CONSERVATION AREAS – THE LAW

A paper based on a Presentation given by
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"Conservation Areas in Crisis?"
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1. Introduction

Obviously it's important to understand the architectural and historic character of historic assets and that will always be an important aspect of the work of conservation officers and others working in the historic environment sector. But amidst the writing of conservation area statements and Committee reports, it is good to remind ourselves what the actual legal protections are which conservation areas enjoy. This paper is intended to do just that.

In some ways, conservation areas are the "Johnny Come Latelys" of the conservation world: their introduction in the Civic Amenities Act 1967 postdating listing by 20 years and scheduling by almost a century. But as at 2005 there were 9,876 conservation areas in England and Wales. No-one knows how many buildings that represents but it is probably in excess of a million. If that is the case then there are around double the number of buildings protected by conservation area designation as there are by listing and scheduling combined, making conservation areas, from a numerical standpoint at least, a very significant form of heritage protection.

In that context, I suggest, it is important that those charged with caring for the historic built environment understand what legal protections exist for conservation areas. This paper sets out to give an overview of the most significant of those protections.

2. What May be Designated?

Section 69 of the Planning (Listed Buildings and Conservation Areas) Act 1990 defines a conservation area as **"an area of special architectural or historic**

interest, the character or appearance of which it is desirable to preserve or enhance". Usually, because we are concerned with the historic built environment the area will contain at least some buildings. But it is possible to designate an area to include the setting of buildings, such as fields around a village (***R v Canterbury CC ex p Halford [1992] 2 PLR 137***), and a conservation area can include docks and harbours – provided that they are within the LPA's jurisdiction (***R v Easington DC ex p Seaham Harbour Dock Co [1993] 3 PLCR 225***).

3. **Who designates?**

Broadly speaking, the power to designate rests primarily with the local council. The detail varies according to where the area is and what administrative arrangements are in operation in that area. Table 1 sets this out in detail:

Table 1

Where?	**Who designates?**
In Greater London and the former Metropolitan Counties	The Borough Council
In the National Parks	The National Park Authority*
In the Broads	The Broads Authority
Elsewhere in England	The District, County* or Unitary Authority
Elsewhere in Wales	The County" or County Borough Council

* Authorities marked with an asterix must consult the relevant District Council before proceeding

In addition, various national bodies have concurrent powers. In England the Secretary of State, and in Wales the Welsh Assembly, may designate a conservation area. In addition, by pure historic accident, English Heritage has power to designate a conservation area but only in Greater London. (For anyone interested in the reason why this is so, the former Historic Buildings Unit of the Greater London Council (which had the power to designate conservation areas) became part of English Heritage on the abolition of the GLC.)

4. Designation Procedure

Local Authorities are under a duty to determine whether any parts of their area meet the s.69 criterion referred to at paragraph 2 (above). If they are so satisfied they **"shall designate those areas as conservation areas"**.

There is no formal procedure as such. The designation takes effect from the date of a resolution by the appropriate Committee. But it is good practice to ensure that there is a clear definition and explanation of the special architectural or historic interest the area possesses. This will help in avoiding subsequent unnecessary planning appeals and/or legal challenges.

Interestingly there is no statutory requirement for consultation prior to designation – although it is good practice to consult and many authorities do so. The only post-designation requirement is to place a notice in a local paper and the London Gazette.

5. The Legal Consequences of Designation: (1) The Duty to "Preserve or Enhance"

In exercising its planning functions in a conservation area, a local planning authority is under a duty to pay **"special attention to the desirability of preserving or enhancing the character or appearance"** of the area (s.72 Planning (Listed Buildings and Conservation Areas) Act 1990). Note that the duty is to **"consider the desirability"** of preserving or enhancing. There is no absolute duty to preserve or enhance.

The meaning of "preserve" in this context was considered in ***South Lakeland DC v Secretary of State [1991] 2 PLR 97***, which held that "to preserve" means **"to keep safe from harm"**. It will be noted that is similar to the concept of "harm to an interest of acknowledged importance" absent which planning applications must be granted.

Colin Chandler v (1) Secretary of State DCLG (2) Richard Moore (3) Glenys Moore [2007] EWHC 1000 (Admin) considered the interaction of the duty under s.72 P(LBCA) 1990 to "pay special attention to the desirability of preserving or

enhancing" the character or appearance of a conservation area with relevant structure plan policies – in this case a policy that the cultural heritage should be preserved and where possible enhanced. The Court concluded that the policy did not require enhancement but did require refusal of any application which failed to preserve character – s72 only requires special attention to the desirability of preserving character.

The section 72 duty has also been considered in relation to Human Rights. In **Sabi v Secretary of State [2005] (unreported)** consent was refused for security gates and fencing where a house in Hampstead Garden Suburb had been subject to a spate of burglaries and other incidents. The owner argued that this breached his Human Rights. The Court rejected the argument and held that the protection of the environment (including protection of character of a Conservation Area) was appropriate and legitimate in the public interest.

6. The Legal Consequences of Designation: (2) The Need for Conservation Area Consent

The second consequence of designation is that conservation area consent is needed for the demolition of an unlisted building in a conservation area (s.74 P(LBCA)A 1990).

This requirement was somewhat weakened by the ruling of the House of Lords in ***Shimizu (UK) Ltd v Westminster CC [1996] 3 PLR 89***. The case concerned an application for listed building consent for the removal of chimney breasts in a listed building in Central London. Consent was refused. At the time s.27 of the 1990 Act (subsequently repealed) provided for compensation for refusal of LBC for alterations but not for refusal of LBC for demolition. So the question arose: would the removal of the chimney breasts amount to demolition or an alteration? The House of Lords held that "demolition" means razing to the ground or substantially razing to the ground and that anything falling short of that was an alteration.

Apart from compensation issues under s27, ***Shimizu*** made little difference in terms of listed building consent: LBC is required whether the works are demolition or alteration. But the consequence in conservation areas has been that CAC is now only required for complete demolition. Ever since Shimizu works falling short of

demolition can and have been carried out with impunity. There is currently still nothing the local authority can do about it. (But see below for a glimmer of hope.)

Conservation area consent works in exactly the same way as planning permission. Application is made to the local planning authority, who must consider the application having regard to their s72 duty, any relevant development plan policies and any other material considerations. Appeal lies to the Secretary of State (in England) or the Welsh Assembly (in Wales) for refusal or failure to determine within the statutory period. The Secretary of State (in England) and the Welsh Assembly (in Wales) also have the power to "call in" applications for their on decision. The consequences of carrying out demolition without CAC are exactly as for breaches of listed building control. It is a criminal offence to carry out demolition without consent (maximum fine of summary conviction £20,000). In addition the LPA may issue a conservation area enforcement notice requiring restoration of the building to its former state (s.38 as applied by s.74(3) P(LBCA)A 1990).

The White Paper "Heritage Protection in the 21st Century" has remarkably little to say about conservation areas. This is perhaps surprising – especially in light of the fact that buildings in conservation areas are numerically, at least, the most significant part of the historic built environment. The one thing about conservation areas the White Paper does include is a proposal to abolish Conservation Area Consent. Instead complete or partial demolition in a conservation area would be included in the definition of "development" and thus require planning permission. Only 11 years after Shimizu the Government has swung into action with a suggested solution that might, with luck, make it onto the Statute book in 2009!

7. The Legal Consequences of Designation: (3) The Effect on Permitted Development Rights

There is a common misconception that the designation of a conservation area has an immediate and significant effect on the permitted development rights a property would otherwise enjoy. Whilst there is some effect, it is not as significant as many believe.

The Town and Country (General Permitted Development) Order 1995 grants planning permission for various types of (usually minor) development. In common

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parlance these are referred to as “permitted development rights”. A number of these are qualified such that they do not apply, or apply to a reduced extent, on what is termed “Article 1(5) land”, which includes land in a conservation area. Table 2 sets out in full those permitted development rights which do not apply or apply in a modified way on Article 1(5) land. It will be seen that there are relatively few of them.

Table 2

Class in the Order	PD Right	Limits in Art (5) Land
Part 1 – Class A	Enlargement improvement or alteration of a dwelling	• Volume limited to 50 m^3 or 10% • Any building in curtilage over 10 m^3 counts towards volume limit
Part 1 – Class B	Roof extensions	Not permitted
Part 1 – Class E	Curtilage buildings etc	Not permitted if more than 10 m^3
Part 24 – Class A	Satellite dishes	• Not permitted on dwellinghouses if on chimney or wall or roof slope fronting a highway or if building is more than 15 m in height • Not permitted at all on buildings other than dwellinghouses
Part 8 – Class A & Part 34 – Class B	Extension of industrial building or warehouse (Part 8) or an operational Crown building (Part 34)	Limited to 10% additional volume and 500 m^3 of floorspace
Part 24 – Class A	Communications apparatus	Antennae or other equipment over 2.5 m^3 not permitted

Part 32 – Class A	Incidental buildings on site of a school, college, university or hospital	Materials must be of similar appearance to those used in main building

Having said that, Article 4 of the 1995 Order provides a power for a local authority to make a Direction (known as an "Article 4 Direction") removing permitted development rights altogether in a conservation area. There are two types: Article 4(1) Directions need the Secretary of State's confirmation and can apply to all or any part of a conservation area. Article 4(2) Directions are made and confirmed by the local planning authority but can only apply to development fronting a highway, waterway or open space. Once an Article 4 Direction is in force, a planning application to the LPA is required for what would otherwise be permitted development.

Considering its potential effect on property owners, the procedures for making and confirming an Article 4 Direction are simple and contain little opportunity for the public to challenge the thinking behind the Direction. In either case the authority simply makes the Direction, puts a notice in the local newspaper and notifies affected owners giving at least 21 days for representations. In the case of an Article 4(2) Direction the authority then simply considers the representations it receives and confirms the direction (or not). In the case of an Article 4(1) Direction the representations are sent to the Secretary of State with a copy of the Order and a supporting statement and he confirms it (or not). PPG15 states that the Secretary of State is likely to confirm an Article 4 Direction if:

(1) the LPA has undertaken an assessment of the special architectural and historic interest of the conservation area concerned;

(2) the proposed direction helps to protect features that are key elements in that area, and whose importance to the special interest of the area can be demonstrated;

(3) there is local support for the direction; and

(4) the direction involves the minimum withdrawal of permitted development rights (in terms of both area and types of development) necessary to achieve its objective.

Compensation may be claimed for the refusal of planning permission for development which, but for the existence of the Art 4 Direction, would have been permitted development. Claims seem to be rare – possibly because small extensions rarely add significantly to the value of a property once the cost of building works have been accounted for.

The White Paper "Planning for a Sustainable Future" contains proposals to overhaul the current permitted development rights system, replacing volumetric and distance limits with "impacts". The problem with that is that the assessment of impacts is a matter of professional judgement. The aim of "unclogging" the system by removing householder development from it is unlikely to be achieved by introducing judgement rather then measurement into the question of what will be allowed without planning permission. Even more worryingly the White Paper is silent as to whether PD rights are to be modified in any way within conservation areas.

8. The Legal Consequences of Designation: (4) Protection of Trees

Trees in conservation areas not subject to a Tree Preservation Order ("TPO") enjoy a measure of protection under s.211 of the Town and Country Planning Act 1990. This provides that six weeks' notice must be given to the local authority of intention to do works to a tree which, if it were subject to a TPO, would require consent (i.e. cutting down, lopping, topping, uprooting, wilful damage or wilful destruction).

Once it receives such a notice the LPA has six weeks to decide to make a TPO or not. If it does not make a TPO within the six weeks, the applicant may proceed with the works. If it does make a TPO, the applicant will have to apply for consent under the TPO, and, in all probability, may expect a refusal. (Otherwise why bother making a TPO?)

9. The Legal Consequences of Designation: (5) Availability of Grants

S77 of the 1990 Act provides for English Heritage to make grants or loans in respect of "any relevant expenditure [which] has made or will make a significant contribution

towards the preservation or enhancement of the character or appearance of any conservation area or any part of any conservation area situated in England". However, this is probably more theoretical than real given the shortage of English Heritage cash and other priorities. Such grant money as there is tends to go on large set-piece high grade listed buildings.

10. The Future of Conservation Areas

We live in interesting times, as the Chinese would say, with reforms to the planning system being proposed, it sometimes seems, almost annually. In the course of this paper I have identified a number of currently-proposed changes to the system which have the potential, at least, to erode the importance and effectiveness of conservation areas

- The Heritage Protection Review promised a unified system but the Heritage White Paper does not propose that conservation areas are on the single Register
- Again the Heritage White Paper proposes the abolition of conservation area consent
- The Planning White Paper proposes reform of permitted development rights. But will the same importance be attached to Art 1(5) land and will Article 4 Directions be retained?

. It remains to be seen whether conservation areas will survive in their current form.

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