Permitted Development: disapplication and loss of permitted development rights

This is the third 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 the second paper, Jenny Wigley and Andrew Byass set out the key current issues relating to the permitted development prior approval procedure. In this paper, Robert Walton QC sets out the key issues in relation to the disapplication and loss of permitted development rights.

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

   "(1) Subject to the provisions of this Order … planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

2. **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.

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

3. **Article 3(4**) goes wider, 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".

4. Given the potential value of permitted development rights it is unsurprising that Article 3(4) has led to litigation as to whether the wording of a particular condition was effective to exclude permitted development rights. 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. With regard to the exclusion of permitted development rights the Court of Appeal identified a number of "themes" in *Dunnett Investments Ltd v Secretary of State* [2017] EWCA Civ 192; [2017] JPL 848:

   - 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

   - 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).

   - 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.

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5. Clearly, then, the wording of the condition will be key. Going forward, Local Planning Authorities will need to ensure that they impose suitable worded conditions if they want to exclude permitted development; the same applies to excluding change of use that do not themselves amount to development, e.g. where LPAs are looking to stop changes between two uses within new Use Class E.

6. **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;

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

7. Article 3(5) is concerned with the legality of the building / use as at the time of the implementation of the permission granted by Schedule 2. So, if the building / use becomes lawful pursuant to a retrospective grant of planning permission then permitted development rights will accrue, unless of course they are excluded by condition attached to the new permission. Permitted development rights would also accrue if the building / use became lawful by passage of time.

8. As can be seen, permitted development rights can be lost as a result of an unlawful change of use in the land. To take an example: Use A is lawful and can be changed to Use B under permitted development rights. But the landowner unlawfully changes to Use C which does not benefit from any permitted development rights. In this situation the landowner has lost the ability to change to back to Use A, and cannot therefore rely on the Order to change from Use A to Use B. Sullivan J (as he then was) put it more succinctly in *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"".

9. It follows that in assessing whether permitted development rights apply it is always essential to investigate the legality of the existing building / use.

10. Finally, **Article 4** allows the Secretary of State or the Local Planning Authority to make a direction disapplying particular permitted development rights:

    "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,

    and the direction must specify that it is made under this paragraph".

11. This draconian power is accompanied by a series of exemptions and necessary procedural safeguards.

12. In terms of exemptions, Article 4 directions are not effective in relation to (inter alia):

    a) development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval where, in relation to that development, the prior approval date occurs before the date on which the direction comes into force and the development is completed within a period of 3 years starting with the prior approval date;

    b) development permitted by Class B of Part 9 of Schedule 2;

    c) development mentioned in Class A of Part 16 of Schedule 2, unless the direction specifically so provides;

    d) development permitted by Class A of Part 18 of Schedule 2 authorised by an Act passed after 1st July 1948 or by an order requiring the approval of both Houses of Parliament approved after that date;

    e) development permitted by Class Q, R, S or T of Part 19 of Schedule 2;

    f) development permitted under Schedule in an emergency.

13. In terms of procedural safeguards, Schedule 3 of the Order sets out the steps that must be taken in relation to Article 4 Directions (there are separate provisions in relation to Orders which do not have immediate effect and those that do).

14. Section 108 of the Town and Country Planning Act 1990 provides for the payment of compensation to landowners in certain cases where planning permission for development granted by the 2015 Order is withdrawn and where on an application for planning permission for that development, the application is refused or permission is granted subject to conditions. Section 108(2A) and (3B) to (3E) allow compensation to be limited in certain circumtances, as to which see the Town and Country Planning Town and Country Planning (Compensation) (England) Regulations 2015/598 as amended.

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The contents of this note do not constitute legal advice and should not be relied upon as a substitute for legal counsel.