DPEA Guidance note 27

Variations in the description of an application

Guidance note for:	Reporters and parties
Relating to:	The description of the proposed development: disputes over the description and proposals to change it

Legal framework:	• Town and Country Planning (Scotland) Act 1997 ("the 1997 Act") part III, particularly sections 32 to 37
	• Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 ("DMPR")
	• Caselaw including:
	  ○ Cumming v Secretary of State for Scotland 1992 SC 463
	  ○ R (Usk Valley Conservation Group) v Brecon Beacons National Park [2010] EWHC 71
	  ○ Bernard Wheatcroft Ltd v Secretary of State for the Environment (1982) 43 P&CR 233
	  ○ Walker v Aberdeen City Council 1998 SLT 427
	  ○ Burgon v Highland Council 2007 GWD 19-339 (OH)
	  ○ Lambeth v Secretary of State for Housing etc. [2019] UKSC 33
	  ○ Finney v Welsh Ministers [2019] EWCA Civ 1868

The issue	There will sometimes be a dispute between the planning authority and appellant or applicant in the course of process before a reporter on an appeal or application as regards what the description of the development ought to be. Different rules apply where any change in the description was proposed by the planning authority or by the appellant. There are also different rules applying to planning applications and appeals and to other types of applications that come before Ministers.
Accuracy of the description	A description must be accurate, convey the substance of what is applied for and give full and fair notice to possible objectors. Whether a description meets this requirement is, in the first place, a matter of judgement for the planning authority. The application's scope cannot be extended by a location plan or any other ancillary document.

	In *Cumming* (cited above), the court held that permission should be quashed in circumstances in which the description had not given full and fair notice to potential objectors: the permission granted had been described as a “roadside petrol station”, but plans showed a 40-bed lodge, restaurants and car parks as well as the petrol station. In *Usk Valley* (cited above), the English and Welsh High Court quashed permission where the application had described the development as “relocation of existing camping facility out of flood zone”. The ambiguity in what constituted the “existing camping facility” (including the intensity of proposed relocated activity and whether permission was sought for stationing of caravans) went to the heart of the application. The description did not give the required notice to neighbours or consultees. Grant of permission by the planning authority subject to the condition “no more than 50 tents and 50 caravan shall be erected or sited within the camping caravanning areas hereby approved” could not rectify the ambiguity. It also potentially involved a grant of permission for a more intense use than that for which the application had been made. In English planning appeal reference 3285754, the inspector in dealing with a listed building enforcement appeal found that listed building consent previously granted for works described as “replacement roof finish to the single storey rear roof” did not cover internal works to incorporate an additional bathroom. This was so, even though the works to the bathroom were shown on approved plans with the listed building consent. Therefore the appeal against enforcement action failed insofar as it was based on the claim that the bathroom works were already permitted.
Check by the DPEA on receipt of an appeal or application	When the DPEA’s case officers receive a planning appeal, they will check the description in the application form against the description given in any decision taken by the planning authority and the description in the appeal form. If the description is different in the decision from the application or appeal form, they will ask the planning authority and appellant for an explanation.
Change of description by the planning authority	Planning applications and appeals The powers of the planning authority in determining a planning application are set out in section 37(1) of the 1997 Act. It has the options: • to grant planning permission unconditionally, • to grant planning permission with conditions, or • to refuse planning permission. A planning authority has no statutory power to change the description of the development of its own initiative. Therefore, the DPEA will usually accept as correct the description of the

	development shown in the application form. There are two exceptions to this: First, if there is evidence the appellant proposed or agreed to the variation of the description by the statutory procedure in section 32A of the 1997 Act, the DPEA will apply the description as varied in that procedure. An appellant's statement that it did not agree to a change in the description will usually be sufficient evidence, if there is no evidence to the contrary from the planning authority indicating the appellant's agreement to the change. However, if it remains uncertain whether the applicant agreed to a change in the development description and the planning authority gave notice of the change of description under section 32A(4), then the DPEA will assume that the changed description stated in the planning authority's decision notice is correct. The second exception is in circumstances such as those in the *Cumming* case (described above), where permission granted on the basis of an application with the original description in the application form would be unlawful because of the description's inadequacy. In such circumstances, the DPEA will accept the description given in the council's notification to neighbours (assuming that is adequate), whether or not it is the same as that in the application form. <u>Other applications</u> The planning authority has no statutory power to change the description of works proposed by the applicant in listed building consent or advertisement consent applications. Unlike applications for planning permission, there are no statutory rules on the variation of such applications. The DPEA considers that, generally, subject to the rule in *Cumming,* a variation in such an application can only be made either by the applicant or with the agreement of the applicant.
Variation of description by the applicant	Following changes to the law on planning applications brought in by the Planning etc. (Scotland) Act 2006, the law is different in respect of changes to planning applications from that on changes to other types of applications that might come before reporters. For planning applications, there are differences in procedure for applications before planning authority, applications before reporters at appeal, and applications that have been called in by Ministers.

	<u>Variation of an application other than a planning application</u> The rule on the degree to which an application may be varied for applications other than planning applications derives from caselaw. It applies for instance to applications before planning authorities for listed building consent or advertisement consent as well as to applications before Scottish Ministers for consent under sections 36 or 37 of the Electricity Act 1989. The rule also applies more broadly than just to changes in the description of a development. It applies to the degree to which the decision-maker can use conditions of consent to modify what was proposed. If an applicant wishes to vary the description in the application following its notification, then the development or works as varied must not be "in substance different" from the development or works for which the application was made (see *Bernard Wheatcroft* cited above). If they are, then re-notification of the application as varied would be likely to cure any problem caused by the variation. Whether a description as varied does result in a development that is "in substance different" is a matter, in the first instance, for the judgement of the decision-maker (see *Burgon* cited above). This will be the planning authority where an application is before it. Where an application is before a reporter on the basis that the reporter is to report to Scottish Ministers with recommendations, it is the Scottish Ministers who must make the judgement. Therefore a reporter should report to Ministers on variations proposed by the applicant from the description for which the application was made. A variation in the description of a development is "in substance different" if it has the effect that substantial new planning issues are raised that were not raised by the original application or the proposal is open to substantial new grounds of objection which were not available against the original application (see *Walker* cited above). A challenge to a variation accepted by the planning decision-maker will only be successful (a) if the acceptance of the variation was unreasonable and (b) if the person challenging the variation has been prejudicially affected by that unreasonable act. Generally speaking, reductions or restrictions of a proposed development have not been treated as "in substance different": • In *Walker* the change in the development involved its reduction from a new university campus with 85,000 square metres of new floorspace to a proposed 15,000 square metres of new floorspace. This did not result in a

	development that was “in substance different” from that for which the application was made. • In *Burgon* a change was made in the description of the development from “dwellinghouse” to “residential annexe or holiday letting unit”. The latter was found to be a more restrictive description than that in the application. It did not result in a development that was “in substance different” from that for which the application was made. <u>Variation of a planning application by agreement with the planning authority</u> An applicant for planning permission under part III of the 1997 Act may vary the description of a proposed development when the application is before the planning authority in accordance with section 32A of the 1997 Act. The rules in section 32A replace (for planning applications only) the rules from caselaw discussed above (though those continue to apply in respect of other types of application). Section 32A(1) provides that a variation in an application may only be made with the agreement of the planning authority. The planning authority is not to agree a variation that would be such that there is a substantial change in the description of the development (section 32A(2)). Under section 32A(4), the planning authority may (but is not required to) give such notice of the variation of an application as it considers appropriate. Where there is a dispute at appeal about any change in a development’s description when the application was before the planning authority, the reporter should be satisfied (a) that the variation was requested or agreed by the appellant and (b) that the planning authority agreed to the variation. The planning authority’s decision on whether to agree to a variation to a development description proposed by an applicant is a matter of discretion for the planning authority. It will not be revisited by a reporter at appeal (though this does not detract from Scottish Ministers’ power, exercised in delegated appeals by a reporter, to modify a proposed development by condition in any permission granted at appeal). What constitutes a “substantial change in the description of the development” in terms of section 32A(2) is, in the first place, a matter of judgement for the planning authority. It is not a matter that a reporter will normally re-visit in a planning appeal. The only circumstance in which such a decision to permit variation of a description might be revisited would be if the variation goes beyond what could lawfully have been accepted

	by the planning authority. If it does, that would call into question the validity of an appeal on the basis of the varied description. The DPEA is not aware of any caselaw interpreting what is meant by a “substantial change” in terms of section 32A(2). The policy memorandum of the Planning etc. (Scotland) Act 2006, by which section 32A was inserted into the 1997 Act, states that section 32A was intended to place variation of an application on a statutory footing by making it clear that an application can only be varied with the agreement of the planning authority. The policy memorandum does not suggest that restriction was to be placed on the range of variations that might be requested. The DPEA’s understanding, therefore, is that the use of the phrase “substantial change” in section 32A(2) was not intended to place any greater restriction on variations that might have been made, without re-notification, under the common law. Consequently, to be a “substantial change” a variation must, in the DPEA’s view, result in a development that is “in substance different” from that for which the application was made. Variations that have been made to an application, including variations in the description of the proposed development, must be set out in the planning authority’s decision notice on the application (DMPR regulation 28). However, if there is no express statement of variation, but the description in the application form is different from that in the planning authority’s decision notice, then the DPEA will assume that the description in the decision notice is correct if it is adopted by the appellant in the appeal form (unless there is evidence to the contrary). In a deemed-refusal appeal under section 47(2) of the 1997 Act, the planning authority should make clear in its appeal response what variations it has agreed to the application. <u>Variation of a planning application at appeal</u> Section 32A(3) of the 1997 Act prohibits the variation of a planning application after an appeal is made. An appellant therefore cannot change the description of a proposed development in a planning appeal. This does not detract from Scottish Ministers’ power, exercised in delegated appeals by a reporter, to modify a proposed development by condition. That power itself is subject to the rule that a development modified by condition is not “in substance different” to that for which the application was made. The reporter does not have power to change the description of the development. This is so, even if the reporter imposes conditions with the effect that the appeal decision is a partial grant of the permission sought.

Variation of a planning application called in by Scottish Ministers

Where an application for planning permission is called in by Scottish Ministers for their determination, Scottish Ministers may agree to a variation to the description (or other elements of the application) proposed by the applicant after the application is made. However, Scottish Ministers are not to agree to a variation such that there is a substantial change in the description of the development. The meaning of “substantial change” is discussed above in respect of variation of an application before the planning authority. Scottish Ministers may (but are not required to) give notice of an agreed variation. The power to agree a variation is not delegated to reporters.

If a reporter receives a request for the variation of a description in a called-in application, then a reporter must decide how to address it.

- The most straightforward approach for minor variations would be to address the proposed variation in the report to Ministers on determination of the application. Since it is not for reporters to determine whether the variation can be accepted, they should make recommendations on approval of the unvaried development, on whether to accept the variation, and on whether the development as varied should be approved. They should also say why they consider notification of the variation is not necessary.
- However, if reporters consider that Ministers ought to give notice of the variation, they should not normally leave the question of whether to accept the variation to their final report. In those circumstances, they should put a specific report to Ministers setting out the variation proposed and giving recommendations on whether the variation should be accepted for consideration, whether notice should be given of the variation, and if so, what notice should be given and to whom. Reporters will have to make a judgement on whether procedure can continue on other aspects of the application before Ministers have given their decision on whether to allow the proposed variation to be considered.
- If reporters consider that the proposed variation would represent a substantial change in the description of the development and so falls outside Ministers’ powers to accept, they can simply address the point in their final report on the application, setting out why they consider it unlawful as a variation.

However, the section 32B procedure for permitting the applicant to vary the application does not place any restriction on reporters recommending Ministers apply conditions that would modify a proposed development.

Section 42 applications	<u>Incorrect description of the development in section 42 applications</u> Permission can be granted on an application under section 42 for development of land without complying with conditions subject to which a previous planning permission was granted. However, applicants are often under the misapprehension that section 42 is a power to amend existing planning permission (rather than – as it is – a power to grant new planning permission for a development of the same description as previous planning permission). Consequently, the description applicants give in section-42 applications will often state that the application is seeking amendment of particular conditions in the previous (specified) planning permission. When granting permission at appeal for an application put in such terms, reporters should state as the description of the development the description in the previous planning permission. This change simply reflects what the application is actually for. The alteration in the conditions sought by the applicant can be put in brackets following the description of the development (that is perhaps the best practice). Reporters should usually re-state all the conditions in the previous planning permission that are not subject of the appeal, unless they are superseded or require correction. When reporters are required to interpret planning permission granted under section 42 that is couched in terms of an amendment to the previous permission, they should follow the principles for its interpretation set out in paragraphs 15 to 19 of *Lambeth* (cited above). They should therefore find the natural and ordinary meaning of the permission, viewed in its context and in the light of common sense. In *Lambeth* the Supreme Court considered the effect of a section-42 permission granted (subject to no conditions) on an application with a description couched in terms of amendment of conditions in a previous permission. The court found that the grant of permission of an application in such terms was confined in its scope and did not change the effect of the conditions of the original permission, which continued to apply. <u>Conflict between the proposed revision to conditions and the description of the development</u> The case of *Finney* (cited above) confirmed that an application under section 42 cannot be used to change the description of the development from that in the previous permission. It is also not lawful to attach conditions that would conflict with the description. The facts of *Finney* involved an attempt to alter conditions to permit turbines of 125 metres to tip, where the description

	referred to development of turbines of up to 100 metres to tip. The court held this to be unlawful.

This guidance note was prepared on 26 April 2024.