

# Permitted Development: Understandings and Pitfalls


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# Topics


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- The role of permitted development
  - Prior approval
  - The approach to interpretation and the scope of PD rights
  - The shadow of permitted development
  - Exclusion of permitted development rights
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# The Place of Permitted Development

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What is the role of permitted development?

- Granting permission for small-scale changes which should obviously be allowed?
  - Providing a streamlined approval process for proposals which should probably be permitted?
  - A policy initiative for permitting proposals which may be rejected by LPAs, and therefore taking power away from LPAs?
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# The Government's View of PD Rights (1)

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○ See para. 53 of the NPPF (this paragraph amended in 2021):

The use of Article 4 directions to remove national permitted development rights should:

- where they relate to change from non-residential use to residential use, be limited to situations where an Article 4 direction is necessary to avoid wholly unacceptable adverse impacts (this could include the loss of the essential core of a primary shopping area which would seriously undermine its vitality and viability, but would be very unlikely to extend to the whole of a town centre)
- in other cases, be limited to situations where an Article 4 direction is necessary to protect local amenity or the well-being of the area (this could include the use of Article 4 directions to require planning permission for the demolition of local facilities)
- in all cases, be based on robust evidence, and apply to the smallest geographical area possible.

# The Government's View of PD Rights (2)

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- In relation to conditions, para. 54 of the NPPF:

“Similarly, planning conditions should not be used to restrict national permitted development rights unless there is clear justification to do so.”

- At least in part, modern PD rights are:
  - Political
  - a Policy intervention
  - about Power!

# Recent Increases in Scope of PD Rights

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2020: introduction of Class E of the Use Classes Order 1987: broad scope of uses where changes between them do not constitute development

2021: introduction of Class MA in Part 3 of Schedule 2 to the GPDO – PD right to change from the broad Class E to residential use

This is subject to prior approval applications

Potential for considerable changes to town centres (although current national policy already stresses the role for housing in town centres: NPPF 86)

# Prior Approval

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*Winters v SSCLG* [2017] PTSR 568

Does prior approval have to be prior?

Yes – no retrospective prior approval (cf planning permission)

Can't just look at what remains to be done, as the whole development needs to be considered

# The Nature of Prior Approval

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*CAB Housing v SSLUHC*  
[2022] EWHC 208 (Admin)

Case under Part 1, Class AA – adding one or two storeys to existing dwellinghouse

Prior approval application is not the same as application for planning permission

Over-simplification to say that PD right establishes principle of development



# Prior Approval: Limitations? (1)

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Prior approval carries considerable significance due to the broad scope of permitted development rights

BUT NB *Keenan v Woking BC* [2018] PTSR 697

Legal effect of a failure on the part of the LPA to respond during the prescribed period

Doesn't have the effect of permitting something beyond the scope of the PD right itself

Contrast the scope of permitted development rights with the means for obtaining the rights for such development

# Prior Approval: Limitations? (2)

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*New World Payphones Ltd v Westminster CC* [2019] EWCA Civ 2250

Application for prior approval under Class A of Part 16, where would include electronic display panel for advertising

Proposed development did not fall within PD rights – PD right did not include development for a dual purpose

LPA had to consider whether the proposal was within the scope of the PD right:

‘On an application to an authority for a determination as to whether its “prior approval” is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development’. [49(i)]

# Prior Approval: Limitations? (3)

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*R (Smolas) v Herefordshire Council*  
[2021] EWHC 1663 (Admin)

Concerned erection of agricultural building under Part 6

LPA considered that the application was not within the scope of the right (insufficient evidence that reasonably necessary for the purposes of agriculture)

Lang J followed *Westminster* – LPA can and should decide whether within the scope of permitted development right before considering prior approval; *Westminster* not confined to Part 16

# Prior Approval: Importance of Clarity

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*R (Spedding) v Wiltshire Council* [2022] EWHC 237 (Admin)

JR of decision that prior approval not required for Class R

Plans unclear as to what was being sought, and lack of clarity about curtilage

Legal requirement to give reasons here: Openness of Local Government Bodies Regulations 2014, Reg 7

# Prior Approval: Importance of Notice

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*R (Coventry Gliding Club) v Harborough DC*  
[2019] EWHC 3059 (Admin)

Giving notice of application under paragraph W.(8) – “on or near the land”

Court’s role to determine whether requirement met

Not met by notice placed 900m from building proposed to be developed

*R (Coventry Gliding Club) v Harborough DC*  
[2020] EWHC 3388 (Admin)

Remedies following the previous hearing – Council had discovered that decision made on 28 February 2019, but not communicated until following day; 56 period expired

Injunction against development of the site?

Possible damages claim?

# Prior Approval: Loss?

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*RSBS v SSHCLG*

[2020] EWHC 3077 (Admin)

Applicant obtained prior approval for change of use under Class O; applicant then carried out unauthorised works, before change of use to residential

Impossible to lose PD rights? (*Orange Personal Communications v Islington LBC* [2006] EWCA Civ 157)

Significance of removal of unlawful development?

# The Interpretation of the GPDO (1)

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Approach to interpreting the GPDO: not to be too technical.

“The ordinary meaning of the language used is to be ascertained when construing the development order in a broad or common sense manner.” *Evans v SSCLG* [2014] EWHC 4111 (Admin), [2015] JPL 589 [17]

This was described as an apt description of the “correct approach to construing provisions of the GPDO”: *R (Mawbey) v LB Lewisham* [2019] EWCA Civ 1016 [20]

Linbdlom also quoted *Waltham Forest LBC v SSCLG* [2013] EWHC 2816 (Admin) [17]

# The Interpretation of the GPDO (2)

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*Bright Horizons Family Solutions Ltd v SSHCLG* [2019] PTSR 818

Role of the court: determine the meaning of the GPDO

Weight to be given to views of expert decision-maker (*Hopkins Homes Ltd v SSCLG* [2017] 1 WLR 1865)?

“School” is not to be read as including nurseries; focus on “school-age”

Approach consistent with established approach of interpreting GPDO: look at ordinary meaning of the word (see *English Clays Lovering Pochin & Co v Plymouth Corporation* [1973] 2 All ER 730 and *Evans v SSCLG* [2015] JPL 589, para. 17)



# The Interpretation of the GPDO (3)

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*R (Mawbey) v Cornerstone Telecommunications Infrastructure Ltd* [2019] EWCA Civ 1016

Consideration of whether an addition to a building constituted a mast

Begin with the straightforward meaning of the term, and then see if anything in the legislative context displaces that meaning

Can look at dictionary definitions

Council had erred in its approach to the meaning of “mast”

# The Interpretation of the GPDO (4)

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*Haytop Country Park Ltd v SSHCLG* [2022] EWHC 1848 (Admin)

Appellant argued that works subject to an enforcement notice were covered by permitted development rights, being those under Schedule 2, Part 5, Class B:

“Development required by the conditions of a [caravan] site licence for the time being in force under the 1960 Act”

This was rejected by the Deputy High Court Judge [72]:

“In my view, the terms in which the permitted development right is expressed require the decision maker to determine not merely whether the development under consideration includes elements which are required by a condition of a caravan site licence read in isolation, but also whether the development is in accordance with the conditions of that site licence read as a whole. I cannot accept that the Class 5B permitted development right is to be read as authorising development on a caravan site which, although containing elements which accord with individual conditions of the site licence issued in respect of that site, nevertheless is contrary to the conditions of that site licence when read and applied as a whole.”

# The Scope of PD Rights (1)

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*Prichard Jones* [2022] EWHC 520 (Admin)

High Court challenge to decision of inspector dismissing appeals against an enforcement notice.

Development subject to the EN was construction of access to the highway.

Appellant argued that the works were covered by PD rights

The inspector held that the highway to which access was constructed was a 'C' classified road (and therefore outside the scope of Schedule 2, Part 2, Class B)

“A road is a classified road for the purposes of Section 12 of the Highways Act in the circumstances there set out. There is not a separate and overriding principle that only A and B roads are classified roads, or that any reclassification process is necessary in order for a classified road to remain a classified road.” [14]

It was not appropriate to consider whether the road had the necessary characteristics of a classified road: it fell within the statutory definition (Highways Act 1980, s.12)

# The Scope of PD Rights (2)

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The issue of curtilage is relevant to setting the scope of a number of PD rights

See principles in *Challenge Fencing Ltd v SSHCLG* [2019] EWHC 553 (Admin), and the 'Blackbushe Airport' case: *R (Hampshire CC) v SSEFRA* [2022] QB 103

Recent case: *Hiley v SSLUHC* [2022] EWHC 1289 (Admin). To note:

- no test of 'smallness' in relation to curtilage
- parcel in question doesn't need to fall within the same enclosure
- functional equivalence / functional interdependence is irrelevant

Curtilage is complicated! (*Practical Guide to Permitted Changes of Use* 4<sup>th</sup> edn pp 424-437)

# The Scope of PD Rights (3)

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*LB Brent v SSLUHC* [2022] EWHC 2051 (Admin)

What test applies to whether an HMO constitutes a dwellinghouse for the purposes of the GPDO?

Owner relied in enforcement proceedings on rights under Sch 2, Part 1, Class A “enlargement, improvement or other alteration of a dwellinghouse”.

The property did not have to be occupied in a manner akin to a single household in order to be a dwellinghouse for the purposes of the GPDO. “Use Category C3 is not exhaustive of the uses to which a dwellinghouse may be put” [68]

However, a HMO is not necessarily a dwellinghouse – an HMO which is a flat or a building containing one more flats would fall outside the GPDO definition of dwellinghouse [72(i)]

Practical point: make your arguments to the inspector, otherwise you may not be able to make them in court, particularly if the inspector would have to have made factual findings and planning judgments [77]

# The 'Shadow' of PD Rights

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*R (Stratton) v LB Enfield*  
[2022] EWHC 404 (Admin)

Admittedly unlawful grant of planning permission for extension (error of fact)

Argued that decision would have been highly likely to be the same, due to fallback and PD rights, such that decision should not be quashed because of s.31(2A) of the Senior Courts Act 1981

Court unwilling to carry out planning judgement

# The Exclusion of PD Rights


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*Dunnett Investments Ltd v SSCLG* [2017] JPL 848

“1. This use of this building shall be for purposes falling within Class B1 (Business) as defined in the Town and Country Planning (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained. 2. In order that the Council may be satisfied about the details of proposal due to the particular character and location of this proposal.”

Does this exclude PD rights? Reference to LPA – what about appeal?

Three propositions:

1. Conditions can exclude GPDO
  2. Potential impliedly exclude of GPDO, but grant for on use insufficient
  3. Condition must clearly evince intention to exclude PD rights
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# Exclusion of PD Rights and Article 4 Directions

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*R (Berkshire Assets (West London) Ltd v LB Hounslow* [2018] EWHC 2896 (Admin)

Justine Thornton QC

What is the date of effect of an Article 4 direction?

What about extant permitted development rights?

Focus on the wording of the Article 4 direction

Approach to interpretation: *Trump International Golf Club Scotland v Scottish Ministers* [2016] 1 WLR 85 (and now *Lambeth LBC v SSCLG* [2019] 1 WLR 4317)

Objective approach





# Further resources

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Planning Practice Guidance 'When is permission required?' paras 016ff

House of Commons Housing, Communities and Local Government Committee, 'Permitted Development Rights', Third Report of Session 2021-22 (HC 32, July 2021)

*Encyclopedia of Planning Law and Practice*, Vol 6 (Sweet & Maxwell, looseleaf)

Ben Fullbrook *An Introduction to the General Permitted Development Order* (Law Brief Publishing, 2021)

Martin Goodall, Alistair Mills, David Evans (eds) *A Practical Guide to Permitted Changes of Use*, 4<sup>th</sup> edn (Bath Publishing, 2022)