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Getting Class MA Permitted Development Applications

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Class MA permitted development applications are often seen as an 'easy win' by many developers. However, this route to obtaining consent for commercial to residential development is often grossly underestimated and is not as straightforward as is often believed to be.

Planning authorities have become increasingly knowledgeable of these permitted development rights and poorly prepared or complacent applications will be susceptible to refusal, often costing developers and investors time and opportunity.

This article looks at the most common 'bear traps' that we have experienced in the last couple of years whilst this permitted development right has been running.

All references to Class MA in this article are to the Town and Country Planning (General Permitted Development) Order 2015 as of 7th February 2023.

3 months' vacancy

An application for Class MA cannot be made unless the building, or the part of the building that it is intended to convert, has been vacant for 3 months (Class MA.1(1)(a)).

Applications are often submitted without any evidence of this vacancy. An LPA would be entitled to refuse to grant consent without such evidence as proof of vacancy. Such proof might comprise the following:

- Letter or statutory declaration from last known owner or occupier, or managing agent
- Photographs (time and date stamped) showing empty premises
- Notices of termination of lease
- Marketing material (date stamped) indicating premises are vacant
- Confirmation of when empty business rates were claimed from.

This list is not exhaustive, but the applicant should submit some form of proof, even if it merely amounts to written confirmation on letter headed paper from the marketing agent. This requirement relates to physical vacancy even if a lease term is still running; i.e. there must be evidence that the tenant or occupier has given up physical possession, even if for some reason the term of the lease has not formally terminated just yet.

Vacancy and CIL Charges

In some Council areas, they will have a local CIL scheme in place for charging for changes of use that create new residential units out of changes of use. Such costs are often not identified by advisers to developers and can add substantially to planning costs, perhaps even 'making or breaking the deal' if the property (and therefore the potential CIL charge) is large enough. In one case where we advised on a potential property purchase in Surrey for a 20,000 sq.ft. building for about £6m, the potential CIL liability was nearly £250,000.

Under the 2010 CIL Regulations, it is possible to claim 100% relief from any such charges (CIL Regulations 2010, Part 5, Regulation 40). However, proof will be required that the property (or part of it at least) had been in at least six months' continuous use at any time in the last three years prior to the application.

If the property (or part of it) being converted needs to have been vacant for at least three months' prior to the date of the application, then this will mean that at least six months' continuous occupation must be proven at any other time in the three years prior to the date of the application. This should ideally be considered prior to submitting the application as a CIL Additional Information Form (Form 1) will need to be submitted to the Council.

When completing CIL Form 1, if your strategy for mitigating or avoiding CIL is considered from the start, then this saves the difficulty of trying to row back on earlier submissions to the Council in such CIL forms in order to try to avoid a CIL charge that, if the applicant is liable to pay, could in

some cases make the development wholly unviable and result in a financial loss.

Daylight and Sunlight

Along with noise investigations, in almost all cases involving Class MA proposals in built-up areas, expert advice should be sought from experts on daylight and sunlight. Both daylight and sunlight have to be tested (Class MA.2(2)(f) refers to the provision of 'natural light'). If this is not done and the developer submits an application merely assuming that 'it all looks alright' or 'the windows are large enough and there should be enough light coming in', then the risk is taken that officers later have concerns and then merely refuse the application without referral back to the applicant.

It must be remembered that the burden of proof that the permitted development requirements are met falls on the applicant. Therefore, it is dangerous to leave any issues of contention or uncertainty unexplored. It is usually far less expensive to pay for good advice early enough than to take the risk of a decision to save money on professionals – if you want to know the value of good advice, then wait to see the cost of bad advice.

It will normally take about two weeks' at least to obtain this advice from a sunlight and daylight expert. They will need plans in DWG format and either a site visit or a comprehensive photo record or aerial and street view. This is so they can map the site and all adjacent and neighbouring buildings in 3D and run computer simulations to calculate the results.

This advice should be sought right at the outset and if it is apparent that the proposed layout would fail the BRE daylight and sunlight guidance, then a separate planning application may need to be submitted first for new windows or revised window sizes or positions. External changes cannot be rolled up into a Class MA application and will be a reason for refusal if they are.

'Noisy Neighbours'

The proximity to 'noisy neighbours' should be noted, which could include any of the following for example:

- Restaurants
- Nightclubs
- Commercial units with nearby air conditioning units or other M&E
- Retail warehouses
- Transport hubs
- Delivery depots (e.g. Royal Mail)
- Railway lines

> **"It is becoming increasingly common in town centre and high street locations for Councils to seek to restrict future residents of development schemes from applying for on-street parking permits"**

Noise from such uses, especially over weekends or unsociable hours, can affect habitable rooms. In extreme cases, this can affect the layout of units or the prospect of extra habitable rooms in the conversion and the number of units.

Therefore, as with sunlight and daylight, this should be checked early and an early noise assessment undertaken. Again, allow about two weeks' at least for the survey and report, so that the architect can adjust the plans and discuss any possible mitigation with experts so as to avoid problems.

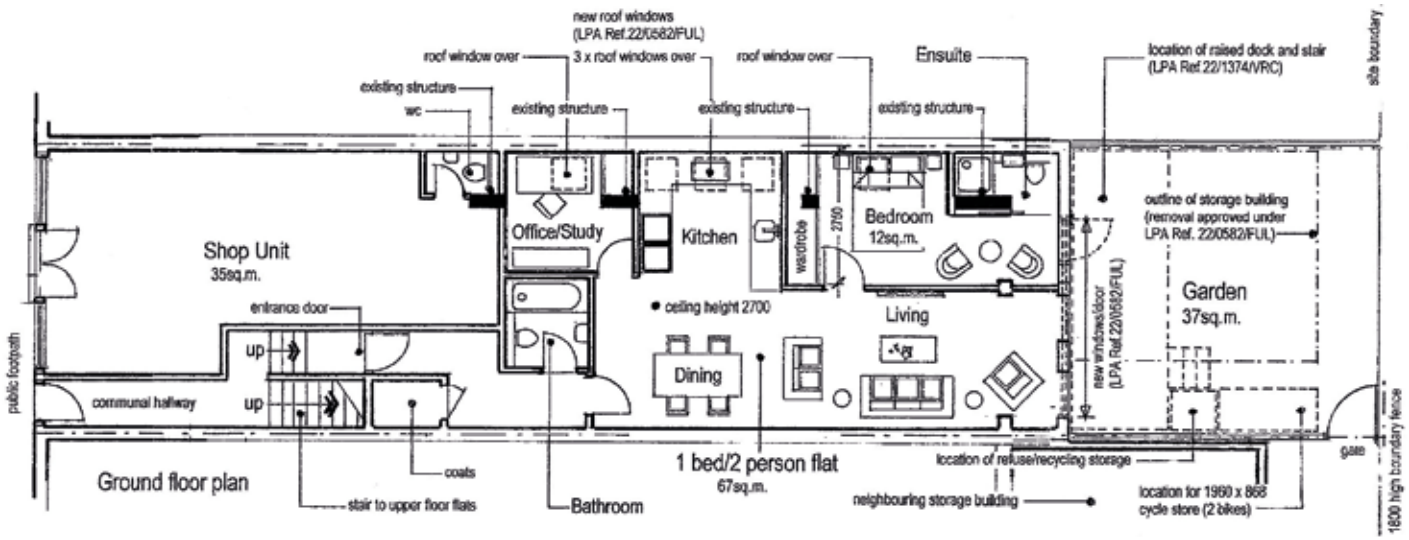
In some cases, the local Environmental Health Officer (EHO) might just be fine with window restrictors or trickle vents to window frames, to allow for some natural ventilation. However, some EHOs might be more reluctant to allow permanently closed windows to habitable rooms and will not allow windows to habitable rooms at all on some facades, severely restraining the development potential.

Car-free Obligations & Section 106

It is becoming increasingly common in town centre and high street locations for Councils to seek to restrict future residents of development schemes from applying for on-street parking permits. This will often be secured through a Section 106 Unilateral Undertaking that the applicant can prepare themselves.

It is advisable to find out from the Council within 4-5 weeks of the application start date whether the Council will insist on such an Undertaking, so there is plenty of time for this to be prepared with at least a week to spare before the end of the 8-weeks and for it to be signed by all parties and sent to the Council before they prepare the delegated report and decision notice.

Councils often have their own form of precedent for such documents and can get quite precious about ensuring that this precedent is used. If choosing to draft this oneself, then it is worth using a precedent either available on the Council's portal (e.g. they may have a section on their website with a standard form, or look for similar applications recently approved by the same Council) or completed with a similar local authority (e.g. a neighbouring London Borough Council – some of them share ▶



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the same legal service provider). The first option is preferable to the second.

Section 106 undertakings must be correctly signed and executed and will usually need to include an appropriate figure for at least the Council's monitoring fees, as well as their legal fees (if being drafted with the intention of their consent to the agreement). Relevant fees are often found in the Council's Planning Obligations Supplementary Planning Document (SPD), if they have one, on the website.

Environmental restrictions

Increased development pressure in some parts of the country have led to acute pressure on local natural resources. This may affect local Special Areas of Conservation, RAMSAR sites (a term used to refer to locally protected wetlands) and other areas of nature conservation importance. These are protected by the Conservation of Habitats and Species Regulations 2017. Councils can prevent development from taking place if certain measures have not been adopted locally and followed by the proposals (e.g. financial contributions toward mitigation), even if the proposals comply in all other respects with Class MA and the GPDO 2015.

For example, the issue of 'Nutrient Neutrality' is a growing problem in areas around the River Avon and the Solent, leading to the suspension of grant of any future consents under full planning permission or PD rights for new housing, due to concerns arising from the discharge of waste water from new housing, having an impact on the local ecosystem.

Before buying a site, much less proceeding with a planning application, professional advice should be sought as to whether the application site is likely to be affected by these issues. It may be that additional planning costs and time need to be factored in to allow for the payment of these financial contributions, together with monitoring costs and legal fees for the Section 106 agreement with the Council to deliver this mitigation. At worst, the site may be undevelopable for residential development in the short to medium term and it may be that the site may have to stack as a commercial investment in the interim.

Proper Plans & Annotations to Drawings

Schedule 2, Part 3, Paragraph W to the GPDO 2015 sets out the procedural requirements of the plans and drawings to be submitted under Class MA applications. It is surprising how many applications are submitted that do not comply with these requirements. LPAs will sometimes validate the application anyway, but then leave it until 8 weeks before refusing the application for non-compliance with these requirements, without letting the applicant or agent know in advance.

The key points are as follows:

- Provide floor plans, sections and elevations, and roof plan, location plan and block plan
- Block plans should show points of access, refuse and bicycle storage
- Sections are needed because the application needs to show compliance with the national space standards (minimum 2.3m finished internal floor to ceiling height to new dwellings)
- Floor areas to each flat and each bedroom to be noted
- Show widths of each bedroom
- Width and height of at least some windows and doors on the elevations must be indicated.

Conclusions

Permitted development is often seen as quick or 'easy win' by new developers. It is no wonder therefore that many applications are still refused by local authorities for failing to make the case properly. Class MA rights are an important tool for managing risk and delivering a certain level of 'minimum value' in a scheme. However, the process and requirements should not be underestimated, or risks downplayed. Whilst reports may not be needed to cover all aspects of the assessment, who is instructed, how and when will be critical to the success of your Prior Approval application. PIN