

OFFICES TO FLATS DEVELOPMENT

PLANNING ISSUES

Richard Moules – February 2019

Updated: Jacqueline Lean – June 2019

1. In 2016/17, permitted development rights provided nearly 18,900 new homes -8.5% of the total number of net additions delivered. The Government sees the conversion of buildings to residential use under permitted development rights as a valuable way of boosting housing supply whilst reducing the need to build in the countryside.
2. In this paper, I will give an overview of the permitted development rights that allow the conversion of offices and other commercial buildings to dwellinghouses, and in doing so I will highlight some of the planning issues and pitfalls likely to arise in practice.

Check permitted development rights have not been excluded

3. Permitted development rights that would otherwise be exercisable under the Town and Country Planning (General Permitted Development) (England) Order 2015 (“GPDO 2015”) may be excluded in a number of ways. Consequently, it is important to begin by checking that permitted development rights have not been excluded.
4. First, permitted development rights may be removed by planning condition. Article 3(4) GPDO 2015 provides that nothing in the GPDO 2015 permits development contrary to any condition imposed by any planning permission. It is very common for planning conditions to remove some or all of the permitted development rights under the GPDO 2015. The extensive case law about when a planning condition will be construed as impliedly removing permitted development rights is beyond the scope of this paper: see further *Dunnett Investments Limited v SSCLG* [2017] EWCA Civ 192 and the authorities discussed therein.

5. Secondly, the use of a property may also be controlled or constrained by a s.106 planning obligation. This would not actually remove permitted development rights, but carrying out the permitted development might amount to a breach of a covenant in the s.106 agreement.
6. Thirdly, the use of the property might be constrained by restrictive covenants.
7. Fourthly, the Local Planning Authority (“LPA”) might have removed some or all permitted development rights throughout its area, or over a specified part of its area by means of a direction under Article 4 GPDO 2015.

Residential conversion of commercial offices

Introduction

8. Class O of Schedule 2, Part 3 of the GPDO 2015 permits the change of use of a building and any land within its curtilage from a use falling within Use Class B1(a) (offices) to a use falling within Use Class C3 (dwellinghouses).
9. Class O grants planning permission for a material change of use only. Consequently, the development permitted by Class O does not include any building operations in connection with the residential conversion of the building. Any such works therefore require planning permission, unless they are exempt from the definition of development by virtue of s.55(2)(a) Town and Country Planning Act 1990 (because they only affect the interior of the building, or do not materially affect the external appearance of the building).
10. There is no floorspace limit in respect of the size of office building that can be converted. Nor is there any maximum or minimum limit as to the number or size of any individual dwellings that can be created. This is important because many development plans contain minimum acceptable sizes for new flats. Those minimum standards do not apply to development under Class O.
11. In an appeal in Hounslow (ref 2228951), the LPA argued that the proposed residential units to be created by converting an office building were too small to be classified as

dwellinghouses. The proposed units were between 18 sq m and 22 sq m in floor area, and comprised a living space with a foldaway bed, kitchenette, and a shower and toilet. The Inspector found that the proposed units fell within Class O because there was no minimum size and the units would meet the test in *Gravesham BC v Secretary of State for the Environment* (1984) P&CR 142 because the building would be constructed or adapted for use as a dwellinghouse i.e. it would be a building that provides for the main activities of, and ordinarily affords the facilities required for, day-to-day private domestic existence.

12. Similarly, in another appeal in Hounslow (ref 2228868), the Inspector rejected the LPA's reliance upon the minimum space standards in the London Plan. The Inspector held that as long as the proposed units provided the facilities for day-to-day living (i.e. they satisfied the *Gravesham* test), they qualified as permitted development.

Not on Article 2(5) land

13. The Secretary of State has granted certain LPAs exemptions from the provisions of Class O: see the list of Article 2(5) land in Part 3 of Schedule 1 to the GPDO 2015. The list includes the Central Activities Zone and Tech City, London, the whole of Kensington and Chelsea, and parts of Tower Hamlets and Newham.
14. This exclusion was extended by 3 years, until 30 May 2019, in order to give the LPAs time to make Article 4 Directions to remove the Class O right. The effect of this exclusion is that the change of use from office to residential is not *currently* permitted development in those areas. After 30 May 2019, the Class O right will apply to those areas, subject to any Article 4 Directions that have been made by the individual LPAs.
15. Article 4 Directions are now in effect in respect of the CAZ in (inter alia) Lambeth, Islington, Westminster, Southwark & Camden.

The need for a qualifying office use

16. The building will only qualify for conversion under Class O if it was used as an office falling within Use Class B(1)(a) (offices) on 29 May 2013 or, in the case of a building

which was in use before that date but was not in use on that date, when it was last in use: Class O.1(b).

17. It is important to ensure that the existing use of the building does in fact fall within Class B(1)(a). This can raise difficult questions of fact and degree. For example, in an appeal in Manchester (ref 3142881), the LPA had refused prior approval for the residential conversion of a solicitor's office on the ground that the use fell within Use Class A2, rather than Class B(1)(a). The Inspector noted the Court of Appeal's decision in *Kalra v Secretary of State for the Environment* (1996) 72 P&CR 423, to the effect that a solicitor's practice does not always fall within Class A2 depending upon whether the services are provided "principally to visiting members of the public". The Inspector then examined the Appellant's evidence that the current occupant of the building was a solicitor's practice specialising in criminal law, and that client contact was predominantly via the telephone or via the duty solicitor scheme directly at the police station. Although the Appeal was dismissed on other grounds, the decision illustrates the importance of a developer providing sufficient evidence of a qualifying use to satisfy the LPA (or an Inspector on appeal).

18. It should also be noted that the change of use under Class O can be carried out only where the planning unit in question is solely used as an office within Class B1(a). This limitation is important in situations where the use of the property as a whole comprises several distinct functions, including an office. There are two possibilities, first as a matter of fact and degree the office use might constitute a separate planning unit applying the test in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240, at 244 (essentially a planning unit is the unit of occupation until or unless a smaller unit is identified which is in separate use, both physically and functionally). Secondly, if the office use is only one element of a mixed use within *the same* planning unit, then the building will be in a *sui generis* use and it will not qualify for residential conversion.

Other exclusions

19. Residential conversion of offices is excluded if the building is a listed building, or is within the curtilage of a listed building, or contains a scheduled monument: O.1(f)-(g).

NB there is no exclusion in respect of conversion under Class O in conservation areas or World Heritage Sites.

20. Permitted development is excluded if the site is or forms part of a safety hazard area or is or forms part of a military explosives area: O.2(d)-(e). A safety hazard area is an area notified to the LPA by the Health and Safety Executive (“HSE”), and a military explosives area is an area, including an aerodrome, depot or port, within which the storage of military explosives has been licenced by the Secretary of State.
21. An example of the safety hazard area exclusion being relevant in London is provided by an appeal in Lambeth (ref 3005268) where prior approval was refused because the office building was within an HSE consultation zone. The Inspector found that the exclusion was an absolute bar to permitted development and it was irrelevant that the nearby gasholders which had led to the designation were empty and disused so as to no longer pose a risk.

Prior approval

22. The change of use from office to residential under Class O is subject to the condition in O.2(1) that before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to:
- (a) Transport and highway impacts of the development
 - (b) Contamination risks on the site
 - (c) Flooding risks on the site
 - (d) Impacts of noise from commercial premises on the intended occupiers of the development.
23. Paragraph O.3 defines “commercial premises” to mean “any premises normally used for the purpose of any commercial or industrial undertaking, which existed on the date

of the prior approval application and includes any premises licensed under the Licensing Act 2003 or any other place of public entertainment”.

24. Crucially, in determining a prior approval application, the LPA is not granting a planning application; it is simply deciding whether its prior approval is required *in respect of the specified matters only* (i.e. transport and highway impacts, contamination risks on site, flooding risks on site and noise impacts from commercial premises). Consequently, the LPA is not able to take into account other considerations that it would be able to consider were it determining a planning application e.g. the sufficiency of the amenity space each dwellinghouse has. As the Planning Practice Guidance explains:

What is prior approval?

Prior approval means that a developer has to seek approval from the local planning authority that specified elements of the development are acceptable before work can proceed. The matters for prior approval vary depending on the type of development and these are set out in full in the relevant Parts in Schedule 2 to the General Permitted Development Order. A local planning authority cannot consider any other matters when determining a prior approval application. (emphasis added)

Paragraph: 026 Reference ID: 13-026-20140306

25. Applications for a determination as to whether prior approval is required are made in accordance with the procedural requirements of paragraph W. Paragraph W(13) provides that the LPA may grant prior approval unconditionally, or subject to conditions reasonably related to the subject matter of the prior approval. This power to impose conditions is strictly limited to the matters specified for prior approval (transport and highways etc), and does not give the LPA carte blanche to conditions relating to the entirety of the proposed development.
26. In *Pressland v Hammersmith and Fulham LBC* [2016] EWHC 1763 (Admin), John Howell QC (sitting as a Deputy High Court Judge) held that an application could be made under s.73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted by development order such as the GPDO 2015.
27. There is no prescribed application form. Even though many LPAs have devised their own prior approval application form, an applicant is not required to use the LPA’s form. An application will be valid provided it complies with the requirements of paragraph

W and an LPA may not impose additional requirements: *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367. The Court of Appeal held that:

- (1) Whether an application is valid is an objective question of law;
- (2) The application for a determination as to whether prior approval is required does not need to be in any particular form and does not need to be accompanied by anything more than what is prescribed by the GPDO;
- (3) It is not mandatory to use a local planning authority's standard form or provide information beyond that prescribed in the GPDO.

28. On facts of *Murrell*, the applicant did not need to provide the requested proposed elevations or a block plan, nor did he need to use LPA's form in order for his application to be valid. The local planning authority was entitled to ask for such further information, but it was not entitled to refuse to treat the application as a valid application until that further information was received.

29. In terms of the time when an application must be made, paragraph W(11) provides that:

“(11) The development must not begin before the occurrence of one of the following—

- (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
- (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or
- (c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.

30. In *Winters v SSCLG* [2017] EWHC 357 (Admin), the Court (John Howell QC) upheld an Inspector's decision dismissing an appeal against the LPA's refusal to grant prior approval for a house extension under Schedule 2 Part 1 para A4 of the GDPO where building works had begun before the application was made. In *Quaystone Properties Limited v SSCLG* (CO/591/2016), the Court (Lang J on renewal) refused permission under s.288 TCPA 1990 to challenge a similar decision in respect of an application for prior approval under Class O where conversion of the offices to flats had commenced

before the application was made, and completed by the time of the Inspector's site visit. The developer has sought permission from the Court of Appeal.

31. Paragraph W(11) establishes a 56 day rule whereby the permitted development in question can be begun upon the expiry of 56 days following the date on which the application was received by the LPA without the authority notifying the applicant as to whether prior approval is given or refused.

32. In *R (on the application of Orange PCS Ltd) v Islington LBC* [2006] EWCA Civ 157 [2006] J.P.L. 1309, the claimant had installed telecommunications equipment pursuant to a prior approval notice granted under Part 24 of Schedule 2 to the GPDO. The work carried out did not, however, comply with the specifications. Subsequently, the site was designated as a conservation area and the local planning authority took the view that the permitted development rights granted under the GPDO no longer applied. The authority contended that the planning permission granted by the GPDO only accrued or crystallised when the work was substantially completed. Laws L.J. rejected that contention and held that where prior approval is granted, or where the local planning authority determines that prior approval was not required, the planning permission crystallises and its benefits accrue at the time when the favourable response of the local planning authority is received.

33. It is worth setting out the relevant parts of the judgment in full:

“14 I think there are difficulties however the case is regarded. One may perhaps postulate two extremes. Take, first, the proposition that since the General Development Order grants planning permission, permission to carry out all the forms of development permitted by Part 24 accrued when the development order came into effect subject only to a prohibition on commencement until stipulated conditions were fulfilled where that applied. That would mean that the exception to permission in a case of Article 1(5) land, provided for by paragraph A.1 (h) , would only apply where the relevant land was already Article 1(5) land at the time the development order came into force. That seems most improbable and no one contends that it is the right approach.

15 Take, secondly, the proposition that Part 24 permission only accrues when the work is substantially completed so that if, at any time before that event, the land becomes Article 1(5) land the planning permission is defeated. That is, in my judgment, even more improbable. It would mean that developers might begin operations not knowing whether they enjoyed an effective planning permission or not.

16 Mr Taylor has suggested that some support may nevertheless be obtained for this latter approach by a decision of Mr Justice Ouseley in a case named *Watts* [2002] EWHC Admin 993.

That case dealt with a different form of development under the development order. I will refer to it briefly later.

17 I would reject the two extremes I have postulated.

18 The question then arises — what middle way can be found consistent with principle and the statutory language? Plainly the Development Order has to be read as a whole. Certainly Part 24 has to be read as a whole. Thus the grant of planning permission for class A development and its withholding by paragraph A.1(h) have to make sense in the light of each other. It seems to me therefore that if we contemplate the notional case of a prospective developer who has not yet taken any steps to carry forward his development — whether by seeking prior approval, commencing works or otherwise — and who, on a particular date, asks the question “Does he have an approved right to install telecommunications apparatus on a particular site?” the answer will be “Yes, unless on the facts then prevailing any of the exceptions including paragraph A.1(h) apply.” So much is consistent with the concession made by Mr Katkowski that in a “non-prior approval” case no right to develop accrued until work had begun. I note in passing that this concession is incorrectly recorded by the judge at the start of paragraph 41 as going to the time when the work had been substantially completed.

19 It seems to me that in a non-prior approval case once the work has been done the advent of conservation area status cannot condemn the development as unlawful. The planning permission has been implemented; work has been done and expense incurred on the faith of it.

20 It is true, as Mr Taylor submitted this morning, that in such a case the developer — perhaps a home owner — will have incurred expense before starting the work and that expense would not be compensatable if then the conservation area is designated before the works are commenced. The matter is, no doubt, inevitably rough and ready, but a point has to be fixed somewhere for the crystallisation of the benefits given by the planning permission; and it seems to me that the start of the works provides at least a desirable degree of certainty.

21 So much for a non-prior approval case. What about a case where prior approval has to be sought, as here? The judge thought this instance was not at all straightforward. I am bound to say that I have some sympathy with that. It seems to me, as Mr Katkowski submits, that in a prior approval case the analogue to the commencement of work in a non-prior approval case is the application for prior approval and receipt of and reliance on the planning authority's response. In making the application the developer must have committed resources to assembling the required materials.

22 In a case where, in response, the planning authority grants prior approval, unlike this case where the response was that approval was not required, it would surely be unjust if the developers' inevitable reliance on the grant could be defeated by the adventitious fact of a conservation area designation. Cases like the present where no approval is required cannot be in a different category.

23 I would not fix the date at which the planning permission crystallises or its benefits accrue in a non-prior approval case at the moment of commencement of the work but at the time when the favourable response of the local planning authority is received.

24 As Mr Katkowski submitted this morning, there is a strong parallel between the prior approval process and the process of the grant of planning permission by a local planning authority in the ordinary way. In that latter case, as far as I can see, it is beyond contest that the planning permission once granted cannot be undermined by a later change in the status of the

land save, I suppose, where there is expressly retrospective legislation or something of the kind. Mr Katkowski submitted also that prior approval fixes the particular location and details of the development and the time within which it may be carried out. Those matters seem to me to be grist to the same mill.

...

28 In all the circumstances, then, I agree with the judge. In a prior approval case the planning permission accrues or crystallises upon the developers' receipt of a favourable response from the planning authority to his application. I acknowledge the court, in dealing with the conundrum presented by this case, has had to deploy ideas such as accrual and crystallisation which do not appear on the face of the legislation. But the two extremes to which I referred earlier demonstrate the need for an approach to be taken to the statute — notwithstanding that it requires assistance from such sources — that produces in the end fairness and overall conformity with the scheme and the planning legislation.”

34. The decision in *Orange* was followed by the Court of Appeal in *R (on the application of Murrell) v Secretary of State for Communities and Local Government* [2012] 1 P & CR 6, which concerned a proposal to erect a cattle shelter pursuant to the permitted development rights conferred by Part 6 of Schedule 2 of the GPDO. That Part of the GPDO granted a permitted development right subject to conditions, including that the developer applied to the local planning authority for determination as to whether its prior approval was required in relation to the siting, design and external appearance of the building.
35. The claimant applied for such determination. The local planning authority responded that the application was invalid and did not comply with the statutory requirements, including having been on an out of date form and requiring further documents. The claimant sent a new completed form and requested documents to the authority. The authority acknowledged receipt of the form, but 22 days later (30 days after it had received the original application). It determined that prior approval was required and that such approval was refused because the proposed development did not comply with planning policies. The claimant contended that the first application was valid and consequently the 28 day period for determining whether prior approval was required had expired and planning permission for the development had accrued before the authority's decision was made.
36. The Court of Appeal agreed with the claimant and held that the ratio in *Orange* applied not only to cases where prior approval was granted or the authority decided it was not needed, but also to cases where within the statutory period for considering the need for prior approval no response was given:

“28 In my judgment, the appellants' case on this issue is well founded. The original application received on 1 December complied with the statutory requirements and was a valid application. The statutory 28-day period for consideration of the need for prior approval ran from that date. The mistakes made by the council in the handling of the application, and the fact that the appellants submitted a new form and further plans in accordance with the council's request, did not stop the clock running or otherwise affect the position. On the expiry of the statutory period, on 28 December, permission for the development accrued under the GPDO. The council's determination of 31 December came too late to have any legal effect.

...

41 That conclusion is supported by *R (Orange Personal Communications Services Ltd) v Islington LBC* [2006] EWCA Civ 157, [2006] JPL 1309. In that case, which arose under Part 24 of Schedule 2 to the GPDO, prior approval had been applied for and a notice had been issued that prior approval was not required, but at a later date the area had been designated a conservation area. There were certain factual complications but the essential issue was whether the developer had an accrued right to develop the site (in accordance with the details submitted in the application for prior approval) at least from the date of issue of the prior approval notice, so that the right to develop was unaffected by the subsequent designation of the conservation area. The court answered that issue in the affirmative. Laws LJ, with whom the other members of the court agreed, stated at para 28:

“In a prior approval case the planning permission accrues or crystallises upon the developers' receipt of a favourable response from the planning authority to his application. I acknowledge the court, in dealing with the conundrum presented by this case, has had to deploy ideas such as accrual and crystallisation which do not appear on the face of the legislation. But the two extremes to which I referred earlier demonstrate the need for an approach to be taken to the statute – notwithstanding that it requires assistance from such sources – that produces in the end fairness and overall conformity with the scheme and the planning legislation.”

In reaching that conclusion, Laws LJ considered and rejected a contention that the benefit of the permission did not accrue or crystallise until work had been started (see paras 23 and 25 of his judgment).

42 The court in *Orange Personal Communications Services Ltd* was not considering a case where an application for prior approval has been duly made but there has been no determination or notification within the 28 day period. Application of the court's reasoning, however, leads inevitably to the conclusion that planning permission in such a case accrues or crystallises on the expiry of the 28 day period. There can be no principled basis for adopting a different approach in such a case.

43 It follows that in my view the inspector ought to have allowed the appeal before her on the basis that the appellants had an accrued permission for the proposed development and the question of prior approval did not arise.”

37. These two Court of Appeal authorities therefore establish that in the case of permitted development rights where prior approval is required, the planning permission granted by the GPDO 2015 accrues, or crystallises, once the local planning authority either grants prior approval, determines that prior approval is not required, or fails to make a decision within the statutory time period.

38. The GPDO does not make the running of time dependent on a decision by an LPA to accept an application as valid, so time runs from receipt: see *Murrell* at [28].

Commencement and completion

39. Paragraph O.2(2) provides that development under Class O is permitted subject to the condition that it must be completed within a period of 3 years starting with the prior approval date (i.e. the date when prior approval is actually given or the date on which the 56 day period expired without the LPA having notified the applicant of the determination of the application).

40. An issue that may arise in practice is the failure of the developer to complete the residential conversion within the requisite 3 year period. What happens if the developer is seeking to create a number of flats, but by the expiry of 3 years has only created some of those flats? If the remainder of the flats are not ready for residential occupation does that mean that the right to create those additional flats is lost?

41. The courts have not ruled on this specific issue and opinion among commentators is divided.

42. The starting point is that, unlike operational development which is commenced by the starting of work, implementation of planning permission for a change of use occurs only when the material change of use is made. There is no definition of “material change of use” in the Town and Country Planning Act 1990 and the courts have held that the question of whether a material change of use has occurred is one of fact and degree: see e.g. *Barling (David W) Ltd v Secretary of State and Swale DC* [1980] JPL 594; *Bendles Motors Ltd v Bristol Corporation* [1963] 1 W.L.R. 2247; and *Miller Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196.

43. The making of a material change of use does not, however, require actual use. In *Impey v Secretary of State for the Environment* (1980) 47 P. & C.R. 157, Donaldson L.J. held that a change of use of premises from a non-residential use to a residential use could take place before the premises are actually used, provided that they were usable for residential purposes.

44. The approach in *Impey* was approved by Lord Mance in *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 [2011] 2 A.C. 304:

“27. The cases on abandonment show that use as a dwelling house should not be judged on a day-by-day basis, but on a broader and longer-term basis. Dwelling houses are frequently left empty for long periods without any question of abandonment or of their not being in or of use. A holiday home visited only yearly remains of and in residential use. Of course, such cases usually fall to be viewed against the background of previous active use. In the present case, the question is whether it is right to describe a dwelling house as having or being of no use as a dwelling house, when it has just been completed and its owner intends to occupy it within days. This too is not a question which can sensibly be answered on a day by day basis. It calls for a broader and longer-term view. Support for this is found in *Impey v Secretary of State for the Environment* (1980) 47 P & CR 157. The question before the Divisional Court there was whether development had occurred in the form of a material change of use of a building from the breeding of dogs to residential use. Donaldson LJ said, at pp 161–162:

“Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use. The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree.”

28. In a later case, *Backer v Secretary of State for the Environment* (1982) 47 P & CR 149, Mr David Widdicombe QC, sitting as a deputy judge, expressed doubt about the decision in *Impey*. He said (p 154) that, but for it, he would have had no hesitation in accepting an argument that “physical works of conversion, that is, say building operations, cannot by themselves give rise to a material change of use: some actual use is required”. *Backer* is on any view an odd case, and the deputy judge's doubt as to whether any change of use had occurred is understandable, even on the approach in *Impey* - indeed, although he remitted the matter for further consideration, his expressed view was that there had been none. The issue was whether development had taken place before 7 July 1976, in circumstances where all that appears is that the works of conversion were “completed, or substantially completed, by July 1976”: see p 151. The owner's brother was sleeping in the building at nights on a mattress which he moved to and from his van every day, since workmen were working during the day: see p 151. Yet the argument was that it was not necessary to consider his activity, and that the result of the physical works of conversion to a residential unit alone sufficed to constitute a material change of use. On any view, the present case involves an altogether simpler and (apart from the deceit underlying it) more conventional scenario.

29. As a matter of law, I consider that the approach taken by Donaldson LJ was correct and is to be preferred to the doubt expressed in *Backer*. Too much stress has, I think, been placed on the need for “actual use”, with its connotations of familiar domestic activities carried on daily. In dealing with a subsection which speaks of “change of use of any building to use as a single dwelling house”, it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is. As I have said, I consider it artificial to say that a building has or is of no use at all, or that its use is as anything other than a dwelling house, when its owner has just built it to live in and is about to move in within a few days' time (having, one might speculate, probably also spent a good deal of that time planning the move).”

45. Accordingly, if as a matter of fact and degree applying the *Gravesham* test, the flats in the building are useable for residential purposes, then applying *Impey* and *Welwyn Hatfield* a material change of use will have occurred, the Class O permitted development right will have been implemented and each such flat will have a lawful C3 residential use. Most commentators agree that any new flats created that are useable for residential purposes will constitute a new planning unit and their lawful use will be residential even though other parts of the original office building have not been converted within the 3 year period.
46. What then of the unconverted parts of the building? One school of thought was that provided that a percentage (with views ranging from 15% to 50%) of the flats had been completed, that would secure the right to complete the residential conversion of the whole office building. That view was based on the wording of paragraph O.1(c) (now repealed) which stated that development was not permitted if the use of the building falling within Class C3 would begin after 30 May 2016. Commentators argued that this was to be construed as referring to the residential use of (a sufficient) part of the building having begun by that date.
47. Paragraph O.1(c) has been replaced by paragraph O.2(2) which provides that development under Class O is permitted subject to the condition that it must be completed within a period of three years starting with the prior approval date. On its face, this appears to require that all the flats have been created within 3 years. Moreover, development that does not comply with a condition subject to which permitted development is allowed does not qualify as permitted development at all. That would appear to jeopardise any flats that had been created as part of the incomplete office to residential conversion.
48. It is perhaps more likely that the courts would take a pragmatic view and hold that flats that have been created would be lawful, notwithstanding the failure to complete all of the flats given that it is unlikely to be practicable for those parts of the building already in residential use to revert to office use. There is a significant risk that the right to complete the remaining flats would, however, be lost after 3 years.

Availability of other permitted development rights

49. Unlike many other permitted development rights authorising a change of use to dwellinghouses, Class O does not exclude the permitted development rights under Part 1 of the GPDO that allow various developments within the curtilage of a dwellinghouse, plus the alteration and enlargement of the dwellinghouse itself. NB, however, Article 2(1) of the GPDO which provides that “dwellinghouse” (except for the purposes of Part 3 of the Second Schedule –permitting changes of use) does not include a building containing one or more flats, or a flat contained within such a building. In other words, permitted development under Part 1 is excluded by Article 2(1) where residential conversion under Class O creates one or more flats, but not if the building converted under Class O does not contain a flat or flats.

Don't forget CIL

50. Do not forget to check whether or not the conversion gives rise to Community Infrastructure Levy liability. As the PPG advises:

Is development carried out under the General Permitted Development Order liable to a Community Infrastructure Levy charge?

Development carried out using permitted development rights can be liable to pay a Community Infrastructure Levy charge. This depends on when development commences and whether there is a community levy charge in place. A developer would not be required to pay a charge where permitted development was commenced before 6 April 2013 or otherwise before a charging schedule was in effect. Where development is commenced after 6 April 2013 and a charging schedule is in place, they would be liable to pay a charge.

Paragraph: 025 Reference ID: 13-025-20140306

Residential conversion of A1 (shop), A2 (services) or launderette

51. Class M of Schedule 2, Part 3 of the GPDO 2015 contains four permitted development rights:

(1) Class M(a)(i) permits the change of use of a building from a use within Use Class A1 (shops) or A2 (financial and professional services) to a use falling within Use Class C3 (dwellinghouses);

(2) Class M(a)(ii) permits the residential conversion of a betting office or pay day loan shop, or launderette;

- (3) Class M(a)(iii)(aa) permits the residential conversion of a building from a mixed use as a dwellinghouse and as a betting office or pay day loan shop or launderette; and
- (4) Class M(a)(iii)(bb) permits the residential conversion of a building from a mixed use as a dwellinghouse and as a use falling within Use Class A1 or A2 (whether that mixed use was granted permission under Class G of Part 3 or otherwise).

52. Unlike Class O, Class M also permits building operations that are reasonably necessary to convert the building to a use falling within Use Class C3: paragraph M(b) (see below).

The need for a qualifying use

53. Development is not permitted by Class M where the building was not used for one of the uses referred to in Class M(a) on 20 March 2013 or, in the case of a building which was in use before that date but was not in use on that date, when it was last in use: Paragraph M.1(a).

54. Development is also not permitted by Class M if the Class A1 (shops) or A2 (financial and professional services) use was permitted only by Part 3 of the GPDO 2015: Paragraph M.1(b).

Exclusions

55. Unlike Class O, the Class M permitted development right is also excluded within conservation areas and World Heritage Sites: Paragraph M.1(g) –referring to Article 2(3) land.

56. The Class M right is excluded if the building is a listed building by paragraph M.1(g)(v).

Floor space limit

57. The cumulative floor space of the existing building changing use under Class M must not exceed 150 sq, and the change of use (together with an previous change of use under

Class M) must not result in more than 150 sq m of floor space in the building having changed use under Class M: paragraph M.1(c),(d).

58. Floorspace means the total floorspace in a building or buildings: Article 2(1) GPDO 2015. Accordingly, it includes all internal floorspace whether or not it is operational or “useable” floorspace.

Limits on building operations

59. Class M grants planning permission for a material change of use and “building operations reasonably necessary to convert the building...to a use falling within Class C (dwellinghouses)”: paragraph M(b).

60. Paragraph M.1(f) prohibits demolition other than “partial demolition which is reasonably necessary to convert the building to a falling within Class C (dwellinghouses)”.

61. Paragraph M.1(e) also restricts new building by providing that development is not permitted if it would “result in the external dimensions of the building extending beyond the external dimensions of the existing building at any given point”.

Prior approval

62. Before commencing development under Class M, paragraph M.2 requires that the developer must apply to the LPA for a determination as to whether prior approval will be required as to:

- (a) Transport and highways impacts of the development;
- (b) Contamination risks in relation to the building;
- (c) Flooding risks in relation to the building;
- (d) Whether it is undesirable for the building to change to a residential use because of the impact of the change of use
 - (i) on adequate provision of services of the sort that may be provided by a building falling within Use Class A1 (shops) or Use Class A2 (financial and professional services), or

- (ii) where the building is located in a key shopping area, on the sustainability of that shopping area;
- (e) the design or external appearance of the building.

Commencement and completion

63. Development under Class M(a) or M(b) must be completed within a period of 3 years starting with the prior approval date: paragraph M.3(3)(a).

Residential conversion of amusement arcade/centre or casino

64. Class N(a)(i) of Schedule 2, Part 3 of the GPDO 2015 permits the change of use of a building and any land within its curtilage from use as an amusement arcade/centre to a use falling within Use Class C3 (dwellinghouses). Class N(a)(ii) permits the residential conversion of a casino.

65. Unlike Class O, Class N also permits building operations that are reasonably necessary to convert the building to a use falling within Use Class C3: paragraph N(b).

Exclusions

66. Permitted development is excluded where the building is a listed building, or within the curtilage of a listed building. It is also excluded within a World Heritage Site, a safety hazard area, and a military explosives area. There is no prohibition in respect of the conversion of a building in a conservation area.

Floorspace limit

67. The cumulative floor space of the existing building changing use under Class N must not exceed 150 sq m, and the change of use (together with any previous change of use under Class N) must not result in more than 150 sq m of floor space in the building having changed used under Class N: paragraph N.1(b),(c).

Limits on building operations

68. The building operations permitted under Class N(b) are restricted to what is reasonably necessary for the building to function as a dwellinghouse, and any partial demolition must also be limited to the extent reasonably necessary to carry out the building operations permitted by Class N. Thus, substantial demolition or reconstruction/replacement of the existing fabric would exceed what is permitted.
69. Additionally, development under Class N(b) must not consist of building operations other than the installation or replacement of windows, doors, roofs, or exterior walls, or water, drainage, electricity, gas or other services, to the extent reasonably necessary for the building to function as a dwellinghouse, and partial demolition to the extent reasonably necessary to carry out the building operations listed there: paragraph N.1(d).

Prior approval

70. Before beginning the development, paragraph N.2 requires that the developer must apply to the LPA for a determination as to whether the prior approval of the LPA will be required as to:
- (a) Transport and highways impacts of the development;
 - (b) Contamination risks in relation to the building;
 - (c) Flooding risks in relation to the building;
 - (d) The design or external appearance of the building.

Commencement and completion

71. Development under Class N(a) or N(b) must be completed within a period of 3 years starting with the prior approval date: paragraph N.2(3).

Proposed reform

72. In its October 2018 consultation *Planning Reform: Supporting the high street and increasing the delivery of new homes*, the Government consulted on a proposal to create a new permitted development right to allow hot food takeaways (Use Class A5) to change to residential use.
73. In its response to the consultation, published May 3 2019 – “*Government response to the consultation on planning reform: supporting the high street and increasing the delivery of new homes*” – the Government has confirmed that it will be bringing forward this amendment to the existing PD rights.

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