

## Legal challenges and PD rights



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## Topics For Today

- Legal Challenge to the recent changes to the GPDO and UCO – Judgment of the Divisional Court in R (Rights : Community : Action) v. SSHCLG [2020] EWHC 3073 (Admin) was handed down 17 November 2020;
- Round up of other important Higher Court decisions relating to PD rights from the last year;
- More detail can be found in the series of papers and the webinar given on permitted development in October 2020 – all can be found on Landmark’s website (resources section) or ask our marketing team for details.

## Rights : Community : Action litigation

### 3 statutory instruments under challenge (1)

SI 2020/755, bringing in:

- New class AA in Part 1 of Sch 2 to the GPDO 2015 - development in curtilage of a dwelling house – enlargement of existing dwelling house by the addition of storeys;
- New classes AA, AB, AC and AD in Part 20 of Sch 2 to the GPDO – rights to create new dwellinghouses by additional storey(s) on top of existing commercial buildings (office, retail, launderettes, betting offices and pay day loan shops) and on top of existing dwelling houses, 30m and 18m limits;
- NB note class A of Part 20, (new dwelling houses on top of detached blocks of flats) introduced SI 2020/632 was *not* under challenge

## Rights : Community : Action litigation

### 3 statutory instruments under challenge (2)

SI 2020/756, bringing in:

- New class ZA in Part 20 of Sch 2 to the GPDO 2015;
- Namely demolition of a detached building with B1 use rights or of a single block of flats and replacement by either new single dwellinghouse or single purpose built block of flats;
- Within same footprint (not exceeding 1,000sq m); no more than 18m in height or 7m higher than previous building and no more than 2 storeys more than previous building. Building must have been vacant for 6 months and constructed prior to 1 January 1990.

## Rights : Community : Action litigation

### 3 statutory instruments under challenge (3)

SI 2020/757:

- Amends the Use Classes Order 1987;
- Use classes A, B1 and D are revoked;
- New class E, commercial, business and service (includes much of former A1, A2 and A3 plus former B1 and some of D1 and D2);
- New classes F1 and F2 for remainder of D1 and D2 (learning institutions and community)
- Some in former A4, A5 and D2 classes moved to *sui generis*

## NB – Effects of those SIs

- SI 2020/756 and 757 introduce new permitted development rights but each are subject to conditions including the requirement to obtain prior approval on a wide range of matters including, amongst others, transport and highway impacts, contamination risks, flooding risks, the external appearance of the building, the provision of adequate natural light in all habitable rooms, and impact on the amenity of the existing building and neighbouring premises
- SI 2020/757 amends the classes of uses within which changes are not to be considered to be development requiring planning permission (see article 3(1) of the UCO 1987)

## Rights : Community : Action

### Interesting that Court felt it necessary to make this clear:

“It is important to emphasize at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. Similarly, criticism has been made of the way in which, or the speed with which, these changes were made. Again, these are not matters for the court to determine save and in so far as they involve questions concerning whether or not the appropriate legal procedures for making the changes were followed.” (para 6)

## Rights : Community : Action

### Grounds of Challenge

- Ground 1 – Failure to carry out an SEA under Environmental Assessment of Plans and Programmes Regulations 2004;
- Ground 2 – Failure to comply with PSED under s.149 Equality Act 2010;
- Ground 3 – Unlawful public consultation
  - Did not ‘conscientiously consider’ responses;
  - Did not take into account advice from Gov’t’s own experts
  - Failure to act consistently with what was done in relation to 5G phone masts
  - Breach of legitimate expectation re: SI 2020/756

# Rights : Community : Action

## Grounds with Traction (1)

### Ground 3(d)

Court granted permission for JR but dismissed claim on the basis that

- There was a representation that there would be further consultation in relation to SI 2020/756
- That gave rise to a procedural legitimate expectation
- But on the evidence, the defendant acted lawfully because he had good reasons for departing from that representation
- Those reasons were proportionate to the action taken (reasons based on economic emergency created by the pandemic)

## Rights : Community : Action Grounds with Traction (2)

Ground 1 – To succeed C had to establish that SIs met the Directive criteria:

Directive requires environmental assessment of plans and programmes which are:

- Subject to preparation and/or adoption by an authority at national, regional or local level
- Required (or regulated) by legislative, regulatory or administrative provisions
- Set the framework for future development consent of projects
- Likely to have significant environmental effects.

(First two agreed to be met, fourth was not a way out for SoS, third was the main subject of consideration in the case)

## Rights : Community : Action

### Grounds with Traction (3)

Court granted JR permission for Ground 1 but dismissed claim on the basis that the plan or programme did *not* set the framework for future development consent of projects:

- Amendments to UCO 1987 simply define certain boundaries of development control
- Amendments to GDPO 2015 do not set a 'framework' within the meaning of the 2004 Regs as requirement for prior approval simply forms part of the conditions imposed on the grant of certain PD rights and only delimits the scope of LPA powers and does not set the criteria of how they are to be exercised.

## Rights : Community : Action Grounds with Traction (4)

### Judicial reasoning

- Prior approval requirements do not themselves set criteria or rules for determining or constraining discretionary powers of LPA – the SIs only delimit the scope of the LPA’s powers;
- SIs under challenge do not repeal or modify a pre-existing plan such as a development plan that was itself subject to SEA (but surely render some provisions or policies redundant in relation to certain projects?)

NB - Application has been made for permission to appeal

## Round up of other higher court cases on PD rights

- *Gluck v. SSHCLG* [2020] EWHC 161 (Admin) – LPA and applicant can agree to extend timescales for determination of prior approval under Article 7(a) or (b) – Art 7(c) since amended to reflect this with effect from August 2020
- *McGaw v. Welsh Minsters* [2020] EWHC 2588 – how to calculate 3m height limit in Class E of Part 1 Sch 2 (building in curtilage of dwelling house)
- *T & P Real Estate Ltd v. Sutton LBC* [2020] EWHC 879 (Ch) – interpretation of Art 4 Direction is a matter of public law for a planning appeal or JR, not for a private law Part 8 determination in the High Court (abuse of process)
- *New World Payphones* [2019] EWCA Civ 2250 – LPA required to determine whether definitional requirements are met before determining prior approval but how does this fit with *Keenan* and *Marshall*?

# Thank you for listening

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