PERMITTED DEVELOPMENT AND ENFORCEMENT

INTRODUCTION

1. In this paper, I will consider:

    a. the nature of permitted developments;

    b. the effect of Articles 3 and 4 of the Town and Country Planning (General Permitted Development) Orders ("GPDOs");

    c. particular enforcement issues involving permitted development rights; and

    d. the practical application of some recent case law.

A. WHAT ARE PERMITTED DEVELOPMENT RIGHTS?

2. Since 1948, the planning system has included a system of granting planning permission at a national level for certain categories of development without the need for a planning application. These are known as permitted development rights.

3. By s. 59(1) of the Town and Country Planning Act 1990, the Secretary of State and the Welsh Ministers may provide for the granting of planning permission by development order.[1]

4. Planning permission under such an order may be granted in two ways (s.59(2)):

    a. by setting out how planning permission may be granted by application to a local planning authority ("LPA") or Minister.

    b. by the order itself granting planning permission for a specified development or class of development.

5. The latter type of order may cover a certain type of development and be nationwide: a general development order. Or its coverage may be restricted to a specific site or scheme: usually called a special development order.

[1] All statutory references are to the 1990 Act unless otherwise stated.

6. Most permitted development rights are conferred by general development orders.

7. Until 1995 there was just one general development order that included procedural rules and permitted development rights. From 1995, there was then the Town and Country Planning (General Development Procedure Order) 1995 ("General Development Procedure Order 1995") and the Town and Country Planning (General Permitted Development) Order 1995 ("General Permitted Development Order 1995").

8. The General Development Procedure Order 1995, was then replaced by separate Orders in England and Wales. In England, these procedures are currently set out in the Town and Country Planning (Development Management Procedure) (England) Order 2015; and in Wales in the Town and Country Planning (Development Management Procedure) (Wales) Order 2012.

9. Permitted development rights in Wales are still provided by the (much amended) General Permitted Development Order 1995 and in England by the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO 2015").

10. In addition, local development orders, which are made by LPAs, grant planning permission to specific types of development within a defined area. Neighbourhood development orders and community right to build orders fulfil a similar function within smaller neighbourhood areas.

B. ARTICLES 3 AND 4

a) Article 3

11. By art. 3(1) of the GPDO 2015:

> "Subject to the provisions of this Order and regulations 75 to 78 of the Conservation Habitats and Species Regulations 2017 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."

12. The GPDO 1995 has the same wording for art. 3(1), but refers to the now revoked regs 60 to 63 of the Conservation (Natural Habitats) Regulations 1994.

13. There are a number of further exclusions in art. 3 of both GPDOs themselves. These include:

    a. that any permission granted by art. 3(1) is subject to any exception, limitation, or condition specified in Schedule 2 (art. 3(2));

    b. where a condition attached to a planning permission has withdrawn certain or all permitted development rights from the development authorised by that permission (art. 3(4));

    c. where the building operations involved in the construction of an existing building or an existing use are unlawful (art. 5);

    d. the limitation of certain types of operational development to particular permitted development rights, even if other classes, would seem to include that development (e.g. art. 3(6)); and

    e. any need for Environmental Impact Assessment or EIA screening (arts 10 to 12).

14. Thus, in an enforcement context, in determining whether a development benefits from permitted development rights, care must be taken to consider whether any of the exclusions in article 3 apply.

b) Article 4

15. By s.60(3), the Secretary of State or an LPA may direct that permitted development rights should not apply, either in whole or in part, "in relation to development in a particular area" or "in relation to any particular development."

16. The power is contained within Article 4 of the GPDOs. A direction can be made with or without immediate effect. There are significant variations between the relevant procedures that have effect in England and Wales.

17. For present purposes, the key point is to note that a development that would appear to benefit from permitted development rights may not if an Article 4 declaration is in place. LPAs should therefore be aware of the possibility.

C. PARTICULAR ENFORCEMENT ISSUES

a) Breaches of limitations or conditions in the GPDOs

18. When deciding whether to take enforcement action, it is sometimes forgotten that a breach of the limitations on, or conditions belonging to, permitted development rights under the GPDOs constitutes a breach of planning control.

19. This is stated explicitly in the Government's Planning Practice Guidance ("PPG") at §001 Ref ID: 17b-001-20140306:

> **"What is a breach of planning control?**
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> A breach of planning control is defined in section 171A of the Town and Country Planning Act 1990 as:
>
> - the carrying out of development without the required planning permission; or
>
> - failing to comply with any condition or limitation subject to which planning permission has been granted.
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> Any contravention of the limitations on, or conditions belonging to, permitted development rights, under the Town and Country Planning (General Permitted Development) (England) Order 2015, constitutes a breach of planning control against which enforcement action may be taken."

b) Enforcement notices

20. Consideration needs to be given as to whether an apparent breach in fact benefits from permitted development rights.

<u>*Mansi* principle</u>

21. A notice should not affect any existing rights. These include existing use rights, those lawful as enforcement action can no longer be taken, ancillary uses, as well as permitted development rights (*Mansi v Elstree Rural DC* (1964 16 P & CR 153)) ("*Mansi"*).

22. The *Mansi* principle operates with the effect that enforcement notices:

    a. should not be worded to prohibit lawful development;

    b. should be interpreted so far as is possible to avoid a conflict.

23. In *Mansi* itself, a plant nursery had primarily used a greenhouse for horticultural purposes, but had an ancillary use for the retail sale of plants. After the retail sales had increased to the extent that they had become the primary use, the LPA issued an enforcement notice requiring the retail use to cease. However, the Divisional Court held that the enforcement notice should be varied to allow the subsidiary sales use.

24. Nevertheless, while an enforcement notice should acknowledge an established use, it does not need to refer to permitted development rights.

25. In *Duguid v SSETR* (2001) 82 P & CR 6 (*"Duguid"*), the appellant challenged the Secretary of State's dismissal of his appeal against an enforcement notice. The enforcement notice prohibited him from using an area of land used for mixed agricultural use and Sunday markets. The appellant argued that the Inspector should have amended the notice so that it provided that the GPDO permitted a temporary change of use for up to 28 days per year, including up to fourteen days per year for markets.

26. The Court held that there was "absolutely no need at all to refer to the GPDO because it operates as a matter of law within parameters that are certain, being those defined by the order itself" (Ward LJ at §28).

27. It was made clear in *Duguid* that an enforcement notice "cannot be construed so as to make a criminal offence out of lawful activity" (Ward LJ at §30). It follows that, in the context of a prosecution for breach of an enforcement notice under s.179, a defendant can put in issue whether the activity relied on by the prosecution as being a breach of an enforcement notice, is, in fact, caught by the notice.

28. This can be compared to where existing use rights are involved. In *Challinor v Staffordshire CC* [2007] EWCA Civ 864, the Court of Appeal made clear that the *Mansi* doctrine does not permit an existing use of land to be relied on as a defence to a prosecution under s.179, even where the use is supported by a lawful development

certificate. Keene LJ considered the relevant authorities, including *Duguid*, and said (at §52):

> "In short, what this line of cases indicates is that an enforcement notice will be interpreted so as not to interfere with permitted development rights under the General Development Permitted Order or with rights to use land for a purpose ancillary to a principal use which is itself not being enforced against. The authorities go no further than that and certainly do not establish any general right to assert existing use rights at a time when the enforcement notice has come into effect after an unsuccessful appeal or in the absence of an appeal. Such rights must be asserted at the time of appeal against the enforcement notice. If the landowner sleeps on those rights, he will lose them. There is a sound practical reason for this, in that any other course would require the courts, including magistrates courts, to delve into the planning history of a site and into the use made of it over a number of years."

Section 173A

29. Where it later transpires that part of an apparent breach detected on an enforcement notice benefits from permitted development rights, then LPAs should consider withdrawing the notice, or waiving or relaxing any of its requirements.

30. Section 173A(1) provides:

> "(1) The local planning authority may—
>
> (a) withdraw an enforcement notice issued by them; or
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> (b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)."

31. Thus, by s.173A(1)(b), in waiving or relaxing any requirement of a notice, the period for compliance may be extended.

32. However, s.173A does not permit any additional requirements to be made or the requirements of the notice to be strengthened in any way. An unlawful variation will not

have any effect, which will mean that the lawfulness of any valid enforcement notice in place will not be affected (*Koumis v SSCLG* [2012] EWHC 2686 (Admin)).

33. By s. 173A(2), the powers conferred under subsection (1) can be exercised irrespective of whether the notice has taken effect. This means that a settlement may be reached, before, or even during, an appeal against a notice without requiring the approval of the Secretary of State. In these circumstances, the appeal can then be withdrawn, though an award of costs is still possible against either party.

34. As to notification, section 173A(3) provides:

> "(3) The local planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it."

35. This means that if ownership of the property changed after service of the original enforcement notice, then both the old and new owners should be notified.

36. Finally, by s.173A(4), the withdrawal of an enforcement notice does not affect the power of the LPA to issue a further enforcement notice.

37. Section 171B(4)(b) provides:

> "(4) The preceding subsections do not prevent–
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> …
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> (b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach."

38. Therefore, as a result of s.173A(4) and s.171B(4)(b), a further enforcement notice could be issued within four years of the issue of the original notice, even if the time limits under s.171B would otherwise have expired.

Under-enforcement and permitted development rights

39. Section 173(3) makes plain the ability of an LPA to under-enforce in relation to an apparent breach:

> "(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes."

40. Thus, an enforcement notice can require the partial demolition of a structure. However, LPAs should be careful in these circumstances to think whether any permitted development rights under a GPDO would enable the structure to be replaced. A replacement could provide to be less acceptable than the original structure.

c) Temporary stop notices

41. Temporary stop notices are often used by LPAs where they want to take swift action to prohibit a breach of planning control. Although they only have effect for 28 days, temporary stop notices have the advantage that they can be served before an enforcement notice has been issued.

42. However, LPAs should still consider whether the apparent breach is in fact permitted development as compensation could be payable under s.171H. The PPG states at §045 Ref ID: 17b-045-20140306.

> **"Is compensation payable?**
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> Only in certain circumstances is compensation payable. A person who at the time the temporary stop notice is served has an interest in the land to which the notice relates may be entitled to compensation by the local planning authority for any loss or damage directly attributable to the prohibition effected by the temporary stop notice. The scope for compensation is set out in section 171H of the Town and Country Planning Act 1990). It should be noted compensation is only payable if one or more of the following applies:

a. the activity specified in the temporary stop notice was the subject of an existing planning permission and any conditions attached to the planning permission have been complied with;

b. it is permitted development (including under a local or neighbourhood development order);

c. the local planning authority issue a lawful development certificate confirming that the development was lawful;

d. the local planning authority withdraws the temporary stop notice for some reason, other than because it has granted planning permission for the activity specified in the temporary stop notice after the issue of the temporary stop notice."

D. PRACTICAL APPLICATION OF RECENT CASE LAW

a) Conversion/rebuilding of agricultural buildings

- *Hibbitt v SSCLG* [2016] EWHC 2853 (Admin) (*"Hibbitt"*)

43. The interpretation Class Q of Part 3 of Schedule 2 to the GPDO 2015 ("Class Q") continues to confuse.

PPG

44. The PPG provides some guidance at §105 Ref: 13-105-20180615 ("§105"):

> **"What works are permitted under the Class Q permitted development right for change of use from an agricultural building to residential use?**
>
> The right allows either the change of use (a), or the change of use together with reasonably necessary building operations (b). Building works are allowed under the right permitting agricultural buildings to change to residential use: Class Q of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015. However, the right assumes that the agricultural building is capable of functioning as a dwelling. The right permits

building operations which are reasonably necessary to convert the building, which may include those which would affect the external appearance of the building and would otherwise require planning permission. This includes the installation or replacement of windows, doors, roofs, exterior walls, water, drainage, electricity, gas or other services to the extent reasonably necessary for the building to function as a dwelling house; and partial demolition to the extent reasonably necessary to carry out these building operations. It is not the intention of the permitted development right to allow rebuilding work which would go beyond what is reasonably necessary for the conversion of the building to residential use. Therefore it is only where the existing building is already suitable for conversion to residential use that the building would be considered to have the permitted development right.

For a discussion of the difference between conversions and rebuilding, see for instance the case of Hibbitt and another v Secretary of State for Communities and Local Government (1) and Rushcliffe Borough Council (2) [2016] EWHC 2853 (Admin).

Internal works are not generally development. For the building to function as a dwelling it may be appropriate to undertake internal structural works, including to allow for a floor, the insertion of a mezzanine or upper floors within the overall residential floor space permitted, or internal walls, which are not prohibited by Class Q."

Hibbitt

45. While the guidance in the PPG is helpful, it refers to *Hibbitt* for a discussion of the difference between a conversion and a rebuild.

46. In *Hibbitt*, the claimants sought to quash a planning inspector's dismissal of their appeal against a refusal to grant prior approval for the proposed development of an agricultural barn into a dwelling under Class Q.

47. The High Court clarified that there is a conceptual difference between a "conversion" and a "rebuild" and that the development permitted under Class Q does not extend to a "rebuild."

48. Nevertheless, it is still not clear from *Hibbitt* where the dividing line falls between conversion and rebuild. For instance, Green J said (at §33) that he did not "gain very much" from the statement in the PPG that the permitted development right under Class Q "assumes that the agricultural building is capable of functioning as a dwelling", a phrase which remains in the current version of the PPG (§105, Ref ID:13-105-20180615).

49. Green J further indicated (at §34) that the extent of the works is not decisive.

50. In addition, the relevant barn in *Hibbitt* was held to be a rebuild, even though it was accepted that it was structurally strong enough to take the loading from the external works. The reference in the PPG to the need for the existing building to be structurally strong enough has now been removed.

51. Ultimately, Green J said (at §25) that the distinction between a conversion and a rebuild is a matter of planning judgment:

> "In my view whilst I accept that a development following demolition is a rebuild, I do not accept that this is where the divide lies. In my view it is a matter of legitimate planning judgment as to where the line is drawn."

<u>Practical application</u>

52. Whether a development is a rebuild or a conversion is a matter of planning judgment whether in the enforcement context or where deciding a prior approval application. Both LPAs and developers need to make a judgment and draw on their professional experience to decide what conclusion an inspector would likely reach.

b) When a building becomes a new building

- *Oates v SSCLG* [2017] EWHC 2716 (Admin) ("Oates")

Oates

53. In *Oates*, the appellant appealed against the decision by an inspector that an enforcement notice should be upheld.

54. On the appellant's farm were three buildings (former chicken sheds) that had permission for B1 and B8 office use. The appellant had engaged in a significant amount of building work, which included erecting metal framed exo-skeletons around the existing buildings. The relevant LPA took the view that the buildings constituted unauthorised development and issued an enforcement notice that required their demolition.

55. The appellant's arguments included that:

    a. the Inspector was wrong to conclude that a breach of planning law had occurred as there were no new buildings; and

    b. the Inspector should have found that the appellant had a valid fallback position that the original buildings benefitted from permitted development rights.

56. The High Court held that the correct approach to considering whether a building is "new" or not is that set out in *Hibbitt*. HHJ Waksman QC, sitting as a Judge of the High Court, said (at §18) that: "Whether what has happened, or is contemplated, extends beyond a mere conversion of or addition to the original building or means that in substance there is a new building is obviously a question of fact and degree."

57. HHJ Waksman QC further said that it was not decisive that parts of the original buildings had remained (at §19).

58. As to appellant's fallback position that the original buildings had benefitted from permitted development rights, the Judge held that, as the buildings were new, there was no question of the appellant being able to benefit from permitted development rights.

Practical application

59. *Oates* demonstrates that the principles in *Hibbitt* go beyond the conversion of agricultural buildings. Whether works to a building result in its modification or create a new one is a

matter of fact and degree. Again, deciding what has occurred is ultimately a matter planning judgment

c) The effect of an LPA failing to respond to a prior approval application on time

- *R (Warren Farm) (Wokingham) Ltd v Wokingham BC* [2019] EWHC 2007 (Admin) (*"Warren Farm"*)
- *Keenan v Woking Borough Council* [2017] EWCA Civ 438 (*"Keenan"*)

Warren Farm

60. The appellant sought to quash a decision to refuse prior approval under the GPDO 2015 for the proposed change of use of a barn on his land to a dwellinghouse.

61. Art. 7 of the GPDO 2015 provided (and still provides) that decisions in relation to prior approval applications must be made within specified time periods.

> "7. Prior approval applications: time periods for decision
>
> Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority—
>
> (a) within the period specified in the relevant provision of Schedule 2,
>
> (b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or
>
> (c) within such longer period as may be agreed by the applicant and the authority in writing."

62. Under Class Q, §Q2 required prior approval to be sought in accordance with the procedure in §W. The relevant time period under §W(11) was the expiry of 56 days. The

LPA asked for an extension of a further 56 days, to which the developer agreed and the LPA then refused prior approval within this extended period.

63. However, the developer argued that the decision was of no effect as it was not possible to extend the original 56-day period.

64. The Court considered the wording of §W(11) in detail and concluded that in the particular circumstances that it was not possible for the deadline to be extended. It concluded (at §34) that:

> "…Where a period is specified, the deemed grant of planning permission takes place at the end of that period, so the authority's decision must be before that. If no period be specified, the deemed grant takes place only when a decision is made, and there is therefore scope for agreeing a time within which the authority has to make a decision. Article 7(c) is to be read as an alternative to article 7(b) only, not to article 7(a)."

Keenan

65. The appellant was the owner of a farm in the Green Belt against whom the respondent Council had issued two enforcement notices. The breaches of planning control alleged were, respectively, that there had been a material change of use of the land, without planning permission, from agricultural to a mixed agricultural and residential use, and the construction of a "hardcore track" without planning permission. He had appealed against both enforcement notices unsuccessfully to the Secretary of State and to the High Court.

66. In the Court of Appeal, the appeal was only concerned with the enforcement notice in relation to the hardcore track. The appellant argued that its construction was permitted development under the GPDO 1995 (which was still in effect in England at the relevant time).

67. The key question for the Court was whether the failure of the Council to respond to the appellant's application for a determination as to whether prior approval was required for the "siting and means of construction of the track" meant that permission was deemed to have been granted.

68. The Court of Appeal rejected the appellant's argument that the failure of the Council to respond to his application within 28 days meant that he was entitled to proceed with the development set out in the application. Crucially, the grant of planning permission came about through the operation of art. 3(1) rather than through the procedure to be followed under art 3(2). Thus, the development could not become permitted development merely because the Council missed a deadline.

Practical application

69. LPAs should take care to determine prior approval applications on time and particularly so where a period of time is specified. Where a period of time is specified, this cannot be extended and a failure to make a decision before the expiry of the period will lead to an automatic grant of prior approval where the development is permitted development (*Warren Farm*).

70. However, an LPA's failure to respond on time for a prior approval determination does not mean that the development applied for automatically becomes permitted development (*Keenan*).

d) Interpreting exclusions

- *R (Marshall) v East Dorset DC* [2018] EWHC 226 (Admin) (*"Marshall"*)

Marshall

71. This judicial review claim was a challenge of the defendant LPA's decision that the interested party's proposal to construct a barn on agricultural land opposite the claimant's land constituted permitted development.

72. The interested party had applied for prior approval under Class A of Part 6 of Schedule 2 of the GPDO 2015 ("Class A"), which is concerned with agricultural development on units of 5 ha or more. Paragraph A.1 provides for exclusions and §A.2 sets out conditions, though different versions were in force at the relevant time.

73. In the versions in force, §A.1 excluded agricultural development if the building were to accommodate livestock and would be within 400m of an occupied dwelling and §A.2

similarly provided that existing buildings could not house livestock if within 400m of an occupied home, subject to certain exceptions under §D.3.

74. The Claimant's house was within 400m of the proposed development, but the Council decided that the latter came within one of the exceptions of §D.3.

75. The Court held that §A.1 was separate to §A.2 and that an exception under §D.3, although it applied to the relevant part of §A.2, did not have applicability to §A.1. Thus, the Court held that the proposed development did not benefit from permitted development rights under Class A and quashed the decision to grant prior approval.

Practical application

76. LPAs should take work through the relevant class and give careful consideration to which provision a particular exclusion applies.

CONCLUSION

77. Permitted development rights simplify the planning process by removing the need for planning applications. However, they are not always easy to navigate and can pose particular challenges in the enforcement context.

78. Nevertheless, many of the main difficulties faced by LPAs recur and are set out in this paper. It is hoped that it will give some indication as to how these can be resolved or avoided altogether.

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