regime boasts Design and Access Statements – and is to be welcomed. It is unlikely to be too heavy an administrative burden on applicants. After all, the law already requires consideration of such matters.

Are you drunk, sir?

Lastly, the Report makes a bold (but, I suggest, inherently futile) bid to encourage greater 'use' of s.141 of the Act – the provision that makes it illegal to serve someone who is drunk. The paragraphs leading up to this recommendation

give a good (and persuasive) explanation of why it isn't used more – no definition of 'drunk', time-lag between drinking and drunkenness, different manifestations of drunkenness, some medication or conditions 'imitating' effects of drunkenness, impracticality of test purchasing – and the Report then leaps, with no suggestion of how any of those are to be overcome, to a recommendation that enforcing s.141 needs to be 'taken more seriously'. That recommendation itself might be taken more seriously if it sought to engage with the issues, rather than simply listing them and then saying more should be done.

Josef Cannon

A fresh Vue on s.73 applications to vary planning conditions

Section 73 of the Town and Country Planning Act 1990 enables an applicant to apply to develop land without compliance with conditions attached to an extant previous planning permission. Under this section a local planning authority may amend or remove conditions but may not amend any other part of the permission. A successful s.73 application results in the grant of a new planning permission and therefore the original permission remains intact. A developer may then elect between them.

When determining a s.73 application, the LPA may impose conditions beyond those proposed in the application. However, the conditions imposed should only be ones which could have been imposed on the original grant. It has previously been held that the amendments permitted should not amount to a "*fundamental alteration*" of the proposal put forward in the original application.[1]

In R (Vue Entertainment Limited) v City of York Council [2017] EWHC 588 (Admin) the Claimant ('Vue') sought to an order quashing a planning permission granted pursuant to an application under s.73 of the TCPA 1990.

The claim concerned a planning permission for the redevelopment of Huntington Stadium outside York. The permission was originally granted in May 2015 and included permission for the erection of a "*multi-screen cinema*". The permission was conditioned so that it was to be built in accordance with plans which showed, so far as the cinema element of the proposal was concerned, 12 screens and a capacity of 2,000. The permission also provided for the erection of an 8,000 seat stadium, leisure centre, retail units, outdoor football pitches and other community facilities. Vue operate a cinema in York city centre and were concerned that the proposed development would have an adverse impact on its clientele and on the city centre.

The application under s.73 sought to amend the condition to increase the size of the cinema to 13 screens and a capacity of 2,400. This was said by Vue to be a fundamental change as the floorspace of the cinema would increase by 80%[2] and there would also be a 20% increase in the number of seats - and thus impermissible under s.73.

Collins J held that the amendment sought did not vary the terms of the permission. It was held that

[1] Arrowcraft [2001] PLCR 7 per Sullivan J at paragraph 33.

[2] This is the figure given in the judgment at paragraph 6.

there was nothing in the permission itself which limited either the size or amount of floorspace or the number of screens and thus the capacity of the multi-screen cinema. It was not a fundamental change to the permission and when considering whether there was such a fundamental change the permission had to be looked at as a whole. One had to consider whether any specific part of the permission, as granted, was sought to be varied by the change of condition.

The High Court distinguished the case of Arrowcraft which was said only to have observed that it was not open to an LPA to vary a condition pursuant to s.73, if the variation meant that the terms of the permission were changed by it. The change to the condition sought here did not require a change to the terms of the permission which referred only to a "*multi-screen cinema*". One therefore had to look at the precise terms of the grant which were not varied by the amended condition. The court contrasted the permitted change to conditions under consideration here with an application which might have sought to increase the stated capacity of the stadium and thus vary the description of the development.

Though the amendment sought was likely to affect Vue as a would-be-objector, there was proper notification, consultation and an ability to make representations. It was held that there was therefore no prejudice to the Claimants in the use of s.73. They had been notified of the application and were able to make representations on it.

Though the court did not go as far as deciding whether there could be a changed condition pursuant to s.73 that was so big that it fundamentally affected the permission, this decision gives clear support for use of s.73 in respect of changes to condition which go beyond "minor" amendments. It places a clear emphasis on preserving the precise terms of the grant. If an amendment to a condition can be made which keeps the description of the development intact it may well be appropriate to make such an application under s.73, even if the effect of the change will be significant.

Ben Du Feu

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