

## Section 73 applications - what's the state of play?

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Section 73 applications have been hitting the headlines in recent months, as the case of London Borough of Lambeth v Secretary of State for Communities and Local Government has made its way through the courts. These rulings have created both confusion and opportunity aplenty.

This unassuming provision under the Town and Country Planning Act 1990 allows an applicant to remove conditions in a planning permission. A successful application would give rise to a new standalone permission, distinct from the one it had originally sought to alter.

### **The Lambeth case**

The Lambeth case concerned a planning permission granted in 1985 for a DIY retail unit. This permission attached conditions that restricted use to the sale of DIY goods. In 2014, a s.73 permission was granted to relax a condition, however Lambeth accidentally failed to reattach the existing conditions, which the council had intended to continue.

The applicant therefore sought a lawful use certificate for unrestricted A1 retail use, on the basis that there was no restriction in the new permission. Lambeth refused, but the planning inspector granted the open use on appeal. Lambeth was again unsuccessful at the Court of Appeal, which reasoned that the 2014 permission was a standalone permission placing no condition on use.

Many owners and tenants in a similar position scrambled to take advantage of this decision, applying for lawful use certificates on all sorts of schemes where a s.73 permission may have inadvertently opened up the use.

In July, the Supreme Court had the final say on this matter. Lord Carnwath surprisingly overturned the Court of Appeal's decision, ruling that the reasonable reader would interpret the 2014 permission as a simple variation of the previous permission, rather than the grant of a permission free of conditions.

## What lessons have we learned?

One can understand the decision from the reasonable reader's view. However, that logic flies in the face of the statutory requirement to ensure that planning permissions state clearly and precisely the full reasons for each condition imposed.

1. Are we now expected to put together a paper trail of various historic permissions to get the full picture?
2. What happens to those conditions which appear to be superseded by the later permission, without having been waived? We will have to carry out another audit of the paper trail to assess if any conditions have been waived.
3. The decision relies on the description of use being read as if it were a condition. This creates additional confusion as to what constitutes a condition.

The Lambeth case therefore appears to raise more questions than it answers.

## Concerns for clients

In the wake of the Court of Appeal decision, many landowners applied for lawful use certificates on sites where a poorly drafted s.73 permission had inadvertently opened up the use. Are these certificates still valid following the Supreme Court decision?

- Firstly, we would stress that the Lambeth decision turned on its facts.
- If a certificate is in place, it is "conclusively presumed" to be lawful by the Planning Act.
- The only statutory route to revoke an existing lawful use certificate is to show that it was based on false information or material information was withheld.

For these reasons, it is difficult to say that a lawful use certificate that was issued under the Court of Appeal's ruling is no longer valid. It will be interesting to see whether local authorities decide to take enforcement action in respect of uses that rely on such a certificate.

} If you have any queries relating to s.73 applications or any other aspect of planning law, please contact [John Bosworth](#).

