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**Permitted Development Rights:**

**Opportunities and Pitfalls**

**Michael Bedford QC and Dr Ashley Bowes**

# Synopsis



- Relevance of the NPPF
- NPPF and Article 4 Directions
- Relevance of plans to material changes of use
- Prior Approval not retrospective
- Prior Approval and the principle of development
- External Appearance
- Heritage matters (duties and setting)
- Town centre/commercial freedoms
- Time limits

# Synopsis



- Fallback position
- Rights: Community: Action decision
- CAB Housing decision
- Questions (subject to time available).

Given the number of registered participants, attendees will be muted but Questions can be posed via the Chat function (and some have already been provided in advance).

# Focus of the presentation



- The GPDO 2015 (SI 2015/596) in its current form runs to some 400 pages. Schedule 2 now has 20 parts covering some 170 separate classes of Permitted Development (each with their own exclusions and conditions).
- This webinar is for 1 hour...
- The focus is therefore on selected recent PD rights, primarily for the creation of new dwellings and changes of use from traditional town centre uses to other uses, (mainly to dwellings).

# Relevance of the NPPF



- NPPF often required to be considered, see e.g.:
  - GPDO, Sch.2, Pt.1, Class AA, para.AA.3(12)
  - GPDO, Sch.2, Pt.3, Class MA, para.W(10)(b)
  - GDPO, Sch.2, Pt.20, Class A, para.B(15)(b)
- BUT only insofar as it is relevant to the prior approval questions
- Not to be applied to frustrate the class of PD in the first place, see: **East Herts** [2017] EWHC 465 (Admin) @ 37

# NPPF and Article 4 Directions



- NPPF para 53 has strict policy tests
- SoS has the power to cancel or modify an Art.4 direction: GPDO, Sch.3, para 1(13) in most (but not all) cases (see Sch.3, para 2(3)).
- For Art.4 directions removing non-resi to resi uses LPA must show 'necessary to avoid wholly unacceptable adverse impacts'.
- For other Art.4 directions, LPA must show 'necessary to protect local amenity/well-being.
- Always: only apply to smallest area possible.

# Relevance of plans to MCU



- Plan showing site and proposed development (GPDO, Sch.2, Pt.3, Class O, para.W(2)(b))
- Prior approval is approved *“in accordance with”* the details approved or provided (para.W(12)(a) or (b))
- MCU permission is for a specified activity not an enduring use (**Cynon Valley** (1987) 53 P & CR 68)

# Relevance of plans to MCU



- Prior approval granted on set of approved plans to change office bloc to residential flats
- At the point MCU takes place, building contains an unauthorised extension not shown on approved plans
- Unauthorised extension then demolished
- Is the use of building in accordance with plans lawful?



# Relevance of plans to MCU



- NO!
- Article 3(5): PD rights do 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"*

- Applies to MCU: **RSBS** [2020] EWHC 3077 (Admin)

# Relevance of plans to MCU



- But what if variation in approved plans involved no operational development?
- Potentially still NO, if:
- degree of variance between approved plans at the point of the MCU was sufficient to mean MCU was not an implementation of the prior approval permission.
- Question of degree (Garland and Impey).

# Prior approval not retrospective



- Where operations or MCU already occurred, prior approval cannot be granted
- **Winters** [2017] EWHC 357 (Admin)
- Prior approval cannot operate retrospectively

# Prior Approval and ‘the principle of dev.’



- **Murrell**: (CA) principle not for reconsideration via prior approval if the GPDO requirements are met
- **Smolas**: when prior approval is considered LPA can also question whether the p.d. arises at all.
- **CAB Housing**: prior approval is a pre-condition and so the principle is contingent on securing prior approval for the particular proposal and its particular effects (but not ‘generic’ effects which amount to an objection of principle).

# What does 'the external appearance of the building embrace'?



- Several prior approval conditions allow LPA to consider 'external appearance of the building/new building/dwellinghouse'
- (e.g. Pt. 1, Class AA; Pt.20, Classes ZA & A)
- Just the building itself or how it relates to neighbouring buildings and the locality?
- Many (but not all) Inspectors were taking a narrow view
- But now resolved by **CAB Housing** (para 102).
- No justification for the narrow view.

# Heritage duties and p.d. rights



- S.66(1) LBA 1990 applies when ‘when considering whether to grant planning permission’.
- S.72(2) LBA 1990 applies more generally to ‘functions’ under the planning Acts.
- Some p.d. rights expressly excluded on Art.2(3) land (includes CAs), e.g. Pt.1, Class AA, para AA.1(b)(i).
- Some p.d. rights excluded on Art.2(3) land and for LBs and within curtilage, e.g. Pt.20, Class A.

# Heritage duties and PD rights



- In some cases, PD rights are not excluded but a specific prior approval requirement applies, e.g.
- Pt.3, Class MA (commercial etc Class E UCO uses to C3 UCO dwellinghouse):
  - Class MA excluded if land is a LB or within its curtilage (para.MA.1(1)(d)(ii);
  - Class MA not excluded if land is within CA but if a ground floor MCU prior approval must consider impact of the MCU on ‘the character or sustainability of the CA’.

# Heritage duties and setting



- But p.d. rights can apply to buildings within the setting of a LB or within the setting of a CA.
- S.66(1) LBA 1990 does not apply to LPA prior approval since not a grant of p.p.
- S.72(2) LBA 1990 does not apply where land/buildings are not in a CA.
- Can LPA consider heritage impacts as part of prior approval?
- Only within confines of stated matters (e.g. as part of 'external appearance' impacts).



# Town centre/commercial freedoms



- It is a sad fact that too many town centres have too much vacant floor space.
- Plan-led strategies to change matters should be the way forward but requires a bold and commercial LPA prepared to ‘shake things up’.
- Absent that, there new PD rights, notably:
  - Pt.3, Class MA: changes of Class E to resi after 3 mths vacancy;
  - Pt.20, Class ZA: demolition of detached (old) Class B1 buildings to a house or block of flats

# Town centre/commercial freedoms



- Pt.20, Class AA: 2 storeys of flats on top of a detached (old) Class A1, A2, A3, B1 building.
- Pt.20, Class AB: 2 storeys of flats on top of a terrace building in (old) Class A1, A2, A3, B1(a) use
- For Class MA the impact on the vitality and viability of the town centre is not a prior approval matter but impacts on local services due to loss of nurseries and health centre can be considered: para MA.2(2)(h). (Cf CA impacts).

# Town centre/commercial freedoms



- For Class ZA the impact on business can be considered: para ZA.2(2)(i).
- For Class AA the impacts on trade/business can be considered: para AA.2(1)(i).
- Class ZA is not applicable if the building to be demolished was built after 31 December 1989 or involves 'relevant demolition' (unlisted building in CA).
- Classes AA and AB do not apply to buildings that are pre-1948 or post 5 March 2018.

# Town centre/commercial freedoms



- LPAs have limited scope to remove these freedoms via Art.4 Directions.
- Town centres may therefore change their composition through unplanned PD changes changing commercial floorspace to residential or inserting new residential above existing space.
- A 'bold' LPA may consider a strategy of selective 'pruning' of retail/commercial floorspace by planned reallocation to resi/mixed use a better approach to town centre management?

# Time limits



- There was a debate about whether a refusal outside the specified time period was valid (see Warren Farm cf. Gluck)
- However, now no longer any confusion because GPDO, Article 7(c) now amended on 1 August 2020
- LPA and applicant can agree in writing any longer period to determine prior approval applications

# PD rights as a 'fallback' position



- Development which is not PD may be justified by reference to PD rights and an argument that the effects of the development are not materially different to what could be done as PD.
- If put forward as a 'fallback' argument, the key is the realism of the PD development taking place if p.p. is refused: **Brentwood** (1996).
- If put forward as a simple comparator, (a) a question of planning judgment/weight, (b) the PD right is deliberately circumscribed.

# *Rights Community Action* [2021] EWCA Civ 1954



- Challenge to GPDO and UCO changes.
- GPDO and UCO did not set framework for future development such that an SEA was required.
- The amendments did not modify any existing plan or programme.
- Future amendments to the GPDO and UCO not likely to require SEA

# CAB Housing Ltd [2022] EWHC 208



- Considers Pt 1, Class AA but also Pt 20, Classes ZA, A, AA, AB
- As well as clarifying ‘principle of dev.’ and prior approval, and what is embraced by ‘external appearance’, **CAB Housing** also addresses ‘impact on amenity’ and ‘adjoining premises.’
- ‘Impact on amenity’ is not limited to overlooking, privacy, or loss of light.
- ‘Adjoining premises’ is wider than ‘immediately adjoining’ and can include ‘neighbouring’.



# Case Reference Citations



- East Herts [2017] EWHC 465 (Admin)
- Cynon Valley (1987) 53 P&CR 68
- RSBS [2020] EWHC 3077 (Admin)
- Garland (1969) 20 P & CR 93
- Impey (1984) 47 P & CR 157
- Winters [2017] EWHC 357 (Admin)
- Murrell [2010] EWCA Civ 1367
- Smolas [2021] EWHC 1663 (Admin)
- Warren Farm [2019] EWHC 2007 (Admin)
- Gluck [2020] EWHC 161 (Admin) and [2020] EWCA Civ 1756
- Brentwood [1996] JPL 939
- Rights Community Action [2021] EWCA Civ 1954
- CAB Housing [2022] EWHC 208 (Admin)



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Thank you