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Reviewing Permitted Development Rights



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In 2021, the Government made several significant changes to the permitted development regime, opening up the prospect of new permitted development (PD) rights, especially through the introduction of Class MA, which permits the movement from commercial uses under Use Class E to self-contained residential use. Changes were made to existing PD rights in response to some use classes moving out of the former 'retail' use class and into sui generis (takeaways, public houses etc.). Changes were also made to Class G prior approval rights.

This month we briefly revisit some of these changes and flag up principal planning and practical challenges to securing such rights.

Current PD rights for Change of Use

The following table summarises the principal PD opportunities currently available for change of use to residential, particularly on Class G and MA rights (as of April 2023).

These are not the only PD rights available for commercial buildings and the following table is a reminder that PD rights and opportunities for residential development also exist on other buildings such as takeaways, betting shops, casinos, amusement arcades and agricultural buildings.

National Space Standards apply to ALL of the above where the proposal involves the creation of new self-contained flats under Class C3. This applies not only to Class M, MA, G, N and Q above, but also to Class L rights when changing from an HMO (6 people maximum) to Class C3.

'Class G' or Class MA Prior Approval Rights

Developers can currently change space above a shop (Class A1 retail or Class A2



professional services - both now Class E(a) and E(b), respectively - to Class C3 flats. This can be done under either Class G (up to two flats above each ground floor unit) or Class MA rights (no limit on the number of flats).

One might choose Class G rights if there are obstacles or challenges to the use of Class MA, which might mean that Class G is the preferred option. For instance, Class G might be a better option because:

- The Council has withdrawn PD rights for Class MA development, but not Class G.
- The building is a listed building and so Class MA cannot be used (Class G can be used on listed buildings but listed building consent would still be needed).

- Meeting parking requirements is challenging (this is not a relevant condition to Class G).

- It might be more commercially expedient to apply for prior approval now and not wait to obtain vacant possession of upper floors and then wait another three months before being able to make an application under Class MA.

Using Class G and 'Ancillary Uses'

When looking to apply Class G rights to upper floors, it should be noted that the use of the upper floors does not need to be in 'ancillary use' to the ground floor. It just has to be in Class E use.

For example, first floor offices or storage above a bank or shop that has been used

as part of the bank or shop is ancillary and thus within Class E use. The storage aspect is, on its own and without connection to the principal operation of the premises, a Class B8 use and thus does not benefit from prior approval to residential use in this example. Therefore, when looking at such situations, it is important to verify to the Council through the application that the use of such space is part of and ancillary to a dominant Class E use of the building.

On the other hand, if the upper parts consist of a separate ‘planning unit’ (i.e. not let or occupied by the same premises, perhaps with independent access off common parts), such as a separate fitness studio or professional services offices, then this use would not be ancillary to the ground floor use, but this would be fine. It does not need to be ancillary, unless the use of the space on its own falls outside Use Class E (such as the storage example above). As long as the use of the space falls within Use Class E, this will qualify the space for possible Class G prior approval rights.

Therefore, in summary, it is advisable to consider the following:

1. Are the upper floors in a use under Use Class E, whether or not ancillary? If yes, then no ancillary relationship to the ground floor is needed.

2. If the answer to Q1 is no, then the application needs to explain how the use of the upper parts is ancillary to the use of the ground floor by reference to evidence and the floor plans.

3. Existing residential floor space, even if only accessible through the commercial premises, which is not in commercial use cannot be converted to multiple dwellings under these PD rights, as the use is not commercial in nature.

Creating HMOs out of Prior Approval flats

Developers looking to create self-contained flats from prior approvals and then change these later to HMOs under Use Class C4 (maximum six people) will not be able to do this now, unless the consent was obtained instead through planning permission. This is because both Class G and Class MA rights are subject to statutory conditions that the new flats have to remain in Class C3 use; Class MA.2(6) and Class G.1(c). A similar condition applies to changes from launderettes, pay day loan shops, betting shops and hot food takeaways to residential (Class M rights) but not to amusement arcades and casinos changing to residential use (Class N rights).

Agricultural buildings to residential

In the countryside, including in areas of Green Belt, where the opportunity for isolated homes is much more limited by policy, the law enables the possibility of cutting through such restraint and establishing the residential use of land.

Any applications for PD in such situations allow the opportunity to turn barns and other buildings identified as being in agricultural use to family dwellings. This PD right does not apply to other countryside

activities such as livery stables and equestrian use.

However, there are often a number of important issues to be resolved in order to prepare such proposals:

- Transport and highways - is there or will there be access across farmland?
- Noise issues - ongoing farm activities may cause disturbance to new residents; what machinery is used and its times of operation; other uses nearby such as railways.
- Contamination - have any pesticides been used in the land requiring at least a desk-top analysis of possible contamination risk for future residents?
- Desirability for residential use - this is a legal test that needs to be passed as part of a PD application. What do local agents say about the desirability of the site for future residential use, with regard to farm activities, noise, smells, access?
- New residents might become an ‘agent of change’, placing pressure on neighbouring farmland to curtail its activities - the Council will seek to avoid this before granting any PD consent, especially with regard to noise, smells and the general potential for future disturbance caused by activity on retained farming land.
- Electricity pylons - the land may be crossed by wayleaves, easements, and maintenance rights relating to any such structures.
- Ecology and protected species - in countryside locations, it is more likely that new housing may have ▶

Existing Use	GPDO Class	Limits to floor area/no. units	Relevant Issues/Conditions	Deemed Approval after 8 weeks? (Y/N)
Floors above existing Commercial in Class E Use to Class C3 Flats	G	No limit to area of proposed flats - cannot have more than 2no.	a) Contamination b) Flood risk c) Noise from neighbouring commercial premises d) Daylight and sunlight e) Storage and management of domestic waste f) National space standards apply [Available on listed buildings but need listed building consent as well]	Yes unless extension agreed
Commercial in Class E Use to Residential (‘Mercantile’ to ‘Abode’)	MA	No limit to number of proposed units or area of proposed flats	a) In Class E (lawfully) for at least 2 years and no other different use since b) Limited to 1,500 sqm c) Floor space to be converted vacant for at least 3 months d) Other considerations: i. Traffic and highways ii. Flood risk iii. Contamination iv. Noise from neighbouring commercial premises v. Adequate natural light to all habitable rooms vi. Conservation Areas - impact as a result of loss of use vii. Registered nursery or NHS registered practice - impact on local services viii. Employment and industrial locations - impact on amenity of future residents from being located in areas of heavy industry, distribution etc ix. National space standards apply x. Building more than 18m in height - consider fire risk	Yes unless extension agreed

Existing Use	GPDO Class	Limits to floor area/no. units	Relevant Issues/Conditions	Deemed Approval after 8 weeks? (Y/N)
C3 Dwellings to HMOs and vice versa	L	Single flat or dwellinghouse to 'small' HMO, or vice-versa	a) Each flat or dwelling in a building can be converted to a separate Class C4 HMO. b) Not more than 6 persons per flat or dwelling. c) Each Class C4 HMO can be turned back into a Class C3 dwelling or flat d) National space standards apply where converting back to C3 use	Yes unless extension agreed
Loan shops, betting office, launderette or takeaways at ground floor to Class C3 dwellings (ground floor)	M	No limit to number of proposed units or area of proposed flats	a) Ground floor = betting office, pay day loan shop, takeaways or launderette b) In above uses on 20 March 2013 or before c) No other different uses since d) 150 sqm maximum area e) Not in Conservation Area f) Other conditions: i. Transport and Highways ii. Flood risk iii. Contamination iv. Local provision of launderette facilities v. Design or external appearance vi. Adequate natural light to all habitable rooms vii. National Space standards apply	Yes unless extension agreed
Amusement Arcade/centre or Casinos to Class C3	N	No limit to number of proposed units or area of proposed flats AND Limited external works and demolition permitted	a) In uses on 19 March 2014 or before b) No other different uses since c) May include new windows, doors, roof and external walls d) 150 sqm maximum area e) Other considerations: i. Transport and highways ii. Flood risk iii. Contamination iv. Design or External appearance of building v. Adequate natural light to all habitable rooms vi. National space standards apply	Yes unless extension agreed
Agricultural buildings to Residential	Q	No limit to area of proposed dwellings AND Limited external works and demolition permitted	a) In uses on 20 March 2013 or last known date before this b) No other different use since c) Where came into use after 20 March 2013, it has been in agricultural use for at least 10 years d) Limited to first 465 sqm of a building or cumulative total over several buildings e) Where conversion is to a unit exceeding 100sqm (must be less than 465 sqm), then it is limited to maximum 3 such dwellings or 465 sqm maximum over full Class Q conversion f) Where conversion is to a unit less than 100sqm, then it is limited to maximum 5 dwellings over full Class Q conversion and each separate converted unit cannot be more than 100 sqm up to cumulative limit of 465 sqm g) Not in Conservation Areas h) Not where agricultural tenancy terminates within last 12 months in order to pursue Class Q PD Rights i) Not to agricultural structure/building already extended under agricultural PD rights (Schedule 2 Part 6 of the GPDO 2015) since 20 March 2013 j) Other considerations: i. Transport and Highways ii. Flood risk iii. Contamination iv. Noise v. Design or external appearance vi. Location or siting makes it otherwise impractical or undesirable to change to dwelling use vii. Adequate natural light to all habitable rooms viii. National space standards apply	Yes unless extension agreed

implications for natural habitats. In some cases, new residential floor space will require prescribed fixed sum financial contributions to the Council as part of a system of habitats mitigation

Adding space at roof level

New PA rights for additional floors to existing buildings were introduced from 31 August 2020; The Town and Country Planning (General Permitted Development) (England) (Amendment) (No.2) Order 2020.

On the one hand, these rights help to avoid a number of tricky planning obstacles to 'air space' rights development in planning terms: no restriction on dwelling mix, no right for the Council to request affordable housing contributions (if otherwise it would

apply to the development), no requirement to provide external amenity space.

However, we have encountered a number of issues with such matters that can be difficult to assess or put an acceptable degree of risk next to, some of which are not planning matters but will affect the overall feasibility of achieving the proposed extension even if it passed planning. For example:

- New parking spaces off-street may be needed for the new flats that might not be achieved unless existing spaces are removed or re-planned and some leases may give existing tenants the right to block this.
- The structural stability of the proposed additional floors may be an issue, especially in the case of trying to retrofit

additional structural support through space currently occupied under commercial leases, unless a compromise can be negotiated with the tenant.

- Building Regulations may require new sprinkler systems to be fitted to existing flats (as well as the proposed new flats) as soon as the proposal takes the building above 11 metres (i.e., anything higher than 3 storeys above ground level).

The prior approval rights for additional floors do not benefit from 'deemed approval' if the Council takes more than eight weeks' to determine the application, and many of the relevant considerations (e.g. outlook, privacy, external appearance) will create a degree of planning uncertainty and risk that will 'feel' much more like a full planning application than a PD application.

