Appeals against Conditions

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Responsibility of	**Subject Lead for Conditions**
Changes made October 2026: • Amended paragraph in Annex B dealing with appeals where the original permission has not been implemented and the standard time limit has elapsed.	

Key legislation and policy

Legislation	• Town and Country Planning Act 1990
National policy and guidance	• Planning Policy Wales Edition 10 • WG Circular 016/2014 'The Use of Planning Conditions for Development Management' • Development Management Manual – Section 13
Judgments	• Powergen UK Plc v Leicester City Council & Anor [2000] EWCA Civ 165 • Lawson Builders Limited v SSCLG [2015] EWCA Civ 122 • Avon Estates Ltd v Welsh Ministers [2011] EWCA Civ 553 • R (Thomas) v Merthyr Tydfil CBC [2017] • Finney v Welsh Ministers & Ors (Rev 1) [2019] EWCA Civ 1868 • Lambeth LBC V SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2019] UKSC 33
Other guidance	• Model Conditions - January 2019

1. S78(1)(a) of the 1990 Act provides the applicant with the right to appeal "*where an LPA refuse an application for planning permission or grant it subject to conditions*".

2. Welsh Government policy on the use of conditions, including the six tests, is found in WGC 016/2014 together with several model conditions in the Annex. These are supplemented by the model conditions.

Other relevant Manual chapters

- Approach to decision-making

- Conditions
- Prior Approvals

Key principles

3. The key principles when dealing with appeals against conditions are:

   - The appellant **should not be left in a worse position**.
   - No change to a condition or new condition should **come as a surprise**.
   - **Apply the tests** in WGC 016/2014.

The different types of appeals against conditions

4. The appeal will relate to an attempt to remove or modify a condition. The first important step is to **establish which type of appeal** you are dealing with and consequently the powers available to you in your determination.

The basic categories

5. Most appeals against conditions fall into 3 basic categories (types 1 to 3) but there are two other types which also arise. These are summarised below. Further detail in relation to each type is provided in **Annex B**.

Type	Appeal circumstances
Type 1 (s79)	Made within 6 months of an LPA's **grant** of planning permission subject to conditions.
Type 2 (s73)	Made within 6 months of an LPA **refusing or failing to determine** an application to carry out a development without complying with previously imposed condition(s).
Type 3 (s73A)	Made within 6 months of an LPA **refusing or failing to determine** a **retrospective** application to carry out development without complying with **breached** condition(s).
Type 4	Seeks to continue a use beyond the time given on a time-limited or temporary permission (or make it permanent).

The flow chart in Annex A should help you decide which type of appeal you are dealing with.

6. There is also a right of appeal under s78(1)(b) against the refusal to approve details required by a condition and further advice can be found within this chapter under the section "Refusal to approve details required by a condition (including reserved matters)"

7. Note that s73 and s78(1)(b) appeals can be made alongside each other and relate to the same condition, but ultimately there is no power under s73/s73A to approve details and no power under s78(1)(b) to vary or remove conditions.

The *Finney* Judgement

8. In the case of John Leslie Finney v Welsh Ministers & Carmarthenshire County Council, Energiekontor (Uk) Limited (otherwise known as “Finney”) the Courts established that an application under s73 may not be used to obtain a permission that would require a variation to the terms of the “operative” part of the planning permission, which would include, the description of the development for which the original permission was granted. This also applies to s73 appeals involving retrospective development, but not those made under s79.

9. In Finney, planning permission had been granted for “the installation of 2 wind turbines with a tip height of 100m”. The applicant submitted a s73 application to vary the plans condition which would allow for the tip height to be increased to 125m. The application was refused by the LPA, but an Inspector allowed it on appeal, amending the condition to refer to the new height and removing the wording in the operative part concerning the turbine height. This resulted in the grant of a new permission which did not accord with the original description of the development.

10. The appeal decision was subsequently quashed as there are no powers under s73 to grant a new planning permission with a different operative part to that contained in the original permission.

11. The same principle was reinforced by the Courts in the case of Fiske v Test Valley BC & Woodington Solar Limited. The original description of development for installation of a solar park included amongst other matters, a substation. Under the subsequent s73 application, the amended plans omitted the substation and the Judge concluded that in granting planning permission, it had created a conflict with the operative part of the permission which rendered the s73 permission unlawful. Furthermore, it was clarified that the operative part of the planning permission ‘may’ be considered to include plans referred to in that part of the permission, however this will depend on the specific wording of the permission.

12. Therefore, in terms of decision making, this means that the description of development in an existing planning permission cannot be amended at all.

    Only the conditions can be varied;

    • The description of development specified in the decision is that taken from the original planning permission and not from the subsequent application to vary any of the conditions;

    • If amending a condition would result in a conflict between it and the description of development / operative part of the development (there is no distinction between use and built development), then that particular amendment is beyond the powers under s73 and cannot be made (a fresh planning

application would be required).

13. If it is considered that the variation or removal of a condition could cause conflict with the original description of the development / operative part of the permission and it hasn't previously been raised by the parties, it is advisable to seek their views before coming to a decision. If it is concluded that a conflict has arisen, the appeal cannot be dealt with under s73 or s73A and the appeal should be dismissed. If you are dismissing the appeal on this ground, there is no need to consider any of the wider issues.

14. S73 / s73A appeals that could potentially be affected by Finney broadly fit into three categories:

i. Variation of the plans condition
ii. Variation or removal of a condition in relation to the 'use' of the land
iii. Variation or removal of a condition in relation to the 'occupancy' of the development

<u>Variation of the plans condition</u>

15. Examples could include, but are not limited to;

• Permission granted for: **single storey rear** extension

Does the amended plan indicate that it is still a single storey rear extension? There would be conflict if the amended plan included an additional storey or the extension covered another elevation other than the rear of the property;

• Permission granted for: conversion of existing building into **5no self-contained flats**

Are there still 5 flats within the amended plan? A change in the layout of the flats would not conflict with the original description of the development but there would be conflict if the number of units had changed.

16. In 2017, York City Council granted planning permission for "*The demolition of existing structures and the erection of an 8,000 seat community stadium, leisure centre, multi-screen cinema, retail units, outdoor football pitches, community facilities and other ancillary uses, together with associated vehicular access, car parking, public realm, and hard and soft landscaping*."

17. The applicant submitted a s73 application to amend a plan to allow 13 screens with a capacity of 2,400 for the multiscreen cinema, an increase from 12 screens and a capacity of 2,000 as granted in the original permission. The council allowed the application and granted a new permission which was subsequently Judicially Reviewed as a result of a challenge submitted by a third party.

18. The Judge held that the change to the condition did not fundamentally alter the permission itself, which did not mention or define the size of the multiscreen

cinema.

19. However, had the applicant sought to change the capacity of the community stadium, there would have been conflict with the description of the original development which specified 8,000 seats, meaning it would go beyond the scope of s73.

Variation or removal of a condition in relation to the 'use' of the land

20. Finney may also be applicable in cases where the original description of the development specifies the use of land and where that use of land is also secured by conditions. For example:

    Original description of development: "The use of the land for the stationing of **two caravans** for **residential** purposes".

    Condition: "No more than two caravans, as defined in the Caravan Sites and Control of Development Act 1960 and the Caravans Act 1968 as amended shall be stationed on the site at any time".

21. If this condition was varied (to increase / decrease the number of caravans allowed on the land), it would create conflict with the original description of the development which specifically stated that only two caravans could be stationed on the land;

    Variation or removal of a condition in relation to the 'occupancy' of the development

22. Cases involving occupancy conditions should however be approached in a different manner as a result of long-established case law. Examples could include:

    • Agricultural workers dwellings

    • Dwellings occupied by Residential Home Owners or Managers

    • Dwellings occupied by the Manager of a Public House

23. In Wilson v West Sussex CC [1963] 2 W.L.R. 669, a permission for an "agricultural cottage" (with no condition restricting occupancy) was found to mean a cottage intended to be occupied by someone engaged in agriculture. The Judge considered that only the first occupation of the dwelling would have to be by an agricultural worker in order for the dwelling to be used for the purpose stated in the planning permission. In this particular case, the situation for subsequent occupiers was not determined.

24. However, in East Suffolk CC v Secretary of State for the Environment [1973] 1 WLUK 162 consideration was given to whether the restriction (again, with no condition restricting occupancy) would apply to subsequent occupiers where the condition was "for the purpose of dwelling accommodation for an

agricultural worker".

25. It was held that subsequent occupation by someone not employed in agriculture is not a change of use and therefore cannot lead to enforcement action; in the absence of a condition restricting occupation, it would not be a breach of planning control for the purposes of s174A of The Town & Country Planning Act 1990.

26. This means that the removal of a condition restricting occupancy is unlikely to create a Finney conflict where the operative part of the planning permission refers to a specific type of occupation. This is because the courts have indicated that, once the dwelling has been built, a statement of the purpose of the dwelling is not sufficient to restrict occupancy.

27. Although this case law refers to agricultural occupancy, based on the principles established in Wilson and East Suffolk it could be applied to all occupancy conditions where a dwelling had been granted permission with the intention of occupancy by a particular kind of person.

28. Therefore, the variation or removal of occupancy conditions should not be rejected as a preliminary point based on a conflict with the original description of development as set out in Finney. Inspectors should determine appeals of this kind in the usual way – see Reid case below.

<u>Freddie Reid v SSLUHC Judgement</u>

29. While 'Finney' (and 'Arrowcroft') concerned the adding of conditions, the case of Freddie Reid v SSLUHC related to the removal of conditions, in particular a condition that had restricted the permitted use of the land to holiday accommodation and no other use within Class C3. The description of development was '34 self-catering holiday units'. The Judge held that *"In adding conditions, a decision-maker is not permitted to intrude upon the operative part of the permission. It is difficult to see how the removal of a condition could give rise to such an intrusion."*

30. When a condition is removed, the operative part of the permission remains intact, albeit in an unconditioned way. In the present case, the removal of the relevant conditions would have had no effect on the description". This is because the removal of the condition does not create a conflict with the description of the development.

31. The Court held the Inspector erred in law confining her consideration to whether removing the condition altered the description of development. Under such circumstances, Inspectors should exercise their planning judgement with regard to all other material considerations to determine whether permission can be granted for the development as set out in the description without the condition attached.

32. Inspectors should be mindful that “what can be done with the land may not be exhaustively written into the description of the development but may arise by the operation of law”.

Minor material amendments and non-material amendments

33. A **minor material amendment** is one whose scale and nature results in a development which is not substantially different from that which has been approved. A s73 application may achieve this by amending the standard plans condition required by s71ZA (2) of the Act, but only where a condition listing the approved plans exists[1].

34. The Development Management Manual provides advice on making a **non-material amendment** to a planning permission under s96A of the 1990 Act, but this application is made to the LPA and there is no right of appeal.

Cases that are not really condition appeals (e.g. plots on new estates)

35. Some appeals may relate to part of a site which was the subject of a wider planning permission, e.g. on a **residential estate where a condition was used to remove PD rights** relating to front walls/fences. Householders wishing to carry out development precluded by a condition may apply to have the condition removed for their plot. However, this may not achieve what they want as the works may still require planning permission.

36. As these types of condition are generally intended to bring development under the LPA’s control rather than prohibit it, provided the details are before you, it is usually best to treat the application as if it were seeking planning permission for the appellant’s proposed development, rather than attempt to modify the condition in relation to one plot. You will need to explain this as a procedural matter and if it is likely to come as a surprise or prejudice the interests of the parties their views should be sought.

Prior approvals

37. Decision-makers have sometimes imposed conditions on prior approval cases that are not deemed conditions as per the GPDO. Although the legality of doing so has not been tested by the Courts, the GPDO does not provide any authority to do this. Where conditions have been imposed which go beyond those deemed in the GPDO they should be removed.

Refusal to approve details required by condition (incl. reserved matters)

38. These are made under s78(1)(b) against an LPA’s refusal to approve details required by a condition. Although they often concern reserved matters following a grant of outline permission, these appeals may relate to any condition which requires the submission and approval of details. In practice the appeal is not

[1] Development Management Manual section 13.3.4

against the condition but seeks approval of the submitted details. You may allow or dismiss the appeal, but you cannot reconsider the permission or the necessity for the condition. The appeal is made under s78(1)(b) – "the Right to appeal against planning decisions and failure to take such decisions. (1) Where a local planning authority - (b) refuse an application for any consent, agreement or approval of that authority required by a condition imposed on a grant of planning permission or grant it subject to conditions …"

39. Case law has established that there is nothing to prevent a decision being made on an application for the approval of reserved matters or the discharge of a condition if the permission expires during the decision-making process, so long as the application has been validly made before the expiry date of the permission.

40. Additionally, it may be argued that a condition is not capable of being discharged, for example, because development has been implemented in breach of a condition precedent. Such matters should not be addressed in this type of appeal which will only have regard to whether the condition should be discharged based on its merits. Any matters of lawfulness are reserved for the LDC process, and you may want to make this point in a preliminary paragraph. For example:

    'It is argued that development commenced before details required by pre commencement condition/s were submitted for approval and, therefore, the development that has taken place does not have the benefit of planning permission/is unlawful. That is outside the remit of this appeal. My decision in this case does not include anything that would prejudice the Council taking enforcement action of the consideration of an application for a LDC."

Assessing a condition's validity

41. The courts have laid down **legal principles** for the validity of a condition; namely that it must fulfil a planning purpose, should fairly and reasonably relate to the development, and should not be Wednesbury unreasonable[2].

42. WGC 016/2014 states that conditions should be necessary, precise and enforceable, ensuring that they are effective and do not make unjustifiable demands of applicants. It sets out **six tests for conditions**. You must assess whether a disputed condition (and possibly also other conditions attached to the existing/original permission) satisfies **all six** of these tests. **If not, you should not impose it**.

43. In assessing the validity of a condition you should consider the following:

    - Is the condition **severable**: i.e. does it meet the test of **necessity** – would its removal cause unacceptable harm?

[2] Newbury DC v SSE [1981] AC 578; see also the Manual chapter on 'Conditions'.

- Having regard to the intended purpose of the condition, could any defects be resolved by **redrafting** it?
- Can any **essential control** be secured by non-planning powers or via an executed s106?

44. A flowchart summarising the assessment process and possible outcomes is included at **Annex A**.

Writing the decision

Main issues and introductory paragraphs

45. Phrase the main issue **widely** to cover all matters to be addressed, e.g.:

    - Whether the condition is necessary [and reasonable] having regard to [e.g. the safety of pedestrians, cyclists, drivers].
    - The main issue[s] [is/are] the effect that [removing/varying] the condition would have on [e.g. the safety of pedestrians, cyclists, drivers; the living conditions of neighbours; the character and appearance of the area].
    - The main issue is the effect that varying the opening hours would have on [e.g. the living conditions of neighbouring residents].

46. It can be useful to **briefly explain which conditions are in dispute** and what the appellant is seeking. Sometimes this can lead into the main issue under the heading 'Background and main issue' or similar. For example:

    A hot food takeaway is now trading at the appeal site. The appellant wishes to extend the opening hours from those originally imposed to between 0600 and 2300 hours every day of the week. The main issue is the effect that these proposed opening times would have on the living conditions of neighbouring residents.

    Planning permission has been granted for four dwellings. The appeal seeks permission to carry out the development without complying with condition [No]. This requires the provision of a footway along []. The main issue is whether the footway is necessary to ensure the safety of road users.

47. The issue (i.e. the alleged harm if the condition was varied/removed) should be clear from the LPA's statement (and the reason for refusal in s73/s73A cases). The LPA's concern will usually relate to the reason given for the condition in the permission, but it may be argued that the condition is now needed for another/additional reasons. Consideration of the appeal must be based on current circumstances and is not confined to the original reasons given for imposing the condition. If the LPA argues that there are now other or different reasons you should explain this within the reasoning or in a 'Background' section.

Reasoning and conclusions

48. Your reasoning and conclusions should reflect the following considerations:

- Is the condition **necessary**? What would be the effect of its removal or variation – would significant harm result?
- Does it still serve a **useful purpose** having regard to the development plan and material considerations?
- If the condition is necessary, does it meet the **other tests**? If not, could it be **amended** so that it would comply?
- Have you concluded clearly against the relevant **development plan policies, SPG and national policy**?
- Only refer to **non-disputed conditions** if you have significant concerns about them.

49. You should ensure that **the parties understand the outcome**. The use of the term 'allow' where a disputed condition is retained but in a modified (possibly more onerous) form can be misleading; for example where it would not provide an appellant with their desired outcome or where several conditions are disputed but you have not modified/varied all of these. You may therefore need to explain the practical implications of your decision.

Common issues

Multiple permissions, applications and appeals

50. Sometimes there will be a long history of permissions, s73 applications and appeals against conditions on a site. If it is unclear which condition from which permission is in dispute, seek clarification from the parties and explain your approach.

Previous permissions allowed by the LPA under s73

51. Where an LPA has previously allowed a s73 application you may find that the decision notice purports to amend the *original* decision. However in reality a *second* permission will have been created (as the only power to vary or remove a condition on an *existing* permission lies with s79). Be clear which permission the appeal relates to and explain your approach. Whatever the outcome of the appeal before you, the original permission remains extant and unaltered, along with the conditions attached to it.

52. In such circumstances the question of which conditions imposed on the *original* permission have been transferred to the *second* permission will be arguable and likely to depend on an interpretation of the precise wording of the decision notice[3]. In *Lambeth*[4] the Supreme Court indicated that conditions could remain valid and binding, even when not expressly repeated in a subsequent s73 permission, if there was nothing inconsistent to their continued operation (see paragraph 38 of the judgment).

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[3] See discussion in R (oao) Reid and Reid Motors v SSTLR & Mid-Bedfordshire DC [2002] EWHC 2174 (Admin)

[4] Lambeth LBC V SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2019] UKSC 33

53. If you are allowing the appeal you would usually use the description of development given in the *original* permission (e.g. 'the erection of 10 houses'), but if the LPA's s73 approval purports to vary the permission the description may refer only to the condition to be varied/deleted. It will normally be possible to amend the description to that of the *original* permission but if there is any doubt seek clarification from the parties.

Creation of a new planning permission and effect on planning obligations

54. As above, although commonly referred to as a variation, the effect of a successful s73 application will actually be to create a new planning permission. The applicant will then have the choice of which of the planning permissions to implement.

55. This is particularly important if the original permission was subject to a planning obligation. In that case, a new planning obligation must be submitted to cover the new permission, or the original planning obligation must be varied to make it also apply to the new planning permission. If this is not done, the applicant would be able to choose to implement the new planning permission free from any planning obligations which were attached to the original planning permission.

56. See also Appendix 1: Casework Scenarios of the Planning Obligations chapter of the ITM for more details as to how planning obligations can be varied by a deed of variation to refer to the planning permission created by a successful s73 application.

57. If a new obligation or correctly executed deed of variation has been submitted with the appeal, it will be a material consideration. This is irrespective of whether it is subject to the same or differing terms of any obligation subject to the original application. The weight afforded will be matter of planning judgement.

Imposing additional conditions

58. In granting permission under s73, new conditions may be imposed provided that they do not materially alter the development that was subject to the original permission and are conditions that could have been imposed on that original permission. This advice is consistent with 'Finney'. Additional conditions should not be imposed though without first seeking the views of the parties. Also, because the original permission ensues, it is likely to be unreasonable to impose more onerous conditions on the new permission.

Appeals which would significantly change the proposal and/or would require changing the description of development

59. WGC 016/2014 states that conditions that would make a development substantially different from that set out in the application should not be used. Whether a modification would amount to substantial difference will depend on the circumstances of the case, but a useful test is whether it would so change

the proposal that those interested in it would wish to comment on the modification. By extension there may also be cases where removing a condition would significantly change the proposal.

60. As set out above, in *Finney*[5] the Court of Appeal ruled that s73 cannot be used to amend the 'operative part' of a planning permission (i.e. the description of development), as a decision-maker's power under s73(2) is limited only to removing/varying a previously imposed condition. Thus if amending a condition would create a conflict between it and the description of development, it would be beyond the powers of s73 and a fresh planning application would be required.

61. If amending the condition would result in a material change to the proposal in this or any other way, you may need to dismiss the appeal for that reason without addressing the substantive issues. However, before doing so you should seek the views of the main parties and provide the appellant with an opportunity to withdraw the appeal, as they may instead wish to apply to the LPA for planning permission or, under s96A, seek a non-material amendment to the description of development.

S73 appeals against conditions where development has been carried out

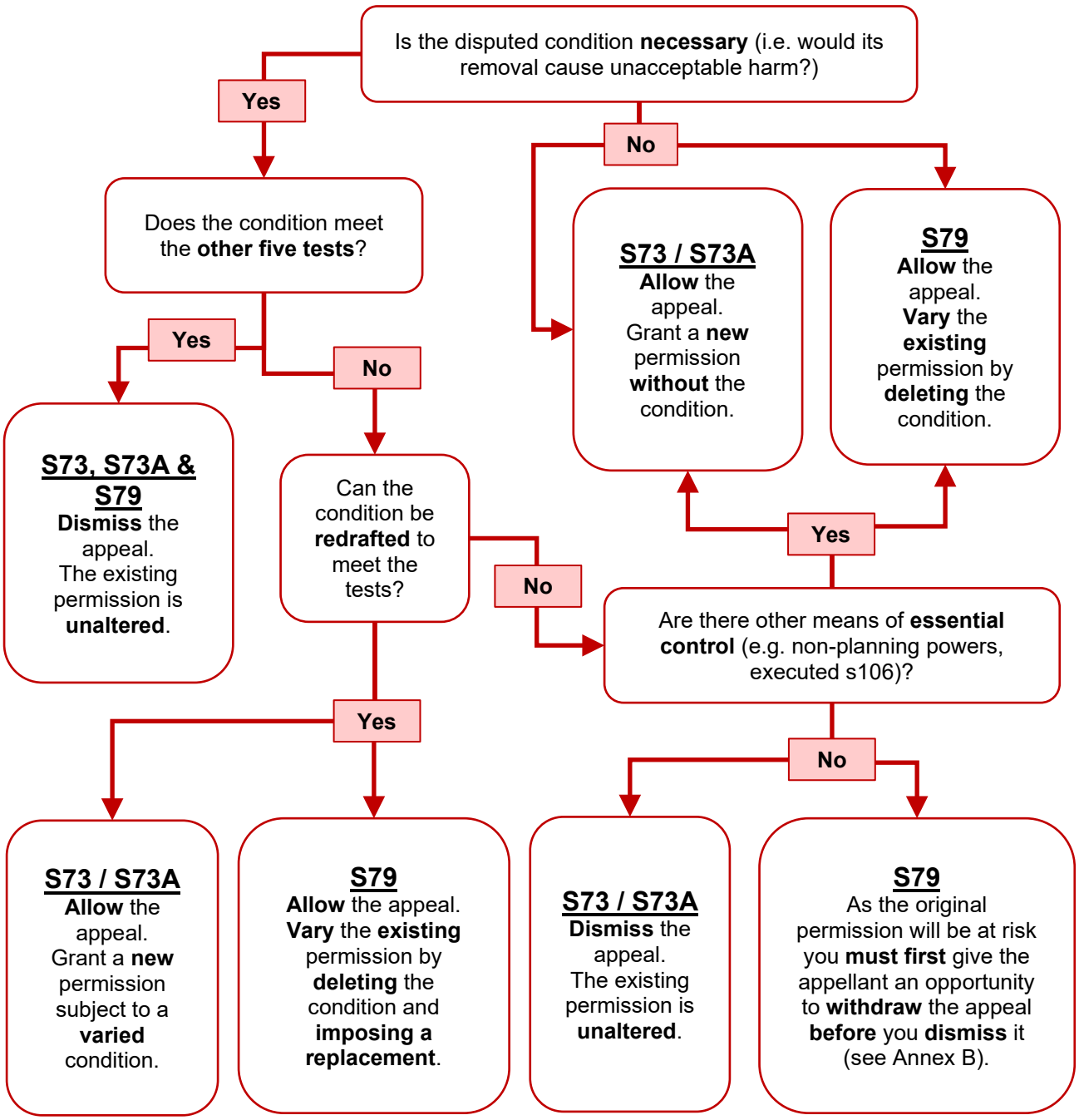
62. In *Lawson*[6] the Court of Appeal confirmed that there is fluidity between sections 73 and 73A. Depending on the nature and stage of the development, a decision-maker considering a **s73** application may grant retrospective permission for development already carried out under **s73A**, and in addition may also impose conditions under **s70**.

63. The circumstances in *Lawson* were that the development had been carried out in accordance with the existing permission, albeit in breach of a (strictly irremediable) condition precedent. The Court found it implicit that the Inspector had been using the power given by s73A to grant permission retrospectively and that this caused no prejudice. Whilst not indicated by the Court, use of this power might not be appropriate where the development which has been carried out is materially different from that previously permitted. In such a case the s73A power may cause prejudice.

[5] Finney v Welsh Ministers & Ors (Rev 1) [2019] EWCA Civ 1868
[6] Lawson Builders Ltd v SSCLG [2015] EWCA Civ122

Annex A

Flowchart: Assessment of conditions and possible outcomes



Annex B

Type 1 (s79): Following an LPA's grant of permission

Although the right of appeal is under s78 of the 1990 Act, we refer to them as s79 in order to distinguish them from other appeals against conditions which follow a refusal by an LPA. The term s79 is not used in the decision template for this type of appeal (which is 'PLG conds (1) variation of existing (s79(1))').

The appeal is made directly against condition(s) imposed on a permission and seeks their removal or modification.

The appeal must be made by the original applicant within 6 months[7] of the grant of planning permission. It makes no difference to your consideration if the permission has been implemented or if the disputed condition is not being complied with.

S93(3) of the 1990 Act provides that where conditions have been imposed to comply with s91 or s92 (time limit and reserved matters conditions), or are deemed to be imposed by those sections, that does not prevent them being the subject of an appeal under s78. **Such an appeal will be a 'Type 1' case**.

S79(1) is a **broad power** and allows an Inspector to consider the whole planning application as if it had been made to them in the first instance thus it should be noted that the Finney principles are not applicable with S79 appeals. In light of the above, in such cases the Inspector also has the powers to amend the description of the development should they consider it necessary. Additionally, you may also **reverse or modify any part of the LPA's decision** (whether the appeal relates to that part or not), e.g. by refusing permission, amending/deleting existing conditions, or imposing new ones.

As s79 appeals **put the original planning permission at risk**, the case officer will advise the appellant of this at an early stage and give them an opportunity to withdraw the appeal. After assessing the disputed condition's validity (see Annex A), if you conclude that the original permission would result in material harm that could not be mitigated by existing or redrafted conditions, and should therefore not have been granted in the first place, you must write to the appellant, outline your concerns and provide them with an opportunity to comment and **withdraw the appeal**. If they choose not to withdraw the appeal, you should proceed with your determination[8].

It is **not normally necessary to look beyond disputed condition(s)**, but under s79 you have the power to vary a non-disputed condition or add a new one where significant harm would otherwise result. If you are satisfied that a non-disputed condition should be deleted or modified, or a further condition imposed, and this would come as a surprise to the parties, you will need to go back to them setting out your concerns and the **possible wording of any revised or additional condition**, giving them an opportunity to comment.

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[7] 12 weeks for Householder/Commercial Appeals Service (HAS/ CAS)
[8] As in Appeal Ref: 3194278

If you decide to vary the original permission in some way, the appeal will be allowed even though this may not give the appellant what they want (e.g. you may have imposed a more onerous or additional condition). You should therefore explain the practical effect of your decision in the reasoning and conclusions.

Type 2 (s73): Following an LPA's refusal or failure to determine

S73 allows for an application to be made to an LPA to "*develop land without compliance with conditions previously attached*". The decision templates for type 2 cases are 'PLG conds (2) variation (s73) – [refusal/failure]'.

S73(2) requires that the LPA shall consider "*only the question of the conditions subject to which planning permission should be granted*".

S73(2)(a) allows the LPA to grant permission "*subject to conditions differing from those subject to which the previous planning permission was granted, or that it should be granted unconditionally*".

S73(2)(b) states that "*if they decide that permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application*".

The appeal will either be against an LPA's refusal of an application to carry out development without complying with a condition which has been imposed on an existing permission, or its failure to determine such an application. The appeal does not have to be made by the original applicant, but it must be made within 6 months[9] of the LPA's refusal to remove/vary the condition (or within 6 months of the expiry period for determination in failure cases).

There are usually **two decision notices**, one granting the original permission and a more recent one relating to the LPA's refusal to remove/vary condition(s).

If the **original permission has been implemented** there is no time limit on when the application can be made to the LPA to vary/remove the condition. However, if the permission has been implemented and the **disputed condition has been breached** it may be necessary to deal with the appeal as a s73A case.

If the original permission **has not been implemented** the application must be made before the time limit has elapsed. If the **time limit has passed** before the application was made there will be no extant permission, so s73 does not apply[10] and it is not possible to remove/vary a condition. This includes where the disputed condition relates to the time limit itself. In such cases the appeal would be invalid, and the appellant should be advised why this is the case. They may then have to make a new application to the LPA. However, where the LPA accepted an application and the permission has lapsed during the application or appeal process, the Courts have

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[9] 12 weeks for Householder/Commercial Appeals Service (HAS/ CAS)

[10] S73(4): "*This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun & that time has expired without the development having been begun.*"

held that there is no subsequent loss of jurisdiction to consider the matter[11].This differs from England were there is an expressed limitation in Section 73(5) that is not applicable in Wales.

The appeal is made in relation to the disputed condition(s) and is not a complete reconsideration of the application. Nonetheless, s73 does provide you with the power to attach new conditions, or to not attach conditions which were originally imposed, or to attach modified versions of them. In most cases you will **not need to look beyond the disputed condition**, but if you find that this is necessary, it is essential that any new conditions imposed **would not materially alter** the originally permitted development and are conditions which **could have been imposed** at the time permission was originally granted. Furthermore, if this would come as a surprise to the parties you may need to give them the opportunity to comment.

If the **appeal is allowed a new permission is created** and the original permission remains unaltered (along with the conditions attached to it)[12]. The original permission is therefore not at risk and the appellant can choose which of the two permissions to implement.

When allowing an appeal, conditions imposed on the original permission will not automatically be carried over. You must therefore consider **whether each condition attached to the original permission should be imposed on the new permission**[13] (as per the assessment process in Annex A). Where a condition requires the approval of the LPA, and that approval has already been obtained, the condition should be redrafted. The new permission will need to refer to the approved details or list of additional plans, drawings or reports that were submitted to approve such conditions and require the development to be undertaken in accordance with these details. If you find it necessary to delete or modify any original conditions, you should consider whether this would **come as a surprise** to the main parties and, if so, take appropriate action.

As planning permissions in Wales are live documents **it should be clear which conditions have been discharged**. If not, you should ask the LPA for a copy of the up-to-date live permission. In the absence of sufficient evidence to make a reasoned decision on each of the uncontested conditions they should **all** be imposed on the new permission. The question of whether the conditions have been discharged would then be a matter between the appellant and the LPA. The reason for taking this course of action should be made clear in the decision; e.g.:

"*The Development Management Manual clearly states that decision notices for the grant of planning permission under section 73 should repeat the relevant conditions (which are considered necessary) from the original decision notice. As I have no information before me about the status of the other condition(s) imposed on the original decision notice, I shall impose all those which I consider remain relevant. In the event that some have been discharged, that is a matter which can be addressed by the parties*."

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[11] Powergen UK Plc v Leicester City Council & Anor [2000] EWCA Civ 165 (19th May 2000) paragraph 30.
[12] As confirmed in the Development Management Manual Section 13.3.13
[13] Development Management Manual section 13.3.18

[Sentence deleted]. The Development Management Manual indicates that unless the decision-maker applies a new timescale to a planning permission granted in respect of a s73 application, the second permission **will last only for the unexpired period** of the original permission (see DM Manual section 13.3.16).

Type 3 (s73A): Retrospective; condition breached

Section 73A(1) and s73A(2)(c) provide that "*On an application made to a LPA, the planning permission which may be granted includes planning permission for development carried out before the date of the application […] without complying with some condition subject to which planning permission was granted*".

The appeal follows the refusal of an application by the LPA to retain the development without complying with the disputed condition(s). The templates for this type of case are 'PLG conds (3) breach (s73A(2)(c)) – [refusal/failure]'.

If the condition was breached **before** the application was made the appeal should be dealt with under s73A. However, if the breach occurred **after** the planning application was made, the appeal should be dealt with under s73.

The practical differences between s73 and s73A appeals are limited and the advice given for s73 appeals generally applies (including in relation to non-disputed conditions). However, you should pay attention to **the tense** used in your decision and address the question of whether failure to comply with the condition has resulted in unacceptable harm or would do over time.

Type 4: Extension to a time-limited or temporary permission

The appeal relates to development for which planning permission has been granted subject to a condition that the use shall cease (or buildings/works be removed) within a given period and consent is sought to **extend the permission or make it permanent** under s72(1)(b). The decision templates for this case type are 'PLG conds (4) ex temp pp (s73A(2)(c)) – [refusal/failure]'.

There are 3 ways in which the appellant may seek to achieve this. You should make it clear in your decision how the appeal has been dealt with:

- By seeking to remove/vary condition(s) after a grant of permission (**s79**),
- By appealing an LPA's refusal or failure to determine an application to vary/remove condition(s) **before**[14] the expiry of the temporary period (**s73**), or
- By seeking retrospective permission for a use to continue or buildings to remain after the specified temporary period specified in the condition has expired, there will be 'no development' because although the development already exists, it will

[14] *Lawson Builders Ltd v SSCLG [2015]* and *R (Thomas) v Merthyr Tydfil CBC [2017]* emphasise that the 'conversion' from s73 to s73A of a temporary permission which has already expired at the time of the appeal decision is beyond the powers of an Inspector. This applies even if the appeal were lodged before the expiry of the temporary permission.

be in breach of a time limited condition (**s73A(2)(b)**). However, s73A(2)(b) may be used to grant planning permission having retrospective effect as it specifically includes a power to grant retrospective planning permission where there is no development.

While there is nothing in legislation preventing a s73 application being made under these circumstances, unlike with other types of conditions where retrospective consent is sought for a change to them, the appropriate application is likely to be a "full" application made under s.62 TCPA for development of the site. This is because the development (buildings / use of site) is no longer authorised following the expiry of the time limit condition and it is likely that full consideration of the planning merits is required to determine whether the development (retention of buildings / continuation of use) should be permitted[15].

S73A(3)(b) permits an application to be backdated so as "*to have effect from – (b) if it was carried out in accordance with the planning permission granted for a limited period, the end of that period*." If such an appeal is allowed a **new** permission is granted as the original permission will have expired. Consequently, conditions attached to the original permission **no longer apply, save for the time limit and restoration condition(s) which will continue to exist until the time limit for enforcement has expired [16].** Therefore you must impose any necessary new conditions if you grant a new permission.

[15] Although this matter has not been specifically considered by the Court, support for this position is derived from the commentary of the Court in the case of Wilkinson v Rossendale BC [2002] EWHC 1204 (Admin) where the Court considered that the grant of permission without compliance with a personal occupancy condition required full consideration of the planning merits.

[16] Avon Estates Ltd v Welsh Ministers [2011] EWCA Civ 553 – this case discussed the status of a temporary permission following the expiry of the time limited condition. The Court decided that at the end of the period specified within the time limited condition, the permission no longer authorised the development and the conditions attached to it could no longer bind the land or be enforced, except for the time limit and restoration condition(s) which survive until the time for enforcement action has passed.