TOWN AND COUNTRY PLANNING ACT 1990,

SECTION 78

APPEAL BY MR PATRICK GAVIN AGAINST THE DECISION OF KETTERING BOROUGH COUNCIL FOR THE NON-DETERMINATION OF a S73 APPLICATION REFERENCE KET/2020/0373 FOR THE REMOVAL OF CONDITION 1, SCHEDULE A, RELATING TO TEMPORARY PLANNING PERMISSION KET/2015/0500

AT LAND SITUATED AT PLOT 24B, GREENFIELDS, BRAYBROOKE ROAD, BRAYBROOKE, MARKET HARBOROUGH IN THE COUNTY OF NORTHAMPTONSHIRE

STATEMENT OF CASE
PREPARED ON BEHALF OF KETTERING BOROUGH COUNCIL
BY THE LOCAL PLANNING AUTHORITY

9th MARCH 2021

Planning Inspectorate Reference: APP/L2820/C/20/3262332

Local Planning Authority Reference: ENFO/2020/00013

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A. Introduction and Background

1. This Statement of Case ('Statement') has been prepared in response to an appeal submitted by Mr Patrick Gavin ('Appellant') against the refusal of Kettering Borough Council ('Council') to validate an application made under section 73 of the Town and Country Planning Act 1990 to vary a condition attached to a planning permission. The Planning Inspectorate has referred to the Council's decision as a "Non-Determination".

2. Save where indicated otherwise, all references to sections and schedules refer to sections and schedules of the Town and Country Planning Act 1990.

3. The relevant site known as Plot 24b ('the Site) Greenfields off Braybrooke Road, Braybrooke, Market Harborough LE16 9LX. Greenfields is a block of about 15 Ha (37 acres) of agricultural land in the open countryside. Much of the Greenfields has been sub-divided up as individual gypsy and traveller plots. The Site is one of those plots and is located in the northern half of Greenfields.

4. On 13 February 2017 the inspector determining appeal APP/L2820/W/15/3139293 upheld the Appellant's appeal against the Council's decision to refuse planning permission (reference KET/2015/0500), and granted planning permission for '*the change of use of land as a residential caravan site for one gypsy family with two caravans, including the laying of hardstanding and erection of amenity building*'. Condition 1 of the permission limited the permission ('Temporary Permission') to a period of 3 years, expiring on 13 February 2020 ('Expiry Date'):

> "*The development hereby permitted shall be for a limited period being the period of 3 years from the date of this decision. At the end of this period the use hereby permitted shall cease, all caravans, buildings, structures, materials and equipment brought on to, or erected on the land, or works undertaken to it in connection with the use shall be removed, and the land restored to its condition before the development took place in accordance with a restoration scheme submitted to the local planning authority within 28 days of the date of this decision and subsequently approved in writing*." [**Appendix A**].

5. On 19 January 2018 Condition 1 was discharged in respect of site restoration at the end of the temporary period. Conditions 7, 8 and 9 were also discharged. [**Appendix B**].

6. On 4 February 2020 a letter was sent by recorded delivery to the appellant advising of the impending Expiry Date of the Temporary Permission ('Reminder Letter') [**Exhibit 1**]. The Reminder Letter advised the Appellant that non-compliance with Condition 1 would mean that the land remains in breach of planning control and that it may be considered for enforcement action as a result. The Council also informed the Appellant that it may visit the site in person or use a drone soon after the Expiry Date to clarify that compliance has been met under section 196A.

7. The Reminder Letter also noted that an unauthorised hardstanding access track from the middle gate to the Appellant's land had been installed in breach of planning control and that, therefore, the Council would be seeking to remedy this matter by serving an enforcement notice to remove the hardstanding.

8. The Appellant did not respond to the Council's Reminder Letter.

9. Various site visits to the Site established that no works in accordance with Condition 1 had been carried out on or after the Expiry Date.

10. On 10 June 2020, just under four months after the Temporary Permissions Expiry Date, 13th February 2020, the Appellant submitted an application under section 73 to remove Condition 1 of the Temporary Permission ('Application'), asserting the latter did not meet paragraph 55 of the National Planning Policy Framework ('NPPF') as it was not necessary or reasonable [**Appendix N**]. The Appellant was, in effect, seeking to transform the expired Temporary Permission into a permanent one for use of the site for the stationing of caravans for a gypsy pitch together with the formation of hardstanding and utility/dayroom ancillary to that use.

11. The Council took legal advice on whether the application could be validated when there was no extant planning permission remaining on the site. It was advised that this could not be done due to the Temporary Permission having expired at the time of the Application.

12. On 22 June 2020, Green Planning Studios Ltd ('the Appellant's Agents') requested a validation letter for the Application. The Council replied on the same day to say that it was unable to issue a validation letter for the Application because, as had been communicated over the telephone the previous week, it did not think that the

application could be submitted, for the reasons stated in the previous paragraph. The Council reiterated that it would resort back once it had spoken to its legal team and head of service [**Exhibit 6, pp. 1-2**].

13. In response, also on 22 June 2020, the Appellant's Agents averred that the variation of condition application constituted a valid application as the permission remained extant due to the use of the site not having ceased after the Expiry Date, relying on the legislative framework and the judgment in *Avon Estates Ltd v Welsh Ministers and Another* [2011] EWCA Civ 533 ('*Avon Estates*') **[Appendix O]** in support [**Exhibit 6, page 3 to 4]** The Council referred this email to their Legal department for comment.

14. On 29 June 2020 the Council sent a letter to the Appellant's Agents in which it advised that the Appellant's Application could not be validated due to it seeking to remove a condition of a temporary permission, which had expired in February 2020 ('Non-Determination'). The Council advised the Appellant's Agents that he could submit a full planning application instead [**Exhibit 7**].

15. No response was received by the Council and the site remained occupied.

16. On the 2nd October 2020, an enforcement notice was served for a Breach of Condition. This is being appealed by the Appellant and is the Lead Case APP/L2820/C/20/3262337. The Council refer to this case and its appendices for detailed information regarding the Site.

17. On 30 October 2020 the Appellant's Agents submitted appeal APP/L2820/W/20/3262332 to challenge the Council's Non-Determination.

A. Legal Framework

18. The general powers for local planning authorities ('LPAs') to impose conditions on the grant of planning permission are set out in sections 70 and 72, although statutory powers to impose conditions are also set out in ss 73, 73A, 96A and Schedule 5.

19. Under section 72 LPAs may grant planning permission for a specified temporary period only.

20. The NPPF, specifically paragraph 55 thereof, sets out key government planning policy on the use of planning conditions, and is a material consideration in planning decisions.

21. The Planning Practice Guidance ('PPG') on the Use of planning conditions provides further guidance on planning conditions. It sets out a number of circumstances where planning conditions should not be used. Circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of the development on the area or where it is expected that the planning circumstances will change in a particular way at the end of that period. It may also be appropriate to enable the temporary use of vacant land or buildings prior to any longer-term proposals coming forward (PPG, paragraph 14).

22. Temporary planning permissions have been employed by other LPAs in similar factual circumstances to those in this appeal.[1]

23. In *I'm your Man Ltd v Secretary of State for the Environment* [1998] 4 PLR 107 it was held that it is necessary to impose an express condition in a planning permission requiring the authorised use of the land to be discontinued or the removal of any authorised building or works at the end of some stated period or else the planning permission will, in effect, be permanent. Sir David Keene held in *Avon Estates* at paragraph [14] that this followed from section 55(1); no "development" as such takes place at the end of the authorised period of time: the buildings (if any) are already there on site, the material change of use has already

[1] *R (on the application of Miles) v Tonbridge and Malling BC, Moore and Barton* [2020] EWHC 1608 (Admin).

taken place, and the continued existence of the buildings and/or the continuation of the use does not constitute development. Thus the time limit on the permitted development can only be achieved by a condition to that effect since that may be enforced in its own right even though no development takes place at that point in time.

24. Where a planning permission has been granted subject to a condition that the use shall cease - or buildings/works are to be removed - within a given period of time, affected individuals can seek to extend or amend the permission, or to make it permanent. This can be done in three different ways:

    i. First, under section 79 an applicant can seek to remove or vary a condition within 6 months of the decision notice date.

    ii. Second, section 73 allows an applicant to apply to amend existing planning conditions; it allows applications to be made for the development of land without complying with a condition subject to which a previous planning permission was granted. On an application under section 73, an LPA can grant permission unconditionally, grant permission subject to new conditions, or refuse the application.

    iii. Third, section 73A of the 1990 Act allows an LPA, on an application made to it, to grant planning permission for development carried out before the date of the application, which was carried out without planning permission, without complying with a condition subject to which a planning permission was granted, or in accordance with planning permission granted for a limited period.

25. Section 73 states as follows:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was

granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

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

26. In *Pye v Secretary of State for the Environment* [1998] 3 PLR 72 ('*Pye*') Sullivan J explained the origin and purpose of section 73. It first entered the planning system as section 31A of the Town and Country Planning Act 1971. Before its introduction, a developer dissatisfied with a condition imposed on the grant of planning permission had no choice but to appeal. That exposed them to the risk of losing the planning permission altogether. Guidance about the policy underlying section 73 was subsequently given in Circular 19/86, from which the following points emerge:

i) Its purpose was to enable an applicant to apply "for relief from any or all of [the] conditions".

ii) The planning authority "may not go back on their original decision to grant permission."

iii) If the planning authority decide that "some variation of the conditions" is acceptable, a new alternative permission will be created. The applicant may then choose between the two permissions.[2]

[2] Sullivan J's description of the origins and purpose of section 73 was approved by the Court of Appeal in *R v Leicester City Council ex p Powergen UK Ltd* (2001) 81 P & CR 5, and by the Supreme Court in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317.

B. The Case for the Council

27. The Appellant relies heavily on *Avon Estates*. What *Avon Estates* has in common with the appeal before the Inspector is that both scenarios involve(d) temporary planning permissions which had expired, and that both saw the LPA in question not make a decision on the relevant appellant's application.

28. However, that is where the similarities stop.

29. As for the facts, in *Avon Estates* planning permissions had been granted for the erection of holiday bungalows on the appellant landowner's land. In each case there was a condition that the permission would expire, and the site had to be restored to its former use by a specified date. The planning permission was also subject to a condition that the bungalows could only be occupied during the summer months. However, the uses remained in existence long after the specified date and the LPA took no enforcement action to secure their removal and the restoration of the site to its former use. The owners applied for certificates of lawfulness for continued use of the bungalows throughout the year. The LPA granted the certificates subject to the imposition/continuation of the seasonal occupation condition.

30. The first relevant difference is that, contrary to the appeal before the Inspector, in *Avon Estates* the appellant did not seek to make an application under section 73. Rather, he applied for a certificate of lawful existing use and a certificate of proposed lawful use under the relevant sections 191 and 192. This is relevant because *Avon Estates* did not consider and is not authority for the contention that an application can be made under section 73 after a temporary permission has expired. Indeed, there is no case law authority on this point.

31. In the event, the application was not determined by the LPA, and the landowner appealed against this deemed refusal. The inspector allowed the appeal in respect of the certificate of lawful existing use, which he said remained subject to the seasonal occupancy conditions imposed in the original planning permission; the seasonal occupancy conditions remained "extant".

32. The appellant appealed, arguing that, due to the original permissions having been temporary, and them having expired, the judge ought to have held that the

seasonal occupancy conditions no longer had any effect post-expiry either. In other words, he argued that 'one could not survive without the other'. Beatson J ([2010] EWHC 1759 (Admin)) agreed with the inspector. He noted that the seasonal use conditions did not refer to the period referred to in the time limit conditions, and were therefore intended to apply after the end of that period.

33. The Court of Appeal allowed the appellant's appeal. It held that a condition attached to a temporary permission could not outlive the permission itself. The seasonal occupation condition fell away at the same time as the lapse of the planning condition, requiring reversion to the original use once the consent expired. If the planning consent could no longer be enforced, its conditions also failed. The seasonal use conditions were, as a matter of objective construction, intended to be coterminous with the authorised development, with the result that the seasonal use restriction applied during that period for which these holiday bungalows were permitted. Accepting that the seasonal use condition persisted "would give rise to major problems of interpretation", which ought to be avoided (paragraph [31]).

34. Delivering the judgment for the Court of Appeal, Sir David Keene explained that the appeal raised a novel point of law about the status and effect of conditions attached to a planning permission granted for a limited period once that limited period had expired and restrictive conditions had become immune from enforcement action by virtue of section 171B (paragraph [1]).

35. This is a very different from the appeal before the Inspector, which turns on the very simple point of whether the section 73 procedure can be had recourse to where the condition imposing the temporariness itself has expired. There is, in this appeal, no analogous co-dependency between the restriction imposing a time limit and another condition restricting the use in one way or another.

36. The question this Appeal is concerned with is one of statutory interpretation. Section 73 is, on an objective reading, and as against the statutory context as a whole, clearly concerned with a situation where there has to be an extant permission. Planning permissions which are not temporary in nature are the norm. Section 75 of the 1990 Act expressly states that "…any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it." Here, the temporary permission expressly stated that *"the development hereby permitted shall be for a limited period being the period of 3*

years from the date of this decision." The phrase "previous planning permission" in section 73 refers to a planning permission currently in place, not one that has 'expired' and 'is sought to be reactivated'. This is the natural reading, which is further strengthened by the observations made in the *Pye* judgment, referred to at paragraph 24 above.

37. The paragraphs focussed on by the Appellant, specifically paragraph [28], do not assist him. There Sir David Keene said he regarded it as "*very unlikely that the statutory scheme allowed for what can be described as a permanent condition on a temporary permission, other than the time limit condition itself*". The most logical interpretation of this phrase is evident from what follows in the next sentence. A 'time limit condition' "*circumscribes the entire authorisation of the use. It is quite unlike a condition limiting in a certain respect a use which has become an unauthorised use*." Later at [31] Sir David Keene put it this way: "*The first condition in each permission makes it clear that permission is only being granted at all for a limited and specified period.*" It follows that whereas the time limit condition itself may be permanent in that the restriction will remain in place - otherwise time restricted development would suddenly become unlimited - this does not mean that an application can be made under the section 73 procedure after the time limit itself has expired. The time limit condition circumscribes the entire authorisation of the use, such that permission is only granted at all for a limited and specified period.

38. Either way, these remarks are obiter dicta. The legally binding principle stemming from *Avon Estates* is that conditions relating to temporary permissions do not, in situations comparable to those in *Avon Estates*, bind the land after the expiry of those temporary permissions. This is not what this appeal is concerned with.

The Inspector's Manual

39. So, it is plain from the above that the time limit condition circumscribes the entire authorisation of the use, such that permission is only granted at all for a limited and specified period. As such an application under section 73 is only possible before the time limit expires. That this interpretation is correct is confirmed by the relevant page from the Inspector's Manual (attached at **Appendix P**) which provides as follows:

Annex D

D. Type 4 – appeals seeking to extend 'temporary permissions'

D1. What is the appeal for?

Where a planning permission has been granted subject to a condition that the use shall cease (or buildings/works are removed) within a given period of time, the appellant can seek to extend the permission, or to make it permanent.[32]

D2. How might the appellant seek to make the permission permanent?

There are 3 ways in which an appellant might seek to achieve this. You should always make it clear how you have dealt with the appeal:

Type 1 (s79)

The appeal would seek to directly remove or vary the relevant condition. See the advice in Annex A on Type 1 appeals.

Type 2 (s73)

The appellant would have applied to the LPA to have the condition 'removed' or 'varied'. This application would need to be made **before** the temporary period expired. If the application is refused, or not determined, an appeal can be made. See the advice in Annex B on Type 2 appeals.

Note: caution should be exercised about the validity of s73 applications which, on appeal, are 'converted' to an application under s73A[33] In principle, a temporary permission which had already expired by its nature would need full consideration of planning merits and it would be beyond the powers of an Inspector to unilaterally grant such a planning permission from an application which had started under s73.

Type 3 (s73A)

Where a use continues or buildings remain, after the specified temporary period, s73A(2)(b) may be used to seek a planning permission having retrospective effect.

s73A(3)(b) permits the application to be 'back dated' "*so as to have effect from – (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.*" It can be good practice to backdate permissions where there is evidence that a failure to do so could cause problems, perhaps by invalidating a waste management or caravan site licence. You can use a modified version of the standard decision wording:

[32] The power to grant a 'temporary' permission is provided under s72(1)(b)
[33] *Lawson Builders Ltd v SSCLG* [2015] followed by *R (Thomas) v Merthyr Tydfil CBC* [2017] emphasised that such a 'conversion' (s73 to s73A) would not be appropriate where the fundamental planning merits of the whole development needed to be considered and most particularly where the permission had been personal to named individuals.

40. In the decision of Inspector Papworth in the appeal at King's School of English, reference APP/G1250/W/15/3022923 (Attached at **Appendix Q),** at paragraph 3 the Inspector notes that the appeal was lodged during the currency of the

temporary permission under paragraph 73. However, he also noted that since that time the permission had expired and no longer existed, so the appeal should be considered on the basis of whether a new permission should be granted, as provided for under section 73(A). The manual, however, with reference to the case of *Lawson Builders Ltd v SSCLG* (attached at **Appendix R**) confirms that where the temporary permission has expired caution should be taken in "converting" a section 73 to a section 73A application because of the need to have a full consideration of the planning merits. It is beyond an Inspector's powers to unilaterally grant such a permission. Such a course is not appropriate where the permission is personal to named individuals, as in this case. This confirms that the Council was unable to validate the application under s.73 because the permission had expired.

41. If the Inspector finds that it was open to the Council to validate and determine the application, even though it was wrongly made under s.73 rather than s.73A, the Appellant's case under s.73A overlaps entirely with the ground (a) appeal on the Enforcement Notice Appeal. Such an application is determined in accordance with relevant provisions of the development plan and material considerations. For the reasons outlined in the Council's Second Statement of Case, Section F, pp. 15-25, the Appellant's Application would have been refused and this appeal should be refused for those same reasons.

C. Conclusion

42. The Council is satisfied that the Appellant was unable to make an application under section 73 after the Expiry Date. The Council committed no error in refusing to validate the Application.

43. On that basis the Inspector will be invited to dismiss the appeal.

44. If the Inspector finds that the Council ought to have determined the Application under s.73A (even though wrongly made under section 73) after the Expiry Date, the Council submits in the alternative that the Application would have been refused for the reasons stated in the Council's Second Statement of Case.

45. The Council reserves the right to make reference to:

- Other sections of the 1990 Act and any other relevant legislation;
- The correspondence between the parties;
- Relevant planning decisions, case law, legislation and other documents relevant to the appeal;
- Any issue that might arise in light of the Appellant's evidence.