Landmark Chambers

Permitted Development Rights: prior approval

This is the second in a series of short papers on key issues arising in permitted development. In the first of these papers, Ben Fullbrook gave an overview of permitted development law and identified some recent developments in the GPDO. In this second paper, Jenny Wigley and Andrew Byass set out the key current issues relating to the permitted development prior approval procedure.

1. Scope of consideration

By Article 3(2) of the Town and Country Planning (General Permitted Development) (England) Order 2015/596 (**GPDO**), planning permission that is granted by Article 3(1) GPDO is subject to any relevant exception, limitation or condition specified in Schedule 2 of the GPDO.

A condition of approval frequently included is the need for a person who intends to rely upon permitted development rights to either apply to the local planning authority for prior approval, or (more frequently) for a determination as to whether prior approval is required. In *Murrell v SSCLG* [2010] EWCA Civ 1367, Richards LJ described the process of applying for a determination as to whether prior approval is required as being:

> "attended by the minimum of formalities and … simple to operate. The application for 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 a written description of the proposed development and of the materials to be used and a plan indicating the site, together with the required fee… When an application is submitted, it engages a two-stage process ... The first stage involves consideration of whether prior approval is required. If the council determines that it is not required, it should notify the applicant accordingly. If it determines that prior approval is required and notifies the applicant of the decision, it moves into the second stage, in which it has … to decide whether to give approval."

Consideration of whether prior approval is required relates to a broad range of matters, set out in the various classes of the GPDO. These include matters relating to noise, odour, waste handling, opening hours, transport and highways, siting, design, external appearance, contamination risks, flooding risks, and air quality. The relevant development class makes clear what matters may require prior approval.

The extent of any obligation to consider whether a proposed development meets the definitional requirements of a particular class of permitted development (as opposed to matters relating to the granting of prior approval such as set out in the above paragraph) is unclear. In *R (Marshall) v East Dorset DC* [2018] EWHC 226 (Admin), Lang J concluded (having considered the Court of Appeal's decision in *Keenan v Woking Borough Council & Anor* [2018] PTSR 697), that a local planning authority could *only* consider the matters relating to which prior approval could be sought.

Marshall concerned purported reliance upon permitted development rights for agricultural development under Paragraph A, Part 6, Schedule 2 of the GPDO. Lang J held that the effect of *Keenan* is that:

> "a local planning authority does not have power under the prior approval provisions of the GPDO, or indeed any other provision of the GPDO, to determine whether or not the proposed development comes within the description of the relevant class in the GPDO": at [44].

In Lang J's judgment, the problem which would arise by development being granted prior approval even though it did not meet the relevant GPDO class description was able to be answered in two ways. First, a local authority could "*advise an applicant of its views*", which could prompt the applicant (in its discretion) to apply for a certificate of lawfulness under either ss. 191 or 192 of the Town and Country Planning Act 1990 in order

for a decision to be made on the issue. Or, second, a local authority could take enforcement action if such (unlawful) development was undertaken following the grant of prior approval.

In the subsequent Court of Appeal decision of *New World Payphones Ltd v Westminster City Council* [2019] EWCA Civ 2250 (a case concerning Class A, Part 16, Schedule 3 of the GPDO), however, the Court of Appeal also considered the decision in *Keenan*, but seemingly contrary to the decision in *Marshall*, concluded, at [49(i)], that:

> "On an application to an authority for a determination as to whether its 'prior approval' is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development."

Whether *Marshall* has now in substance been disapproved by the Court of Appeal in *New World Payphones* (albeit that *Marshall* was not expressly considered in that judgment) is a matter requiring resolution by the Courts. The approach of the Court of Appeal in *New World Payphones* has the advantage of allowing local planning authorities to stop development prior to the point that enforcement action would need to be taken, and would seem to better accord with good administration.

The question whether a development falls within the definitional scope of a particular class of permitted development may be more straightforwardly answered if the development falls within Part 3 of Schedule 2, which concerns changes of use. Prior approval applications under Part 3 have to comply with paragraph W. This provides at paragraph W(3) that a local planning authority may refuse an application if the proposal does not comply with any conditions, limitations or restrictions specified in this Part as being applicable to the development in question. This is the same language however as found in Article 3(1) of the GPDO, and may do no more than make express that which is otherwise required by Article 3(1).

2. Effect of non-determination

For those (relatively few) classes of development where prior approval is required by the terms of the Order itself, the remedy for non-determination of the prior approval application is an appeal to the Secretary of State under section 78 Town and Country Planning Act 1990. That right to appeal is triggered on expiry of the eight-week period for determination specified in Article 7(b) of the GPDO, or any extension of time agreed under Article 7(c).

For those (many more) classes of development which are subject to an application for determination as to whether prior approval is necessary, there is effectively a deemed prior approval provision under paragraph W(11) of Part 3 Schedule 2 GPDO. Under that paragraph, so long as the proposed development falls within the definitional scope of the particular class (see below), it is automatically permitted to proceed if the local planning authority fails to notify its prior approval determination decision within the 56 days specified. In order to avoid the deeming provision, the authority must notify within the 56 day period both its determination as to whether prior approval is required, and, if it is, its determination of the prior approval application itself. The 56 day period specified in paragraph W(11) can be subject to an extension of time agreed under Article 7(c): see *Gluck v. SSHCLG* [2020] EWHC 161 (Admin)); *Gluck* overturned an earlier decision to contrary effect in *R (Warren Farm (Wokingham) Ltd) v. Wokingham BC* [2019] EWHC 2007 (Admin) and is subject to an appeal pending in the Court of Appeal.

The default deeming provision in paragraph W(11) can have unfair and prejudicial consequences for third parties potentially affected by the development. Their rights in relation to the matters subject to prior approval can be unlawfully infringed in circumstances where the development is allowed to proceed by default due to the local planning authority's failure to determine a prior approval application in time and lawfully (see *R (Nunn) v. First Secretary of State* [2005] Env LR 32). That situation has arisen in *Coventry Gliding Club v.*

Harborough District Council [2019] EWHC 3059 (Admin). In that case, a remedies hearing is pending to determine what remedy may be available to a third party in such a position.

3. Is prior approval determinative of rights?

The case of *Keenan* determined that the grant of deemed prior approval is not determinative of permitted development rights. In other words, it does not determine whether or not the development is permitted in terms of falling within the definitional scope of the relevant class by meeting the description and other conditions and limitations.

As set out above, if an application for determination of whether prior approval is required is not determined within the time limit specified in the GPDO, the GPDO provides that prior approval is deemed to be granted. In *Keenan*, it was argued that once deemed prior approval was granted, that was determinative of permitted development rights. But that argument was rejected.

The Court of Appeal instead held that the condition which required a developer to seek prior approval for matters relating to siting and means of construction neither imposed a duty on an authority to determine whether a proposal constituted permitted development, nor the power to grant planning permission outside the defined class of permitted development. Lindblom LJ held as follows:

> "36. The condition [in the GPDO] … to apply to the local planning authority for a determination as to whether its "prior approval" would be required … did not impose on the authority a duty to decide whether or not the development in question was, in fact, permitted development under Class A - albeit that the guidance in paragraph E14 of Annex E to PPS7 might have been read as encouraging it to do so. Nor did it confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. The sole and limited function of this provision was to enable the local planning authority to determine whether its own "prior approval" would be required for those specified details of that "permitted development". …
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> 38. The provisions relating to conditions in Class A of Part 6 and Class A of Part 7 effectively define the ambit of the local planning authority's jurisdiction in respect of the several kinds of "permitted development" within the relevant class. They do not expressly, or implicitly, engage any other question, such as whether the development is "reasonably necessary", respectively, for the purposes of agriculture within the agricultural unit or for the purposes of forestry. The local planning authority does not have the power, under the provisions for conditions in either of these two classes, to vary the terms of the "permitted development" rights within the relevant class. Those provisions do not empower an authority to consider whether permission should be granted for development which is not of the specified type and description…"

It was the above passage that was specifically considered in *New World Payphones* when the Court held in that matter that a local planning authority must consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development. *Keenan* in sum was applied as being directed at only the situation in which a prior approval decision is not made by a Council.

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