

## Permitted Development – Prior Approval



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## Two Prior Approval Routes

- By Article 3(2) of the GPDO, the planning permission granted is subject to any relevant exception, limitation or condition specified in Sch 2;
- A condition frequently included in the classes in Sch 2 is the need to apply to the LPA for either:
  - prior approval of specified matters; or
  - determination as to whether prior approval of specified matters is required

## What does prior approval cover?

- Depends on the class of PD;
- Can include such matters as noise, odour, waste handling, transport and highways, siting, design, external appearance, design, contamination risks, flooding risks, air quality, natural light, impact on amenity, impact on trade and business;
- Different procedures in different classes but procedure often includes duty to consult statutory consultees, duty to notify neighbours / third parties, duty to take into account representations and duty to take into account the NPPF so far as it relates to the subject matter of the prior approval.

# How does prior approval procedure interact with definitional scope requirements?

- Can prior approval determine that those requirements are met:
- Keenan v. Woking BC [2018] PTSR 697 and R (Marshall) v. East Dorset DC [2018] EWHC 226 (Admin) say 'NO'
  - power only to consider prior approval matters
  - issue of whether in description of PD to be dealt with by CLOPUD or enforcement
- New World Payphones Ltd v. Westminster CC [2019] EWCA Civ 2250 says 'YES' LPA is required to determine whether in 'definitional scope' (at least in relation to applications as to whether prior approval is required as in Class A, Part 16 Sch 3)

## In relation to changes of use:

- Paragraph W procedure applies to Part 3 of Schedule 2;
- Part 3 includes changes of use from agricultural to resi and office to resi;
- Para W(3) provides that a local planning authority may refuse an application for prior approval if the proposal does not comply with any applicable conditions, limitations or restrictions – including definitional scope?

## Effect of non-determination (1)

- Depends on whether application is for prior approval itself or is for a determination as to whether prior approval is required;
- Where application is for prior approval itself (as in cases of new PD rights under Part 20), applicant has right to appeal to Secretary of State against non-determination (under s.78(2) TCPA 1990)
- No automatic default right to proceed
- Eight week time limit or longer agreed period under Article 7 (c) GPDO

## Effect of non-determination (2)

- Where application is for determination as to whether prior approval is required (as in changes of use) .....
- There is effectively a deemed prior approval provision under para W(11) of Part 3 Schedule 2 GPDO;
- Similar, but not identical, provision under other Parts including Part 6 Schedule 2 GPDO (para A.2(iii))
- This means that applicant has right to proceed (as long as within definitional scope) if LPA fails to notify its prior approval determination within set period (56 days or 28 days)

## Implications of default right to proceed

- Only applies to permitted development that is within definitional requirements (Keenan) so if there is uncertainty, wise still to seek CLOPUD;
- What about infringement of third party rights which are recognised under the prior approval procedure?;
- Uncertainty as to remedy for third parties for either faulty decision or out of time decision – how to get round right to proceed notwithstanding third party rights?;
- May be right to damages under the Human Rights Act 1998 – see R (Nunn) v. First Sec of State [2005] Env LR32 and pending hearing in Coventry Gliding Club v. Harborough DC [2019] EWHC 3059

## Wider Implications?

- Note proposals in 'Planning for the Future' (para 2.40)
- Suggested deemed grant of planning permission where LPA fails to make a timely determination.
- Likely to lead to similar problems for third parties – conflict with ECHR – right to damages?

Thank you for listening

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