Landmark Chambers

Permitted Development: pitfalls

This is the fourth 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 the third paper, Robert Walton QC set out the key issues in relation to the disapplication and loss of permitted development rights. In this paper, Kate Olley sets out the pitfalls of permitted development.

1. There are pitfalls in the exercise or implementation of permitted development rights. These arise simply by virtue of the fact that the parameters of the development permitted by the General Permitted Development Order 2015/596 are, as one would expect, precise and certainly where for example maximum measurements and dimensions are specified, there is little margin for error. The potential pitfalls are therefore as many and varied as the classes of development permitted.

2. Permission for development is granted by the GPDO subject to the criteria, limitations, conditions and restrictions qualifying each class of permitted development within each part of Schedule 2 to the Order. Thus, Article 3(1) of the GPDO grants permission for the classes of development set out in Schedule 2, but subject to the other provisions of the Order *and* to Regulations 75-78 of the Conservation of Species and Habitats Regulations 2017, and Article 3(2) provides that the permission granted by Article 3(1) is subject to "any relevant exception, limitation or condition specified in Schedule 2".

3. The permitted development regime can therefore be seen as a jigsaw; it may be that an applicant successfully seeks prior approval in relation to, for example, the design and siting of a proposal, but that does not absolve them from complying with all other applicable conditions and indeed, in an appropriate case, from fulfilling the requirements of the Habitats Regulations before commencing development.

4. It is necessary to check that permitted development rights have not been excluded:

5. First, those rights may have been removed by a condition on the planning permission for the development. Article 3(4) of the Order provides that nothing in the GPDO permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Town and Country Planning Act 1990 ("the 1990 Act") otherwise than by the GPDO.

6. An example is ***Dunnett Investments Limited*** **[2017] EWCA Civ 192** in which a planning condition which stated that the property could be used for "no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained", was held to be sufficiently clear to exclude the operation of the GPDO.

7. The claimant argued that the phrase 'express planning consent' was equally applicable to permission granted through the GPDO as on an application under the 1990 Act, and that in order to exclude permitted development rights a condition had to be express and unequivocal.

8. The court noted that, following the starting point of ***Trump International Golf Club Scotland Limited v Scottish Ministers*** **[2015] UKSC 74**, as long as appropriate caution was exercised there was no bar to implying words into conditions and in order to exclude the operation 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. In ***Dunnett***, the natural and ordinary meaning of the words was that the condition allowed planning permission for other uses, but restricted to that obtained upon application from the LPA, and excluding permission granted by the Secretary of State by means of the GPDO.

9. Further, carrying out permitted development may mean breaching an obligation set out in a s106 Agreement to which a building or development is subject, or the use of a property may be constrained by restrictive covenants governed by general property law. Finally, a local planning authority may by an 'Article 4 direction' have disapplied, for a specified area, the permission granted by Article 3 GPDO for all or any development of the Part or Class that the direction specifies, or the permission for particular development falling within that Part or Class. Such development would therefore need to be pursued by a planning application instead.

10. Then we come to Article 3(5), which provides that the permission granted by Schedule 2 does not apply if, in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful, or in the case of permission granted in connection with an existing use, that use is unlawful. For example, where an extension has been built on the assumption of permitted development rights but in fact exceeds the permitted parameters of the GPDO and otherwise does not comply with other requirements, such as using construction materials which do not conform with the conditions placed on Class A of Part 1 to Schedule 2 (enlarging, improving or altering a dwellinghouse). Having been constructed unlawfully, Article 3(5)(a) means that the development cannot benefit from rights granted under Schedule 2. It is no good, therefore, seeking afterwards to reduce the breadth of the extension, having once built it too wide; the entire works would be unlawful. The position would need to be regularised by seeking planning permission retrospectively to retain the unlawful works.

11. Similarly, where permitted development rights are sought to be relied upon to change from one use to another, Article 3(5)(b) means that it is necessary to bring a property into a certain use (if it is not already in that use) before then changing from it to the desired new use.

12. Again in the context of Class A of Part 1 to Schedule 2, problems also frequently arise in the case of the construction of a dwelling where attempts are made to amalgamate anticipated permitted development rights with what has been granted permission pursuant to a planning application, all in one set of construction works. However, this is not possible. It is necessary first to carry out the development for which permission has been granted, which was presumably subject to a condition requiring that the permission be implemented in accordance with the approved plans. An enlarged property representing the development granted plus an extra element representing what might be available by taking advantage of the GPDO, will result in a development which does not comply with the approved plans. The outcome will be a development for which there is no permission, and the permitted development rights will certainly not cover the whole development.

13. Permitted development rights are not, therefore, intended to add 'instant' further space to what has already been granted permission. Rather, the scheme envisages a modest expansion over a period of time. That said, there is no set period of time which must go by. The key will be whether the approved scheme has been validly implemented first. Once that is established, permitted development rights can come into being. Different LPAs may make different judgment calls about what constitutes the point at which the development has been implemented as approved, and it can be sensible to make use of the lawful development certificate procedure in order to gain a measure of security before proceeding with further works assumed to be covered by permitted development rights. The other alternative would be to apply for a fresh permission for an updated scheme.

Kate Olley

September 2020

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