

Extending control over lawful uses

Planning conditions can be imposed where a lawful development certificate exists. *David Kemp* examines a High Court ruling

- The Town and Country Planning Act 1990 empowers LPAs to grant permission regardless of whether there is an LDC
- Conditions can be imposed on a grant of permission where an existing development has an LDC
- Legal and policy tests need to be addressed in deciding to impose conditions

The High Court ruling in *R (on the application of Lambeth London Borough Council) v Secretary of State for Communities and Local Government* [2007] EWHC 2976 (Admin), clarified the position that a lawful development certificate for existing use of land does not prevent the imposition of planning conditions on the grant of permission for proposed development, such as to control the effect on residential amenity.

In *Lambeth*, an application was made to Lambeth London Borough Council (LBC) for planning permission to convert a single dwellinghouse into three self-contained flats. Conditional planning permission was granted by LBC. The conversion is typical of those undertaken in terraced houses, which often intensify the use of the property while improving the standard and quality of accommodation.

Intensified use

The conversion also proposed to retain the balcony for the use of the first floor flat, which would extend over the flat roofed extension to the rear at ground floor. LBC was concerned that this would give rise to greater use of the balcony, since access to the rear garden would no longer be available to occupants of the first floor flat.

Owing to concerns that this would intensify the use of the balcony and materially worsen residential amenity in terms of privacy, overlooking and general noise and disturbance, LBC sought to prevent access to the balcony by imposing a planning condition.

The balcony area had been used by the earlier dwellinghouse, which had benefited from a lawful development certificate (LDC). An appeal against the condition was made on the basis that the LDC had allowed the continued use of the balcony area and, therefore, access to it could not be restricted by the council. The planning inspectorate allowed the appeal. LBC challenged the decision in the High Court.

The inspector's decision was flawed since it lacked adequate reasoning, either expressly or inferentially, and sufficient evidence that he had applied the relevant policy or legal tests

Section 70(1) of the Town and Country Planning Act 1990 empowers local planning authorities to grant permission "subject to such conditions as they think fit". This power is supplemented by section 72(1), which allows conditions to be imposed on other land in the control of the applicant, not just the application site, and in respect of operational development and use of land.

Counsel for the secretary of state argued that a condition could not be imposed to restrict the existing use of land that was already considered lawful under an LDC. Rejecting that argument, Gilbart J held that such conditions are often necessary in addressing a change in circumstances occasioned by new development where the effect of an otherwise acceptable development would be made unacceptable by the continuation of the existing use.

Gilbart J also held that it would be wrong to accord any greater weight to the existence of the LDC since this would overlook the fact that to carry on a use is entirely lawful until one seeks to make a material change.

Additionally, the court held that no policy presumption, under Circular 11/95: Use of conditions in planning permission, against restrictions or conditions applied in this case. This was because an LDC merely confirms the current lawful use (or status of operations) on land and cannot act as a bar to the imposition of conditions to control any future development of the same land. This should be contrasted with any attempt to restrict the operation of permitted development rights, such as under the Use Classes Order 1985, against which there is a policy presumption.

Flawed decision

The inspector's decision was also flawed because it lacked adequate reasoning, either expressly or inferentially, and sufficient evidence that he had applied the relevant policy or legal tests. This was not helped either by the way in which the inspector had structured his reasoning in the decision letter. Consequently, the inspector's decision had given rise to a "substantial doubt" as to whether he had erred in law and his decision was quashed. It is currently awaiting re-determination by the inspectorate.

The decision confirms that the presence of an LDC should not prevent a planning authority from imposing planning conditions on a grant of permission where harm would arise through the combination of the existing use and the proposed use.

This should be contrasted with conditions seeking to restrict permitted development rights in respect of proposed development, as opposed to existing lawful use rights, where there is a policy presumption against such conditions in all but exceptional circumstances.

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