

Welcome to Landmark Chambers' 'Permitted Development' webinar

The recording may be accessed [here](#).

Your speakers today are...



Richard Turney (Chair)



Robert Walton QC

Topic:
Exclusion / Loss
of Permitted
Development
Rights



Kate Olley

Topic:
Permitted
Development:
Pitfalls

Your speakers today are...



Jenny Wigley

Topic:
Permitted
Development –
Prior Approval



Matthew Henderson

Topic:
New permitted
development
rights and the
challenges they
face

New permitted development rights and the challenges they face



Matthew Henderson

Topics – a busy year so far!

- 1) Town and Country Planning (General Permitted Development) (England) Order 2015
 - a) Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020/330
 - b) Town and Country Planning (General Permitted development) (Coronavirus) (England) (Amendment) Order 2020/412
 - c) Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020/632
 - d) Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755
 - e) Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756

- 2) Rights Community Action Limited v SSHCLG CO/3024/2020

Coronavirus Amendments

- 24.3.2020 – 2020/330 – Class DA
 - Temporary takeaways (any purposes within Class A5) – Class A3 or A4 or mixed A3/A4 and Class AA
 - Notification not prior approval
 - 24.3.2020 – 23.3.2021
- 9.4.2020 – 2020/412 – New Pt. 12 to Sch. 2
 - Class A – development by Local Authorities and Health Service Bodies
 - Land owned, leased or occupied by LA/HSB
 - Purpose: preventing an emergency; reducing, controlling or mitigating the effects of an emergency; or taking other action in connection with emergency

2020/632 – Pt. 4 & Pt. 12

- New Class BA in Pt. 4, Sch. 2
 - Additional temporary use of land during relevant period (and moveable structure)
 - In addition to Class B of Pt. 4, Sch. 2
 - 28 days in total
 - 14 day limit for markets, motor car and motorcycle racing
 - Relevant period: 1.7.2020 – 31.12.2020
- New Class BA in Pt. 12, Sch. 2
 - Temporary holding of market by or on behalf of a local authority and the provisions on the land of any moveable structure for the permitted use
 - Relevant period: 25.6.2020 – 23.3.2021

2020/632 – Pt. 20 - scope

- NEW - Class A – New dwellinghouses on detached blocks of flats
- “construction of up to two additional storeys of new dwellinghouse immediately above the existing topmost residential storey on a building which is a purpose built, detached block of flats”
- Ancillary operational development
- Tight limitations – construction, height, location, floor to ceiling height, type of dwellinghouse, height, visible support structures, some engineering operations

2020/632 – Pt. 20 – conditions

- Conditions
 - prior approval in advance: transport/highways; air traffic & defence; contamination; flooding; external appearance; natural light; amenity; protected views
 - New procedure for prior approval – extensive plans
 - 3 year completion limit
 - Pre-commencement reporting – hours of operation, noise, dust, vibration, traffic
 - Completion notification in writing
 - Class C3 use

2020/632 – Pt. 20 – definitions

- Interpretation:
 - “block of flats” means a building which is divided horizontally and consists of separate and self-contained premises construed for use for the purposes of a dwellinghouse, and any ancillary facilities constructed solely for use by occupiers of the building
 - “habitable rooms” means any rooms used or intended to be used for sleeping or living which are not solely used for cooking purposes, but does not include bath or toilet facilities, service rooms, corridors, laundry rooms, hallways or utility rooms
 - “purpose-built” means a building that was built as and remains as a block of flats

2020/755 – Pt. 1

- Class AA – enlargement of a dwellinghouse by construction of additional storeys
 - Up to two additional storeys where the existing dwellinghouse consists of two or more storeys; OR
 - One additional storey where the existing dwellinghouse consists of one storey
- Limitations: date of construction, previous enlargement, height, floor to ceiling height, location, visible support structures, engineering operations.
- Conditions:
 - similar materials; windows in side elevations; roof pitch; use
 - pre-commencement prior approval: amenity external appearance; air traffic & defence; protected views
 - pre-commencement report & completion report
 - 3 year time limit

2020/755 – Pt 20

- Amendments to Class A!
- New Class AA- new dwellinghouses on detached buildings in commercial or mixed use
 - Two additional storeys of new dwellinghouses
 - Class A1, Class A2, Class A3, or Class B1(a), betting office, pay day loan shop or launderette or mixed use of foregoing (inc. with Class C3)
- Limitations: height; date of construction; use as at 5.3.2018; location; floor to ceiling height, visible support; engineering operations; extent.
- Conditions: pre-commencement prior approval (similar issues plus impact on “commercial premises”); 3 year time limit; pre-commencement and completion reports; use

2020/755 - Pt. 20

- Similarly:
 - Class AB – new dwellinghouses on terrace buildings in commercial or mixed use
 - Class AC – new dwellinghouses on terrace buildings in use as dwellinghouses
 - Class AD – new dwellinghouses on detached buildings in use as dwellinghouses

2020/756 – Pt. 20

- Class ZA - demolition of buildings and construction of new dwellinghouses in their place
 - Demolition: single purpose-built detached block of flats; and any other single detached building in use within Class B1(a), B1(b) or B1(c) (or any combination).
 - New building: purpose built block of flats or purpose built dwellinghouse
- Limitations – use/designations of land; date of construction; footprint; height; vacancy period; sabotage, Conservation Areas
- Conditions – pre-commencement prior approval (similar matters plus demolition, heritage, landscaping); 3 year time limit; pre-commencement report; post-completion notification; use.

Community Rights Action v SSCLG

- Grounds:
 - SEA Directive
 - PSED
 - “*failed to consider the weight of evidence*” – consultation, Living with Beauty Report and re-consultation
- No interim relief
- Rolled up hearing: 14 – 15th October

Permitted Development – Prior Approval



Jenny Wigley

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?

Permitted Development: Pitfalls



Kate Olley

Exclusions and parameters

- Have the PDR been excluded:
 - Removal by planning condition? Article 3(4) GPDO. *Dunnett Investments* [2017] EWCA Civ 192
 - s106 Agreement?
 - Restrictive covenant?
 - Article 4 direction?
- Parameters-
 - Margin for error
 - Restrictions, limitations, conditions; prior approval
 - Consequences of going beyond
- Article 3(5) GPDO
- (5) The permission granted by Schedule 2 does not apply if- (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful; (b) in the case of permission granted in connection with an existing use, that use is unlawful.
- Examples- need to bring into a certain use before change to another use

Exclusion / Loss of Permitted Development Rights



Robert Walton QC

Topics

- 1. Exceptions, limitations, conditions
- 2. Exclusion by condition
- 3. Exclusion where baseline unlawful
- 4. Exclusion by Article 4 Directions

When you don't get permission at all

Permitted development rights are the right to develop land in accordance with the planning permission granted by Article 3(1) of the Town and Country Planning (General Permitted Development) Order 2015:

“Subject to the provisions of this Order ... planning permission is hereby granted for the classes of development described as permitted development in Schedule 2”.

Exceptions, limitations and conditions

Article 3(2) brings into play the various exceptions, limitations and conditions that are set out in the different classes of development listed in Schedule 2.

“Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2”.

This is a reference to the exceptions etc set out in Schedule 2, e.g. the height limit on Class E buildings within the curtilage of a dwellinghouse.

Article 3(2) is authorised by s.60 of the 1990 Act – which allows permission granted under a development order to be conditional

PD rights excluded (1) – by conditions

Article 3(4) goes wider than Article 3(2), ruling out permitted development rights if the development would breach any conditions imposed on an extant planning permission, e.g. one issued by the Local Planning Authority:

“Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under [Part 3](#) of the Act otherwise than by this Order”.

How to interpret a condition

The starting point for the correct approach to the interpretation of planning conditions is set out in the Supreme Court's decision in Trump International v Scottish Ministers [2015] UKSC 74.

.... requires an open-textured approach to the objective exercise of construction of planning conditions, with due regard to the natural and ordinary meaning of the relevant words, but also consideration of the context (including purpose) and common sense.

What does a condition need to say to exclude PD rights?

In *Dunnett Investments Ltd v Secretary of State* [2017] EWCA Civ 192; [2017] JPL 848
the Court of Appeal considered whether a particular condition excluded PD rights.

The condition in Dunnett:

- This use of this building shall be for purposes falling within Class B1 (Business) as defined in the [Town and Country Planning \(Use Classes\) Order 1987](#) , and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained.
- In order that the Council may be satisfied about the details of proposal due to the particular character and location of this proposal."

Theme 1:

- a planning condition on a planning consent can exclude the application of the GPDO (see [Dunoon Developments v Secretary of State for the Environment and Poole Borough Council \(1993\) 65 P&CR 101](#))

Theme 2:

- Exclusion may be express or implied. However, because a grant of planning permission for a stated use is a grant of permission for only that use, a grant for a particular use cannot in itself exclude the application of the GPDO. To do that, something more is required (see, e.g. Dunoon at [107] per Sir Donald Nicholls VC).

Theme 3:

- In [Carpet Décor \(Guilford\) Limited v Secretary of State for the Environment \(1981\) 261 EG 56](#) , Sir Douglas Frank QC sitting as a Deputy High Court Judge said that, because in the absence of such a condition the GPDO has effect by operation of law, the condition should be in "unequivocal terms". ... [In order] to exclude the application of the GPDO, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion.

PD rights excluded (2) – illegal baseline

Article 3(5) excludes reliance on permitted development rights where the underlying building or use is unlawful:

“The permission granted by Schedule 2 does not apply if—

(a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;

(a) in the case of permission granted in connection with an existing use, that use is unlawful.

Watch out for unlawful changes of use ...

Fairstate v Secretary of State [2004] EWHC 1807 (Admin) | [2004] 7 WLUK 191:

“... if there is a material change of use from use X which has continued for 10 years and has therefore become immune from enforcement action and lawful to use Y, then a change back from use Y to use X will be a further material change of use requiring planning permission. That is why, in shorthand form, it can be said that the right to continue with the immune use will have been “lost””.

NB s.57(4) of the 1990 Act: “Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out”.

PD Rights excluded (3) – Article 4 Direction

“If the Secretary of State or the local planning authority is satisfied that it is expedient that development described in any Part, Class or paragraph in [Schedule 2](#), other than Class DA of Part 4 or Class K, KA or M of Part 17, should not be carried out unless permission is granted for it on an application, the Secretary of State or (as the case may be) the local planning authority, may make a direction under this paragraph that the permission granted by [article 3](#) does not apply to—

- (a) all or any development of the Part, Class or paragraph in question in an area specified in the direction; or
- (b) any particular development, falling within that Part, Class or paragraph, which is specified in the direction ...”

Article 4 procedure and compensation

- Set out in Schedule 3 to the 2015 Order
- Different procedures for orders that come into force with immediate effect and those that do not.
- Compensation payable pursuant to Town and Country Planning (Compensation) (England) Regulations 2015

Conclusion

- PD Rights are subject to:
 - Exception, limitation or conditions in Schedule 2
- PD rights can be excluded by:
 - Condition imposed on grant of permission
 - Unlawful baseline
 - Article 4 Direction

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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