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Practice and Precedents

“Build, build, build” – new permitted development rights

At the time of writing this piece there are currently over one hundred pieces of secondary legislation with the word ‘coronavirus’ in the title.¹ One of these is the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020.² But many of the changes which these particular regulations have introduced have nothing to do with coronavirus and are not temporary. One of these changes is to allow from 1 August 2020 the construction of up to two additional storeys to the top most residential storey of an existing purpose-built, detached block of flats to create new homes without the need for planning permission.³ This change has been made by the insertion of a new Class A of Part 20 to the Town and Country Planning (General Permitted Development) (England) Order 2015.⁴

Permitted development rights have existed since the planning system was introduced in 1948 and the 2015 Order is the eighth such order since 1948. The extensions to these permitted development rights introduced by the 2020 Order are the latest in a number of significant extensions since 2013 which have allowed the creation of new dwellings through the change of use of buildings used for office, agricultural, storage, light industrial, retail and various associated sui generis uses.

Restrictions and exclusions

There are a number of restrictions to the new permitted development right. These include that development is not permitted if:

- the building is less than three storeys in height;
- the height of the extension would be more than seven metres higher than the existing roof or the floor to ceiling height of any new floors would be more than three metres in height;
- the extended building would be more than thirty metres in height;
- the building was constructed before 1 July 1947 or after 5 March 2018;⁵
- the building is or forms part of a site of special scientific interest, a listed building, a scheduled monument, a safety hazard area, a military explosives storage area or is within three kilometres of the perimeter of an aerodrome; or
- the building was converted to housing under the permitted development rights in Part 3 of Schedule 2 of the 2015 Order allowing change of use to dwellings, including changing offices to dwelling houses.

These restrictions will limit the use of the new permitted development right. As the new permitted development right only applies to blocks which were purpose-built as residential flats, it does not apply to mixed-use buildings. So if a small proportion of the building is used

¹ See <http://www.legislation.gov.uk/coronavirus>.

² SI 2020/632.

³ Regulation 22.

⁴ SI 2015/596.

⁵ The Town and Country Planning Act 1947 came into force on 1 July 1948 and on 5 March 2018 the government launched a consultation on updating the National Planning Policy Framework (see <https://www.gov.uk/government/consultations/draft-revised-national-planning-policy-framework>).

for offices, or if there are retail units on the ground floor, the permitted development right will not apply. If the planning permission for residential use was obtained through another permitted development right, then this new permitted development right is not available. This means that office blocks or retail units which have been converted to flats under the 2015 Order cannot be extended upwards under the new permitted development right.

The new permitted development right will not apply in areas where the right has been removed through an Article 4 direction.

Prior approval

The permitted development right is not automatic and is subject to prior approval from the local planning authority. Factors to consider in the prior approval application include:

- transport and highway impacts;
- flooding risks;
- the external appearance of the building;
- the provision of adequate natural light in all habitable rooms; and
- the impact on the amenity of the existing building and neighbouring premises including overlooking, privacy and loss of light.

The application for prior approval must be accompanied by various documents and information including:

- a written description of the proposed development;
- a plan;
- floor plans specifying the dimensions and proposed use of each room, the position and dimensions of windows, doors and walls, and the existing and proposed elevations of the building;
- a written statement specifying the number of new dwelling houses proposed by the development that is additional to the number of dwelling houses in the building immediately prior to development;
- a list of all addresses of the flats within the existing block of flats; and
- where the local planning authority is required to consult the Environment Agency, a site-specific flood risk assessment.

There is a right of appeal against refusal of prior approval.

Whilst the application must be accompanied by floor plans specifying the dimensions and proposed use of each room, the position and dimensions of windows, doors and walls, and the existing and proposed elevations of the building, there is no requirement for a local planning authority to decide whether the amount of space provided is adequate. Recent research into the quality of homes delivered through change of use permitted development rights has found that developers have used permitted development rights to create flats that are no bigger than twenty square metres in size, with the smallest being ten square metres.⁶ Overall, the research found

⁶ Clifford, B., Canelas, P., Ferm, J., Livingstone, N., Lord, A., & Dunning, R. (2020). *Research into the quality standard of homes delivered through change of use permitted development rights*. Ministry of Housing, Communities and Local Government. Available at <https://www.gov.uk/government/publications/quality-standard-of-homes-delivered-through-change-of-use-permitted-development-rights>.

that only 22.1% of dwellings created using permitted development rights would meet the nationally described space standards, compared to 73.4% of dwellings created through full planning permission. In terms of windows, 72.0% of the dwellings created under permitted development rights only had single aspect windows, compared to 29.5% created through planning permission, whereas 67.1% of the planning permission dwellings benefitted from dual or triple aspect windows compared to only 27.3% of permitted development rights dwellings. Whilst the research did not consider issues such as the size of the windows, their arrangement in relation to the layout of the dwelling, or their outlook, it is suggestive of permitted development rights dwellings having worse natural daylight and sunlight than planning permission dwellings.

Developer contributions

A local planning authority cannot secure planning obligations on a prior approval application and so an applicant will not be required to provide a percentage of affordable housing units when using this permitted development right.

If a Community Infrastructure Levy charging schedule is in place, then CIL will be payable on the net increase in useable floorspace.

Rights of light

An issue which will need to be considered before using this permitted development right will be whether any neighbouring buildings will suffer any infringement of rights of light as a result of the proposed development. Where such a right has been, or may be, infringed by such development, the owner of the right may apply for an injunction to either stop the proposed development or to require it to be cut back, however the court has a discretion to award damages in lieu of an injunction. The Supreme Court in *Coventry v Lawrence*⁷ considered the principles that govern the exercise of the court's jurisdiction to award damages instead of an injunction. The court said that the remedy should initially be an injunction and the legal burden was on the defendant to show why one should not be granted. In *HKRUK II (CHC) Ltd v Heaney*⁸, an injunction, rather than damages, was granted where two floors had been added to the building, the floors had already been let and the owner of the right of light had not taken any steps to stop the development during its construction. An injunction was also granted in *Beaumont Business Centres Ltd v Floral Properties Ltd*⁹ where the development had also been completed. These cases illustrate that care must be taken to investigate and resolve any rights of light before this permitted development right is used.

Restrictive covenants

Another issue which must be considered before using this permitted development right is whether there are any restrictions on the title which may prevent the building being extended. There may, for example, be a restrictive covenant which prohibits increasing the height of the building. Problems can arise if the height is not defined using precise measurements such as in *Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson Solicitors*¹⁰ where it was

⁷ [2014] UKSC 13.

⁸ [2010] EWHC 2245 (Ch).

⁹ [2020] EWHC 550 (Ch).

¹⁰ [2001] EWCA Civ 1360.

not clear whether a restrictive covenant which prohibited any new construction above the height of existing buildings meant the roof line or the line of the chimney tops.

Existing leases

Any existing leases of the building should be checked to see whether they might prevent the use of the permitted development right, for example the lease may include as part of its demise the roof or roof space of the building or the airspace above the building. A recent example of the problems which can arise is *R. (on the application of HCP (Hendon) Ltd v Chief Land Registrar*¹¹ where a lease was granted to a developer of the roof and roof space of a two-storey building together with the airspace. The building comprised 14 flats or maisonettes and the leases of the upper floor included the roof and roof space of the building. Given this overlap the development lease took effect concurrently with, and subject to, the flat leases. Consequently the developer could not take possession of the roof and roof space. The only way forward in order to proceed with the development would therefore be for the parties to agree a surrender of the overlapping parts or rectification.

Where a lease does not prevent the permitted development right, the developer must still bear in mind the covenant for quiet enjoyment in the lease and also ensure that it has adequate rights reserved under the lease in order to be able to carry out the works.¹²

Comment

Given the relatively limited circumstances in which the new permitted development right may be exercised, it is unlikely that it will be attractive to large developers but it may help home owners and smaller developers who wish to expand individual properties.

Whilst writing this, the Government has announced further changes to permitted development rights which take effect from 31 August 2020 and are subject to a number of limitations and conditions, including a requirement for prior approval from the local planning authority in relation to certain matters.

The first of these will enable the enlargement of a dwelling house by the construction of new storeys on top of the highest existing storey of the dwelling house.¹³ Two storeys may be added if the existing dwelling house is two or more storeys tall, or one additional storey where the dwelling house consists of one storey.

The other new permitted development right allows for the demolition of a single detached building in existence on 12 March 2020 that was used for office, research and development or industrial processes, or a free-standing purpose-built block of flats, and its replacement by an individual detached block of flats or a single detached dwelling house within the footprint of the old building.¹⁴ The old building should have a footprint no larger than 1,000 square metres and be no higher than 18 metres. The old building must have been built before 1990 and have been vacant for at least six months before the date of the application for prior approval. The

¹¹ [2020] EWHC 1278 (Admin).

¹² See for example *Timothy Taylor Ltd v Mayfair House Corp* [2016] EWHC 1075 (Ch).

¹³ Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 (SI 2020/755).

¹⁴ Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 (SI 2020/756).

right provides permission for works for the construction of a new building that can be up to two storeys higher than the old building with a maximum overall height of 18 metres.