

Legal Viewpoint: An upwards struggle for upwards extension permitted development rights?

March 2022

Cab Housing Limited & Ors v Secretary of State for Levelling Up, Housing and Communities & Ors

16 February 2022

[2022] EWHC 208 (Admin)



The High Court has confirmed that upwards extension permitted development rights are to be interpreted broadly, which may make it more difficult for developers to rely on these rights in the future.

In 2020, much trumpeted new regulations were introduced by the government amending the General Permitted Development Order 2015 (the GPDO). Enter Classes AA-AD, allowing upwards extensions of buildings. The rights were to be subject to defined criteria and limitations, and the need to seek prior approval for particular elements of proposals.

The policy objective was to make it easier for developers to deliver new homes without expanding the existing footprint of buildings, providing a “quick” method of creating additional living space. Indeed, the government boldly estimated that on the introduction of the measures, up to 8,600 new homes per year could be created through building upwards on purpose-built flats and other buildings. The reality is that between July-September last year only 116 applications for an upwards development were either granted or did not require prior approval – figures which fall well short of the government’s lofty ambitions.

Against this policy backdrop, the High Court recently had its first opportunity to interpret the upwards extension provisions. The decision in the case highlights the need for clarity and precision in the legislative drafting of the description of matters requiring prior approval. It also highlights the need to avoid, where possible, the use of vague language.

The case hinged on the meaning and extent of matters covered by the need to have regard firstly to the external appearance of the building, and secondly the impact on the amenity of other premises. The claimants put forward two lines of argument supporting a narrow interpretation of these matters. Regarding amenity, the claimants argued that decision makers were limited to considering effects on other properties that abut or are contiguous to the property. They argued that the issues to consider were limited to overlooking, privacy and the loss of light. Regarding external appearance, the claimants argued that decision takers should only consider the design and architectural features of any principal elevation and any side elevation fronting a highway (i.e. its public facing aspects).

Mr Justice Holgate, in dismissing all three claims for judicial review, rejected the claimants’ narrow interpretation of these matters. He concluded that:

- i. assessing the impact on amenity is not limited to overlooking, privacy or loss of light matters;
- ii. the phrase “adjoining premises” includes neighbouring properties and is not limited to premises contiguous with the property;
- iii. considerations relating to the external appearance of a dwellinghouse are not limited to its principal elevation and any side elevation fronting a highway, or the design and architectural features of those elevations; and
- iv. the control of the external appearance of the dwellinghouse includes the impact on neighbouring premises and the locality.

The judgment may provide some comfort to local planning authorities who were perhaps uneasy about the loss of development control over decision-making for upwards extension developments under the GPDO. In practice, the broad interpretation of prior approval matters is likely to create uncertainty in the development industry and make it more difficult for developers to rely with confidence on these permitted development rights. Moving forwards, developers will need to carefully consider and weigh up the potentially limited advantages of the complex upwards extension permitted development rights, with their inherent restrictions, limitations, and uncertainties. Developers will also need to balance these issues against the more tried and tested route of an application for full planning permission.