



News and Events from November 2019

Important Note for Planning Applications by John D. Campbell QC

A NOTE FROM A LEGAL CONTRIBUTOR

This case is important for planning applications which seek to substitute higher tip heights for consented lower tip heights, say for an increase from 100m to 150m. In [Finney V Welsh Ministers 2019 EWCA CIV 1868](#), the Court of Appeal considered an application under the English Town and Country Planning Act 1990, s. 73 to grant planning permission for development without complying with conditions subject to which a previous planning permission had been granted. Section 42 of the Scottish Act is in the same terms as s. 73. The facts are that in March 2016 a Council in Wales granted full planning permission "for the development proposed by you as shown..." There were 22 conditions. One of them provided that the development was to be carried out in accordance with a number of approved plans and documents. One was a figure described as "typical wind turbine elevation ...100 meters to blade tip."

The developer then applied under section 73 for the "removal or variation" of the height limiting condition. The application made it clear that the developer now sought an overall tip height of 125 m. The Council refused permission. On appeal to the Welsh Ministers, the Inspector granted the appeal. She granted planning permission for the installation of higher turbines without compliance with the original height limiting condition. The permission included reference to plans which showed turbines of 125 m in height.

The question in the appeal was whether on an application under section 73 it is open to the local planning authority or an Inspector (in Scotland, a Reporter) to alter the description of the development contained in the operative part of the planning permission.

The Court of Appeal held that the question was one of statutory interpretation. The purpose of an application to proceed without complying with conditions is to avoid committing a breach of planning control. The section 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. The underlying philosophy of section 73 is that it is only the conditions that matter.

On the face of it, this is an odd decision, since it may be thought to be artificial to look at conditions in the abstract, without considering that to which they would be applied., But that is what the Court says a decision maker must do, in the clearest possible terms. This cannot be good news for the growing number of applications to Councils which simply seek to raise the heights of wind turbines which are consented, but not yet built. It would seem that they are going to have to begin again, with new applications. This case may yet find its way to the Supreme Court.

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