

**IN THE MATTER OF REDEVELOPMENT OF THE NURALITE SITE
AND IN THE MATTER OF NON-MATERIAL AMENDMENT**

OPINION

Introduction

1. I am instructed by Ashfords LLP on behalf of LEJ Properties (“LEJ”).
2. I am asked to advise on three issues relating to an application by LEJ, pursuant to section 96A of the Town and Country Planning Act 1990, for a non-material amendment (“NMA”) of planning permission 20190290 dated 23 December 2021 (“the Planning Permission”).

The scope of NMAs

3. Insofar as is relevant to the current application, section 96A of the 1990 Act provides as follows:

“(1) A local planning authority may make a change to any planning permission...relating to land in their area if they are satisfied that the change is not material.

- (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change...on the planning permission...as originally granted.
- (3) The power conferred by subsection (1) includes power to make a change to a planning permission –
...
(b) to...alter existing conditions.”

4. The limited section 96A case-law does at least illustrate that the power afforded by it may be lawfully exercised in a wide range of circumstances.
Thus:

- (i) In R (Daniel) v East Devon DC [2013] EWHC 4114 (Admin), a case of mine, section 96A was lawfully used to add a condition requiring the development to be carried out in accordance with a series of listed plans. An application under section 73 of the 1990 Act was then granted to vary the approved plans.
- (ii) In R (Corrie) v Suffolk County Council [2015] Env LR 5, section 96A was lawfully used to vary the figure of hazardous waste which could be accepted at the site in question from 5,000 tonnes per 12 months to 800 tonnes per 12 months.
- (iii) In R (Fulford Parish Council) v City of York Council [2020] PTSR 152, the Court of Appeal confirmed that section 96A may be used to make non-material changes to conditional approvals of reserved matters.

- (iv) In R (Swire) v Canterbury City Council [2022] JPL 1026, the local planning authority lawfully granted a section 96A application whereby a condition preventing a reserved matters approval application until design code parameters had been approved was varied such that the reserved matters application could be submitted before approval of the design code parameters.
5. I have also been made aware of the 2020 decision relating to land off Hopcott Road in Minehead. In that case, planning permission was originally granted subject to a range of pre-commencement conditions. A section 96A application was then granted. This varied the pre-commencement conditions to make it clear by reference to a cited plan that a very small element of the approved development, namely part-construction of a retaining wall, was outside the scope of the pre-commencement conditions and could be undertaken to begin the development before the pre-commencement conditions were discharged. I would mention that the applicant was the Homes and Communities Agency, now known as Homes England.
6. As recorded above, section 96A(1) in combination with (3) affords the Council power to make a change to the Planning Permission by altering its existing conditions. LEJ's section 96A application seeks to do just that. It adopts the Minehead precedent, so there is nothing novel about it.

7. The Council must be satisfied that the proposed change is not material. In deciding whether it is material, it must have regard to the effect of the proposed change on the Planning Permission. As for this, it seems to me that the proposed change has no effect on the Planning Permission. All it seeks to do is enable a very small element of the approved development to be begun, in advance of discharge of the pre-commencement conditions, consistent with the Minehead precedent. It also seems to me that the proposed change is even more immaterial than the lawful section 96A NMAs granted in Corrie and Swire.

Determining section 96A applications

8. Section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply to section 96A applications, and indeed there is no express duty to have regard to the development plan.
9. Section 96A is not an opportunity to revisit the planning merits of the development the subject of the original planning permission. If the local planning authority decides that the proposed change is non-material, it is not strictly bound to grant the application, but, in the words of one of the leading textbooks, “it is difficult to see how a change which is immaterial could be unacceptable in planning terms.”¹

¹ *Planning Permission*, Bloomsbury Professional Ltd, at 15.19.

Reference to Planning Committee

10. The Council's Constitution has a provision whereby a member may require the reference of any undetermined application to the Planning Committee.
11. On its face, this power is unfettered. But, by implication, it cannot be exercised unreasonably, arbitrarily or capriciously. In my opinion, any member seeking to exercise this power ought to provide a good and written planning reason for doing so.
12. I note that the Council's Constitution was adopted in 2002, years before section 96A was introduced in 2009. Whilst the Constitution was updated and re-issued in 2020, I rather suspect that the members' power to refer an application to Planning Committee is directed at applications for planning permission. However, a section 96A application is not an application for planning permission.
13. I would also mention that the planning application regulations as to publicity and statutory consultation do not apply to section 96A applications. Any purported member referral of LEJ's section 96A application to Planning Committee in order to engage the public or statutory consultees would thus be inconsistent with the section 96A legal framework.

14. In the light of all the above, and if the Council has determined that the proposed change is not material, I cannot discern any reasonable planning reason for a member referral of LEJ's application to Planning Committee.

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