Recent changes to the General Permitted Development Order[1]

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1. The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 ("the Amendment Order") entered into force on 30th May 2013. Permitted development rights have been extended in the following areas:

   (1) Home extensions
   (2) Office to Residential
   (3) Agriculture to Commercial
   (4) Telecoms Masts
   (5) Reuse of existing buildings
   (6) Schools

2. In the Written Ministerial Statement accompanying the changes, Eric Pickles MP, the Communities Secretary stated: *"The coalition government believe that a swift and responsive planning system is vital for delivering sustainable development. We want to promote the use of brownfield land to assist regeneration, and get empty and under-used buildings back into productive use. Using such previously developed land and buildings will help us promote economic growth and still ensure that we safeguard environmentally protected land…These changes will bring empty and underused buildings back into productive use; make it easier to bring forward suitable buildings for state-funded schools; allow business and families to extend and improve their premises and homes without the expense of moving; and facilitate delivery of superfast broadband. These measures also implement recommendations from Mary Portas' review to reduce restrictive 'change of use' red tape."*

Home Extensions

3. Prior to 30th May 2013, paragraph A1 of Part 1, Class A of the Second Schedule to the General Permitted Development Order (the enlargement, improvement or other alteration of a dwellinghouse), stated that development was not permitted by

[1]This paper concentrates on the main changes to the GPDO which came into force in May 2013. Further changes have since been made to reflect the changes to the Conservation Area consent regime.

Class A if, inter alia:

the enlarged part of the dwellinghouse would have a single storey and—
(i) extend beyond the rear wall of the original dwellinghouse by more than 4 metres in the case of a detached dwellinghouse, or 3 metres in the case of any other dwellinghouse, or
(ii) exceed 4 metres in height;

4. Article 4 of the Amendment Order modifies this provision by adding a new paragraph after paragraph A.1(e). This new paragraph, A.1(ea), provides that until 30th May 2016 for a dwellinghouse not on Article 1(5) land[2], nor on an SSSI, the enlarged part of the dwellinghouse, which must be single-storey, must not:

(i) extend beyond the rear wall of the original dwellinghouse by more than 8 metres in the case of a detached dwellinghouse, or 6 metres in the case of any other dwellinghouse, or
(ii) exceed 4 metres in height;

5. Therefore, the size limits for house extensions have doubled from 4 metres to 8 metres for detached houses, and from 3 metres to 6 metres for all other houses.

6. The Amendment Order also sets out a new procedure for approval in a new paragraph A.4. These additional conditions will apply only to the enlarged extensions allowed under paragraph A.1(ea), but not to extensions within the original limits set out in paragraph A.1(e).

7. Before commencing the development, the developer must provide the Local Planning Authority ("LPA") with:

   (1) A written description of the proposed development, including how far the enlarged part of the dwellinghouse extends beyond the rear wall of the original dwellinghouse, the maximum height of the enlarged part of the dwellinghouse, and the height of the eaves of the enlarged part of the dwellinghouse.

   (2) A plan indicating the site and showing the proposed development (there is no requirement for drawings showing the elevations). The plan must be clear and accurate, because if the original information does not go through the prior

[2] i.e. not land in a National Park, an Area of Outstanding Natural Beauty, a Conservation Area, the Broads or a World Heritage Site.

approval process (see below), the development must proceed in accordance with this plan.

(3) The addresses of any adjoining premises, and the developer's contact details.

8. The Amendment Order does not define "Adjoining Premises". The term is defined in section 61(2B) of the Town and Country Planning Act 1990 (as inserted by the Growth and Infrastructure Act 2013) as including *"any land adjoining the dwelling house concerned, or the boundary of its curtilage".* This broad definition could include land without buildings on, however the use of the word "premises" suggests that this is not the intention. The Amendment Order states that it is the developer who must identify any adjoining premises, and there is no obligation on the LPA to identify any other premises. However, if the developer has clearly omitted adjoining premises, it would be good practice for a LPA to include these premises in the consultation procedure (see below) to avoid later challenge on this basis.

9. The LPA must then notify adjoining owners/occupiers through notice. This should give the address of the proposed development and describe it, including a written description of the proposal which includes the length that the extension extends beyond the rear wall of the original house, the height at the eaves and the height at the highest point of the extension. The notice should also set out when the application was received, and when the 42-day determination period ends, as well as setting out how long neighbours have to make objections and the date by which these must be received. Adjoining owners/occupiers must be given a minimum of 21 days from the date of the notice (not the date that the LPA was notified of the proposed extension) in which to make objections. This 21-day period can be extended by the LPA. A copy of the notice must also be sent to the developer.

10. If any adjoining neighbour raises an objection within the 21-day period, the prior approval of the local planning authority is required as to the impact of the proposed development on the amenity of any adjoining premises (para A.4(5)). No other issues are to be considered by the LPA.

11. In order to make this assessment, the LPA has power under para. A4(6) to require the developer to submit such further information regarding the proposed development as the local planning authority may reasonably require in order to consider the impact of the proposed development on the amenity of any adjoining premises. In this respect, it should be noted that, although not stated in terms, it appears that the LPA can only request additional information under paragraph A.4(6) if an objection is made. That is because the requirement for the information stems from the LPA's need to consider the impact of the development on amenity of adjoining premises, a need which only arises on objection.

12. In assessing the impact of the proposed development on the amenity of any adjoining premises, the LPA must take into account any representations made as a result of the notice. However, it should be noted that the LPA must consider the impact on all adjoining premises, and not just those whose owner or occupier has objected (see para. A4(7)(b)). There is no requirement to have regard to the Development Plan. Therefore, section 38(6) of the Planning and Compulsory Purchase Act 2004 (which states *"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise"*) will not apply.

13. If no objections are received within the period specified by the LPA in their neighbour notification, the LPA can write to the developer to state that its prior approval is not required (see paragraph A.4(8)(a)), however there is no obligation to do so.

14. Development is permitted:

    (1) Where prior approval is not necessary (because there have been no objections). In this case, development can begin on the receipt by the developer from the local planning authority of a written notice that their prior approval is not required or, if the LPA does not serve this written notice, after the expiry of 42 days, whichever is the sooner.

(2) Where prior approval is granted by the LPA. In this case, the development can proceed immediately upon receipt of that notice (para. A.4(8)(b)).

(3) If 42 days expire from the date when the information was received and the LPA has failed to notify the developer as to whether its prior approval of the extension is given or refused (see para. A.4(8)(c))

15. The 42 day time limit is of particular importance. The 42 day period runs from the date on which the LPA originally received notice of the proposed extension. It is not possible to extend the period by agreement. Further, it is clear from the wording of paragraph A.4(8)(c) that within that period the LPA must not simply notify the developer that prior approval is required, but carry out the prior approval determination and notify the developer of the result.

16. The practical implications are as follows:

(1) The 42 day limit runs from the date that the developer provided the LPA with the initial information. It does not run from the date that notice is given to adjoining owner/occupiers. Therefore, the LPA should try to notify adjoining owners/occupiers as soon as possible after receipt of the information.

(2) Further, whilst it is possible to agree to extend the 21 day time limit for objections, an extension will reduce the time available in which to make any prior approval decision which might be necessary. Indeed, care must be given not to give adjoining owners/occupiers an objection period which expires after the end of the 42-day period. In this situation, the LPA would be unable to prevent the construction of the extension once the 42-day period had expired.

(3) For the same reason, the 42-day limit should be borne in mind when setting time limits for the receipt of information from developers pursuant to a request for information under para. A4(6).

(4) The prior approval decision will almost certainly need to be made by officers, rather than by the relevant development control committee. Nevertheless,

speaking in the House of Lords, Communities and Local Government Minister Baroness Hanham has said: *"It will be up to individual councils to decide how they handle the consideration of these proposals. We would expect it to work in the same way as for planning decisions: that is, for the council to decide whether the decisions are delegated to officers or made by a planning committee."*

17. If approval is refused, the developer may appeal. The appeal will be dealt with as a householder appeal in the usual way.

18. Where prior approval of the development is required, and granted, the development must be carried out in accordance with the details approved by the LPA. Where prior approval is not required, or where the 42 day limit has expired without a decision being made and communicated to the developer by the LPA, the development must proceed in accordance with the original information provided. In the latter case, the developer and the LPA may agree that the development would proceed "otherwise" in writing[3]. On its face, this appears to give the LPA and the developer a great deal of flexibility to amend the original information, without the need to re-consult adjoining owners/occupiers. However, care should be taken given that a radical change to the details could deprive adjoining owners of their right to participate in the process.

19. Any new extension built in reliance on the provisions in the Amendment Order must be completed on or before 30th May 2016 (see para. A4(10)). The Amendment Order does not explicitly address a situation where development is partially completed at this date. However, in such a situation, the development would not amount to permitted development. Therefore, the developer would need to make an application for retrospective planning permission and, absent this, the LPA could (if expedient) commence enforcement action to ensure the removal of the partially complete extension.

20. Finally, the developer shall notify the local planning authority of the completion of the development as soon as reasonably practicable after completion (see para.

[3]Paragraph A.4(9)

A4(11)). This notification should be in writing and include the name of the developer, the address or location of the development, and the date of completion.

Office to Residential

21. Under new Class J in Part 3 of the Second Schedule to the GPDO, it is now possible to convert office buildings to residential use without express planning permission, subject to a number of limitations. Class J consists of the change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) in the Use Classes Order to a use falling within Class C3 (dwellinghouses).

22. This right also applies where the existing office use forms only part of a building. This is because Article 1(2) of the GPDO defines "building" as including any structure or erection and any *part* of a building. As a result, where only part of a building forms a planning unit which has been used as an office within Use Class B1(a) before 30th May 2013, this part can be changed to residential use without requiring express planning permission (subject to the other limitations set out in Class J).

23. There are a number of restrictions.

24. First, development is not permitted by Class J where the building is on article 1(6A) land. Article 1(6A) land is the land described in Part 4 of Schedule 1 of the Amendment Order. This sets out a number of specified areas within 17 different local planning authorities which have been exempted from these provisions (although it should be noted that this is currently subject to a legal challenge).

25. Importantly, unlike with the amendments relating to larger domestic extensions, there is no exclusion to this change of use on Article 1(5) land (i.e. land in a National Park, an Area of Outstanding Natural Beauty, a Conservation Area, the Broads or a World Heritage Site) or in an SSSI. Instead, the change is prevented

where the site is or forms part of a safety hazard area[4]; the site is or forms part of a military explosives storage area[5]; or where the building is a listed building or a scheduled monument.

26. Second, the building must have been used for a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order immediately before 30th May 2013 or, if the building was not in use immediately before that date, have been used as such when it was last in use (see para. J.1(b)). As such, if the building has previously been used for B1(a) use, but then has been more recently used for another purpose (even if only temporarily, and even if this other use also falls within Use Class B1), then it will not qualify from the permitted change of use in Class J. Further, a new-build office building, which has never actually been let, will not be able to take advantage of the permitted change of use.

27. Third, other restrictions may prevent the change of use. These include conditions attached to any relevant planning permission (such as a condition restricting the use of the building to Class B1(a) offices or to a named occupier),in a section 106 agreement, or any user covenants in the occupier's lease. Building Regulations approval will still be needed.

28. Further, whilst section 55(2)(a) of the 1990 Act exempts from the definition of development the carrying out of works for the maintenance, improvement or other alteration of any building which affect only the interior of the building, or which do not materially affect the external appearance of the building, any works that do materially affect the external appearance of the building will be development. Therefore, planning permission will be required for any such external alterations.

29. There is one further important restriction, which requires detailed consideration

[4]Paragraph J.1(d): An area notified to the LPA by the Health and Safety Executive for the purposes of paragraph (e) of the Table in Schedule 5 to the Development Management Procedure Order.
[5]Paragraph J.1(e): An area, including an aerodrome, depot or port, within which the storage of military explosives has been licensed by the Secretary of State for Defence, and identified on a safeguarding map provided to the LPA for the purposes of a direction made by the Secretary of State in exercise of powers conferred by article 25(1) of the DMPO.

Prior Approval

30. In all cases of a change of use under Class J, the developer must apply to the LPA for a determination as to whether the prior approval of the authority will be required as to:

    (a) transport and highways impacts of the development;
    (b) contamination risks on the site; and
    (c) flooding risks on the site,

31. This requirement, and the comments set out below, also applies to any change permitted under the Amendment Order to school use, and from agricultural to commercial (flexible) use.

32. The procedure for an application to the LPA for a determination as to whether prior approval is required is set out in paragraph N of Part 3 to the GPDO (as amended). The application must be accompanied by a written description of the proposed development, a plan indicating the site and showing the proposed development, the developer's contact address and the developer's email address if the developer is content to receive communications electronically, together with any fee required to be paid (see para. N(2)).

33. As regards fees, para. N(2) in the Amendment Order simply states that: "*The application shall be accompanied by* - …[the items set out above]*...together with any fee required to be paid*". The reference to a fee "required" to be paid, must be a reference to a requirement pursuant to the relevant fees statutory instrument, rather than a requirement by the LPA. The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012, which is the relevant fees regulation, does not provide a fee in relation to applications under Part 3 of the GPDO. Instead, regulation 14(1) provides that:

    "Where an application is made to a local planning authority for their determination as to whether the prior approval of the authority will be required in

relation to development under Schedule 2 to the General Permitted Development Order (permitted development) a fee shall be paid to that authority of the following amounts — (a) for an application under Parts 6 (agricultural buildings and operations), 7 (forestry buildings and operations) or 31 (demolition of buildings) of that Schedule, £80; (b) for an application under Part 24 of that Schedule (development by electronic communications code operators), £385."

34. As such, for any application received before 1st October 2013, no fee is payable. However, the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2013/2153 came into effect on 1st October 2013. This inserts a new paragraph (za), which states that for an application under any Part of that Schedule relating to development which involves the making of any material change in the use of any buildings or other land, the fee is £80.

35. Where on receipt of the application, the opinion of the local planning authority is that the development is likely to result in a material increase or a material change in the character of traffic in the vicinity of the site, the local planning authority must in certain circumstances consult the relevant statutory consultees set out in para. N(3) (i.e. the Secretary of State for Transport, the local highway authority, the operator of the network).

36. Similarly where the application relates to prior approval as to the flooding risks on the site, on receipt of the application, the local planning authority shall consult the Environment Agency.

37. Statutory Consultees will be given 21 days to comment. In addition, the LPA must display a site notice for at least 21 days, giving notice as to the proposed development, and must serve a notice on any adjoining owner or occupier (see para. N(6).

38. The LPA may require the developer to submit such information regarding the impacts and risks in relation to transport and highways impacts of the development, contamination risks on the site and flooding risks on the site as they may reasonably require in order to determine the application. This may include

assessments of impacts or risks and statements setting out how impacts or risks are to be mitigated. There is no power for the LPA to request additional information in respect of other impacts and risks, even if objections are received on these issues from neighbouring owners/occupiers.

39. Paragraph N(8) states as follows:

> *(8) The local planning authority shall, when determining an application—*
> *(a) take into account any representations made to them as a result of any consultation under paragraphs (3) or (4) and any notice given under paragraph (6);*
> *(b) have regard to the National Planning Policy Framework issued by the Department for Communities and Local Government in March 2012 as if the application were a planning application.*

40. Further, in relation to the contamination risks on the site, the LPA must determine whether, as a result of the proposed change of use, taking into account any proposed mitigation, the site will be contaminated land (as described in Part 2A of the Environmental Protection Act 1990), and in doing so they must have regard to the Contaminated Land Statutory Guidance issued by DEFRA in April 2012. If they determine that the site will be contaminated land, they must refuse to give prior approval.

41. The requirement that the LPA should "*have regard to the NPPF as if the application were a planning application*" has given rise to competing interpretations. Some have argued that the duty to have regard to the NPPF might enable a LPA to refuse to grant prior approval if the application did not comply with general principles set out in the NPPF, such as the principle of sustainable development, or if the application did not comply with relevant policies in the NPPF on issues other than transport/highways, flooding or contamination (such as development in the Green Belt, or affordable housing policies). This would, for example, allow a change of use from offices to residential to be refused if no affordable housing is provided on site.

42. There is no indication or guidance from the Secretary of State as to the meaning of this phrase. However, in my view, the requirement to have regard to the NPPF is only applicable insofar as the NPPF is relevant to the consideration of transport

and highways impacts, contamination risks and flooding risks. This is because these are the only issues under which the developer is required to apply to the local planning authority for a determination as to whether the prior approval of the authority will be required. Further, if the prior approval procedure could include wider considerations the purpose of making these changes of use permitted development in the first place would be frustrated.

43. This analysis is supported by the Court of Appeal decision in ***Murrell v Secretary of State for Communities and Local Government*** [2010] EWCA Civ 1367. In this case the Court of Appeal held that the principle of whether the development should be permitted is not for consideration in the prior approval procedure. As Richards LJ put it:

> *45 The question of prior approval under paragraph A2(2) can only arise in respect of "permitted development" within Class A (i.e. development falling within the terms of Class A and not excluded by paragraph A1). Such development is permitted subject to the conditions in paragraph A2, including the condition relating to prior approval, but those conditions do not affect the principle of development. In recognition of the importance of agriculture and its operational needs, the GPDO has already taken a position on the issue of principle. Thus, as the guidance in Annex E spells out, if the GPDO requirements are met, "the principle of whether the development should be permitted is not for consideration" in the prior approval procedure (paragraph E15).*
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> *46 Paragraph E22 draws an analogy with outline planning permission, stating that details submitted for prior approval "should be regarded in much the same light as applications for approval of reserved matters following the grant of outline permission". The analogy is not a precise one and is not put forward as such in Annex E . One obvious difference is that in the case of an outline planning permission there exists an accrued permission, whereas in a Class A prior approval case no permission accrues until the occurrence of one of the events in paragraph A2(2)(iii). In practice there may also be differences of detail: for example, although both cases may involve the approval of siting, design and external appearance, in the case of outline planning permission there is likely to have been an assessment of the general suitability of the site at the permission stage, leaving less flexibility at the reserved matters stage. Nevertheless, the two situations call for a broadly similar approach, and the analogy with outline planning permission has a real value in underlining the point that the assessment of siting, design and external appearance has to be made in a context where the principle of the development is not itself in issue.*
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> *What troubles me about the inspector's decision on the substantive appeal in this case is that, far from acknowledging that the principle of development was not in issue, she appears to have based herself on policies where the principle of development was very much in issue, so that on the question of impact on visual amenity her decision reads more like the determination of an ordinary planning application than the determination of an application for prior approval of a Class A permitted development…"*

44. These comments were obiter, but the Court of Appeal heard full argument on the issue. Further, although ***Murrell*** was a case under Part 6 of the GPDO (agricultural permitted development rights), the approach has been applied in different contexts. For example, in ***Infocus Public Networks Limited v The Secretary of State for Communities and Local Government*** [2010] EWHC 3309 (Admin), the above paragraphs were applied in the context of electronic communications apparatus, including telephone kiosks under Part 24 of the Town and Country Planning (General Permitted Development) (Amendment) (England) (Order) 2001.

45. Therefore, matters which are addressed in the NPPF but do not relate to transport and highways impacts, contamination risks and flooding risks should not be taken into account by the LPA. Therefore, for example, affordable housing policies should not be taken into account because the principle of the change of use from office to residential is not in issue (following ***Murrell***), and the mix and type of housing is not one of the three specified matters which must be taken into account.

46. There is no specific requirement to have regard to the development plan. This means that section 38(6) of the 2004 Act is not engaged.

47. The requirement to "*take into account any representations made to them as a result of any consultation*", should be read in light of the above discussion. Therefore, whilst this consultation does not just include the relevant statutory consultees, but also includes neighbours, any objection received which is not related to one of the three stated issues should not be taken into account.

<u>After prior approval</u>

45. Development can only take place once:

(1) The LPA gives written notice that prior approval is not needed.

(2) The LPA gives written notice that prior approval has been refused. In this situation, a developer has the choice of either making a full planning

application, or appealing the refusal to the Secretary of State under section 78 of the 1990 Act in the usual way.

(3) The LPA gives written notice that prior approval is granted.

(4) 56 days have expired without the LPA giving notice.

48. As in the case of larger domestic extensions, where prior approval of the change of use is required, the development must be carried out in accordance with the details approved by the LPA or, where prior approval was not required or where the LPA did not notify the developer of its decision within the 56-day time limit, in accordance with the information provided in the original notification to the LPA. This, however, is again subject to the proviso "*unless the local planning authority and the developer agree otherwise in writing*".

49. Finally, any change of use to residential use within Use Class C3 permitted under this provision must be begun before 30 May 2016, but there is no requirement to notify the LPA of the completion of the development in this case.

Agricultural to Commercial

50. The Amendment Order adds a new Class M, which allows existing agricultural buildings to change use to shops (A1), financial and professional services (A2), restaurants and cafes (A3), business (B1), storage and distribution (B8), Hotels (C1), assembly and leisure (D2). Subsequent changes of use to another use falling within one of these use classes is also permitted. The buildings must have been in sole agricultural use since 3 July 2012 or for ten years if brought into use after that date. This change of use cannot be made if the agricultural building is a listed building or a scheduled ancient monument.
51. The change is not permitted where the cumulative floor space of the buildings within an original agricultural unit whose use is sought to be changed is over 500m2. Up to 150m2, developers must notify LPAs of the date when use will change, nature of use and a plan. Where the existing cumulative floor space is

between 150m2 and 500m2 – developers must apply to LPA for a determination whether 'prior approval' needed in respect of transport and highways, noise, contamination risk, flooding risk.

Other changes

52. The Amendment Order makes a minor change to Part 3 (Class B) of the Second Schedule to the GPDO. This increases from 235 square metres to 500 square metres the amount of floor space that can be changed to a use for any purpose falling within Class B1 (business) of the Schedule to the Use Classes Order from any use falling within Class B2 (general industrial) or B8 (storage and distribution) of that Schedule or to a use for any purpose falling within Class B8 (storage and distribution) of that Schedule from any use falling within Class B1 (business) or B2 (general industrial): see art. 6(1) of the Amendment Order. This is a permanent change, and does not expire in 2016.

53. Article 8 of the Amendment Order increases the thresholds for erecting, extending or altering industrial and warehouse use classes under Part 8:

(1) The gross floor space of the new building may be up to 200 square metres, from 100 square metres, but not on Article 1(5) land.

(2) The gross floor space of the original building can increase by (a) 10% on Article 1(5) land; 25% within an SSS1; and 50% in other cases (the existing permission allowed 10% in respect of development on any article 1(5) land or 25% in any other case) or (b) Up to 500m2 in Article 1(5) land or 1000m2 in other cases, whichever is lesser.

54. These changes also expire on 30th May 2016. In respect of those developments that are larger than the previous limits, the developer must notify the local planning authority of the completion of the development as soon as reasonably practicable after completion. The notification should be in writing and include the name of the developer, the address or location of the development, a description of the development, including measurements and calculations relevant to the

above requirements and the date of completion. No prior notification is involved and neither is prior approval required.

55. The Amendment Order also introduces an amendment to Part 4 in relation to the temporary use of various commercial premises. A new Class D is added. This allows a change of use of a building and any land within its curtilage to a flexible use falling within either Class A1 (shops), Class A2 (financial and professional services), Class A3 (restaurants and cafes) or Class B1 (business) of the Schedule to the Use Classes Order from a use falling within Classes A1 (shops), A2 (financial and professional services), A3 (restaurants and cafes), A4 (drinking establishments), Class A5 (hot food takeaways), B1 (business), D1 (non-residential institutions) and D2 (assembly and leisure) of that Schedule. The use is permitted for a single continuous period of up to two years beginning on the date the building and any land within its curtilage begins to be used for one of the flexible uses.

56. There are a number of limitations: see paras. D2 and D3. The change is not permitted if the change of use relates to more than 150 square metres of floor space in the building. Neither is the change permitted if the site has at any time in the past already relied upon the permission granted by Class D. As in other cases, this change of use cannot be made if the building is a listed building or a scheduled ancient monument and the site must not be or form part of a military explosives storage area or be or form part of a safety hazard area.

57. The developer must also notify the LPA of the date the site will begin to be used for one of the flexible uses, and what that use will be, before the use begins. At any given time during the two-year period the site can be used at any one time only for one of the use classes comprising the flexible use. However, the site may at any time during the two-year period change use to a use falling within one of the other use classes comprising the flexible use, subject to further notification to the LPA. No prior approval is required, and the site reverts to its previous lawful use at the end of the period.

58. Article 9 of the Amendment Order changes Part 24 of Second Schedule the GPDO (developments by electronic communications code operators). The changes remove the need on "Article 1(5) land" for prior approval of the construction, installation or replacement of telegraph poles, cabinets or lines for fixed-line broadband services under Part 24 (paragraph A.3) for a 5-year period. Any developments covered by this concession must be completed before 30 May 2018.

59. Finally, there are also temporary increased thresholds for offices. Article 11 of the Amendment Order increases the PD threshold to erect, extend or alter office premises from 25% gross floor space or 100 square metres to 50% or 200 square metres. This change expires 30th May 2016 and, as before, developers must notify LPA when the change is complete.

Schools

60. To accelerate the delivery of the Free School programme, a number of changes are made to permit a change of use to schools. These changes have been described by the Secretary of State as "a move to assist the free schools agenda there are a series of measures to make it easier for parents and community activists to convert existing buildings to become new state funded schools." New permitted development rights are introduced permitting a permanent change of use from Business (B1), Hotels (C1), Residential Institutions (C2) Secure Residential Institutions (C2A) or Assembly and Leisure uses (D2) to a state funded school: see Class K, introduced by art. 6 of the Amendment Order.

61. The site is to be used as a state-funded school and for no other purpose, including any other purpose falling within Class D1 (non-residential institutions) of the Schedule to the Use Classes Order, except to the extent that the other purpose is ancillary to the primary use of the site as a state-funded school. Further, this changes of use is permitted subject to a prior approval procedure in which the LPA will consider transport and highway impacts and contamination and flooding risks (as described in more detail above).

62. The Amendment Order also permits a change the use of land from a school permitted under this new right back to the previous lawful use of the land. (Part 3 Class L)

Article 4 directions

63. A number of local authorities have considered making Article 4 directions to avoid the effect of these changes. Article 4 confers a wide power, and a Direction made under it can cover the entire geographical area of an LPA, and also permitted development rights with a temporary effect (such as the proposed changes). There are two main types of Article 4 Direction:

(1) Non-immediate Directions, where permitted development rights are only withdrawn following local consultation and the subsequent confirmation of the Direction by the LPA; and

(2) Immediate Directions made under Article 6, where permitted development rights are withdrawn with immediate effect. Immediate Directions must then be confirmed by the local planning authority following local consultation within six months, or else the Direction will lapse.

64. The distinction is important. Immediate Directions can only be used to withdraw a small number of permitted development rights permitted by Parts 1-4 and 31 of Schedule 2 to the GPDO where the LPA consider that the development to which the direction relates would be prejudicial to the proper planning of their area or constitute a threat to the amenities of their area. This includes development within the curtilage of a dwellinghouse, and the permitted change from office to residential use in new Class J in Part 3 of the Second Schedule to the GPDO. However, immediate directions could not be used to withdraw the proposed changes to Part 8 (industrial and warehouse development), Part 24 (Development by electronic communications code operators), Part 41 (Office Buildings) and Part 42 (Shops or catering, financial or professional services establishments). There are also provisions that permit immediate directions for specified changes in

conservation areas: see art. 6(1)(a) GPDO.

65. There is no statutory appeal against the making of an Article 4 Direction. However, such a decision would be open to challenge by way of judicial review.

66. In order to make an Article 4 Direction, the LPA must be satisfied that it is expedient that the permitted change of use should not be carried out unless permission is granted for it (see Article 4(1)). Additionally, for Directions with immediate effect, the authority should consider that the development to which the direction relates would be prejudicial to the proper planning of their area or constitute a threat to the amenities of their area (Article 6(1)(a)).

67. In making any such decision, it is important that the LPA takes into account all relevant guidance. There are two pieces of guidance of particular importance:

(1) Appendix D to Circular 9/95 which states that Local Planning Authorities should consider making Article 4 Directions only in exceptional circumstances, where evidence suggests that the exercise of permitted development rights would harm local amenity or the proper planning of the area. It states that there should be a real and specific threat to interests of acknowledged importance.

(2) The guidance also states that there should be a particularly strong justification for the withdrawal of permitted development rights relating to: (a) a wide area (e.g. those covering the entire area of a local planning authority) and (b) cases where prior approval powers are available to control permitted development.

(3) The National Planning Policy Framework which states, at paragraph 200, that:

> *"The use of Article 4 directions to remove national permitted development rights should be limited to situations where this is necessary to protect local amenity or the wellbeing of the area (this could include the use of Article 4 directions to require planning permission for the demolition of local facilities). Similarly, planning conditions should not be used to restrict national permitted development rights unless there is clear justification to do so."*

68. Second, it is important that the LPA does not make a blanket direction in respect of all of the changes brought about by the Amendment Order. Instead, it should consider each change and consider whether a direction is expedient and that the development to which the direction relates would be prejudicial to the proper planning of their area or constitute a threat to the amenities of their area.

69. There is no in principle reason why it would be unreasonable for an LPA to make a blanket direction in respect of each proposed change, and covering its entire area, but this must be carefully explained to insulate against the risk of successful challenge. In particular, it will be necessary to consider how the local circumstances differ from the national position, and why existing safeguards, such as building regulations, the Party Wall Act, or environmental legislation would not protect amenity.

70. Overall, provided that a LPA takes into account all relevant considerations, and applies the correct test, a successfully judicial review of an article 4 direction made on the basis that it wishes to consider applications on a case-by-case basis is unlikely. Indeed, this outcome was expressly anticipated in the consultation's impact assessment (at page 30).

71. One significant limitation, however, is that under Article 5(13) the Secretary of State has power to cancel or modify an Article 4(1) Direction made by a local planning authorityat any time before or after its confirmation by the LPA. Article5(13) reads as follows:

> *(13) A local planning authority may, by making a subsequent direction, cancel any direction made by them under article 4(1); and the Secretary of State may, subject to paragraphs (3) and (4) of article 6, make a direction cancelling or modifying any direction under article 4(1) made by a local planning authority at any time before or after its confirmation.*

72. Paragraphs (3) and (4) of article 6 relate to certain classes of permitted development in conservation areas, listed buildings, buildings which have been notified to the authority by the Secretary of State as a building of architectural or

historic interest and development within the curtilage of a listed building, and does not relate to land of any other description.

73. Modification or cancellation of an Article 4 Direction before it comes in force is possible because under the Town & Country Planning (General Permitted Development) (Amendment) (England) Order 2010 (SI 2010 No.654) LPAs are obliged to give notice of Article 4 directions to the Secretary of State, and cannot confirm them for 28 days or such longer period as the Secretary of State may specify following notice of the draft Article 4 direction having been received by the Secretary of State from the LPA.

74. Any cancellation of an article 4 direction could be justified by the Secretary of State for the reasons the Government has already set out for proposing the policy. In light of the large discretion afforded to the Government in making macro-political decisions, it would be difficult to challenge any such cancellation by way of judicial review. However, it might be politically unsatisfactory for the Government to make any such order.

75. Another important consideration to take into account in considering making an Article 4 direction is the implication for compensation. Section 108 of the Town and Country Planning Act 1990 includes a provision that compensation can be sought where (i) the LPA makes an Article 4 Direction, (ii) an application is made for planning permission to carry out development that would formerly have been permitted by the GPDO and (iii) the LPA refuses that application or grants permission subject to conditions differing from those in the GPDO.

76. However, importantly, ss. (3B) states that the section does not apply if the condition in ss. (3C) is met. Section 103(3C) provides as follows:

(3C) The condition referred to in subsection (3B)(a) is that—
(a) the planning permission is granted for development of a prescribed description,
(b) the planning permission is withdrawn in the prescribed manner,
(c) notice of the withdrawal was published in the prescribed manner not less than 12 months or more than the prescribed period before the withdrawal took effect, and
(d) either—
(i) the development authorised by the development order had not started before the notice

was published, or
(ii) the development order includes provision in pursuance of section 61D permitting the development to be completed after the permission is withdrawn.

77. The Town and Country Planning (Compensation) (No. 3) (England) Regulations 2012gives effect to section 103(3C). This provides that:

(1) Development of a prescribed description includes development within the curtilage of a dwelling house, changes of use from B1 to C3 and the flexible use changes.

(2) Planning permission is withdrawn in the prescribed manner if it is withdrawn by articles 4, 5 and 6 of the GPDO (as appropriate).

(3) Notice of the withdrawal is published in the prescribed manner if the direction is non-immediate and the procedure in Article 5(1)-(5) is followed.

78. Read together with section 103(3C), the effect is that where 12 months notice is given in advance of a direction taking effect there will be no liability to pay compensation (provided that the development authorised by the new changes had not started before the notice was published). Where directions are made with immediate effect or less than 12 months notice, compensation will only be payable in relation to planning applications which are submitted within 12 months of the effective date of the direction and which are subsequently refused or where permission is granted subject to conditions.

79. It is also important to note the limitations in the amount of compensation that will be payable. Compensation may only be claimed for abortive expenditure (for example, expenditure incurred in the preparation of plans for the purpose of development) or other loss or damage directly attributable to the withdrawal of permitted development rights. The latter might include the depreciation of land value, provided that this is directly attributable to the removal of the permitted development rights.

80. Further, all claims for compensation must be made within 12 months of the date on which the planning application for development formerly permitted is rejected (or approved subject to conditions that go beyond those in the GDPO).

Current consultation

81. The current DCLG consultation on "Greater flexibilities for change of use" closes on 15th October. There are five proposals for permitted development rights to allow:

(1) shops and financial and professional services to change use to a dwelling house

(2) existing buildings used for agricultural purposes of up to 150 square metres to change to residential use

(3) retail uses to change to banks and building societies only

(4) premises used as offices, hotels, residential and non-residential institutions, and leisure and assembly to be able to change use to nurseries providing childcare

(5) a building used for agricultural purposes of up to 500 square metres to be used as a new state funded school or a nursery providing childcare

Issues arising

Class J

82. The permitted development rights granted by Class J of Part 3 of Schedule 2 have proved to be the most controversial changes.

83. The Secretary of State offered local planning authorities the opportunity to seek exemptions from Class J. Many LPAs made exemption applications as they feared

that the ability to change form B1 use to residential use without the need to obtain express planning permission might adversely affect the supply of land available for employment use.

84. Certain areas, mainly in central London, have been exempted[6]. However many exemption applications were rejected by the Secretary of State.

85. Many LPAs whose exemption applications were rejected may consider how best to prevent the harm that they consider will arise as a result of the new Class J rights and either have or are likely to consider making Article 4 directions.

86. The ability to rely on permitted development rights to change a use from offices to residential is likely to be relied upon by those seeking planning permission for residential developments.

87. For example, when advancing a viability case in support of an argument that no or a reduced level of affordable housing should be provided, a developer may seek to rely on the permitted development rights when assessing benchmark or threshold value. In order to place reliance upon the permitted development rights when advancing such a case, it may be necessary to secure prior approval and to begin the use.

88. In addition, a developer seeking express planning permission to develop land in B1 use for residential purposes, may rely upon the class J permitted development right as a 'fall back'. Such a 'fall back' might be relied upon in order to overcome a policy which seeks to ensure that land in employment use is retained for that use.

Agricultural Buildings

89. Class M of part 3 of Schedule 2 to the GPDO grants permission for a change of use of agricultural buildings to a flexible use within A1, A2, B1, B8, C1 or C2.

[6]Areas defined as Article 1(6A) land

90. The ability to change the use of agricultural buildings to business class uses is likely to be attractive to many farmers and landowners. However the suggestion canvassed in the August 2013 consultation paper, that permitted development rights should be extended to allow agricultural buildings to be converted into residential use is likely to cause those farmers and landowners to wait; a potential change of use to residential may be more attractive that change to business class use.

Neil Cameron QC 7th October 2013

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