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'Air Rights' Prior Approval: The Sky's The Limit?



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The Government's new PD rights for roof-level extensions to existing buildings was announced with a lot of fanfare in August 2020. However, as many developers are finding out, it is not as straightforward as it may at first seem.

We look at a prior approval consent we obtained in Romford on an existing office block and consider some of the challenges that were faced, which we would suggest will be key areas for due diligence and planning risk for developers on most other sites.

The property

Holgate Court comprises a three-storey office development, which already benefits from permission for the conversion of the office areas to residential use.

The buildings are arranged around a central courtyard and divided into separate blocks of offices. Therefore, they in effect comprise a terrace of office buildings, as each individual office block has a party or adjoining wall to the neighbouring block comprised in the same group around the central courtyard. Prior approval was sought for only part of this group, together with the entrance way that services the block.

Access routes from the public highway across private land are normally included within the 'red line' area to the application, so any servient land to an application should normally be included in the application, and it is important to ensure control over this land is deliverable (e.g. deed of right of way or ownership). This can come up in a Prior Approval application (see below on Section 106 Agreements).

Due to the physically separate buildings within the same overall block of offices, Prior Approval was sought under Class AB of the GPDO 2015 (as amended by the GPDO 2020 (SI No.2020/755). Had it comprised one whole office building, and



not separate office buildings abutting around a courtyard, then the application would have been made under Class AA.

External appearance and design & architecture

A key area of uncertainty of many of these projects will be around the subjective aspect of the external appearance of the building with the extra floors. This is principally where the application begins to feel more like a planning application instead of permitted development, as such issues are open to uncertainty and argument between the planners.

In this case, the first attempt to secure Prior Approval, in November 2020, was refused partly on these grounds, as the Council thought that the building failed to integrate into the existing building, which was characterised by pitched roofs, rather than the flat roof that was proposed. The windows were also thought to be too close to the eaves, making the building look 'squat':

Due to the limitations on heights in

comparison to the existing roof height of the same part, and by comparison to neighbouring roofs in the terrace, the roof ridge had to be at a set height anyway.

This meant that the best way forward was a hipped or pitched roof to overcome the Council's concerns, with the further accommodation in the new roof space.

Future battles on design and appearance

Although, happily, the issue of design and appearance was swiftly resolved with the Council in this case, we are seeing conflicting appeal decisions come through from some Councils and the Planning Inspectorate, which is going to make this a key issue of uncertainty for such projects going forward.

On the one hand, we have seen some Inspectors allow appeals by emphasising the importance of the general objective of the legislation, namely to add new homes through upwards extensions, being one that Councils should not aim to frustrate with constraints on height, except

where imposed through specific height constraints in the legislation. One example of such a decision involved adding storeys to a building in Eastbourne which would have resulted in a building out of context with the street scene in terms of height: Seaforth Court, Eastbourne; reference: APP/T1410/W/20/3263486 (12th April 2021).

On the other hand, other Inspectors have taken a different approach. In such cases, the Inspectors have stated that the requirement for regard to design and architectural characteristics does extend to looking at the street scene (the direct opposite of the Eastbourne case). With some free-standing blocks where the additional height will push them above their neighbours in particular, following this reasoning will be fatal to the prospect of approval: 23 Greenfields Avenue, Alton; reference: APP/M1710/21/3266609 (21st July 2021).

At this time, it is difficult to tell if we are just seeing a variation and inconsistency with appeal inspectors, or a general hardening of approach against these cases, trying to tighten up on the circumstances where they might be encouraged.

We think that, in general, this is more likely to be a problem when seeking to use this legislation to raise the height of houses in quiet residential or suburban streets, or where upsetting the rhythm of semi-detached pairs of houses. Free-standing buildings in more urbanised locations are less likely to encounter such criticism with such proposals – but nothing can be taken for granted and risk needs to be built-in on all similar cases.

Consideration should definitely be given of CGIs or at least sketches or street scene elevations that present the building changes in their wider context.

Natural light – the scheme & neighbours

The legislation that introduces this PD right refers to the importance of securing “adequate natural light in all habitable rooms”. There are a number of key takeaways here:

1. ‘Natural light’ is understood by daylight and sunlight experts and by most Council officers to refer to daylight and sunlight – both must be tested.

2. Bring in a light consultant early to test the scheme before submitting the application. It always takes more time than you think and might mean that changes to

the plans will be necessary to comply – officers might not accept changes to plans post-submission.

3. Consider if immediate neighbours have permission or have applied (to the Council or via an ongoing appeal) for change of use or extra floors themselves – the assessment needs to take this into account too.

4. Thoroughly check through the report from the light consultant – officers will often refuse if the CAD plans shown at the back of the report do not match the submitted drawings.

5. ALL habitable rooms need to provide ‘adequate natural light’ – not just a majority of them.

A common constraint with natural light is where to put the windows to the new floors. Firstly, there is a condition on all commercial or mixed-use buildings in terraces that the extra floors cannot have any windows in the side elevations or the side roof slope to the new floors (this condition does not apply to detached commercial buildings). Secondly, consideration needs to be given to the alignment and position of windows on the elevation, so they fit in with the architecture and rhythm to the façade.

As can be seen from the floor plans and elevations below, we overcame this through proposing a ‘crown roof’ (hipped and pitched with flat-top, and roof lights on the flat part). This maintained the design but also ensured that we got light into the rooms that could not be served by side windows or roof lights.

Outlook is often raised as a consideration. However, this is only relevant to the extent of neighbour’s outlook being harmed by the visual impact of the new extension. Outlook is not relevant to the amenity of future occupiers to the new floors – so you can have rooms with no outlook but well-served by roof lights.



Noise impact

In this case, the surrounding development and environment was not seen as particularly harmful. However, this is becoming more of an issue more often on PD applications – for changes of use and extra storeys – in general.

Often the issue arises in respect of proximity to nightclubs, pubs, railway stations or other commercial premises. However, if officers raise the issue in relation to ‘high levels of ambient noise’ or road traffic, then this should be resisted. The GPDO refers only to noise from commercial premises with PD applications, and the Council would be acting unlawfully in seeking conditions or noise assessments where this is not proven to be the case.

Car-free housing & Section 106 Agreements

This will often be the final hurdle to the application, as it was in our case. It is straightforward in of itself. However, the difficulty comes in the timing and logistics around the application and the parties involved – so plan ahead and be prepared!

In this case, there was not only the applicant and the Council involved, but ►





also a bank/lender to the applicant, and a third party owner (of the entrance and access to the part of the block affected). The Council would not extend the time beyond eight weeks to deal with the Section 106 Agreement – this is now quite common with Councils severely under workload pressures and seeking to get through applications quickly. Therefore, if you think you will need to get on top of this aspect early then the following tips might help:

1. Obtain a clear recent copy of the Land Registry title and title plan for ALL parts within the red line to the application.
2. Give all parties early notice and check their

forms of execution – private individuals, company directors or Power of Attorney?

3. Push and chase planning officers to instruct their legal officers ASAP and be in direct contact with them.
4. Carefully check where documents need to be sent to for execution and sealing – many people are still not based in their offices and papers sent to business addresses can go missing or not be checked for days.

Conclusion

Whilst we cannot deny that the new PD rights for extra storeys to buildings create great opportunities for adding value

(especially in locations where otherwise affordable housing contributions might be needed for the extra units), there are plenty of pitfalls along the way.

Officers are overworked and will often not look at these applications until very late and will usually not revert with changes needed or further information if they can make a quick decision instead. This priority in many cases, placing speed of decision-making over quality, will not go away anytime soon. Therefore, understanding the key issues and how to navigate your way through them is where the profits in such schemes will either be secured or will be eroded. 

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