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"Build, Build, Build": Understanding The Planning Reforms

Planning consultant **David Kemp**, director at DRK Planning Ltd,comments

Graucho Marx said: "My plans are still in embryo, a town on the edge of wishful thinking."

On the 30 June 2020, PM Boris Johnson announced what he has touted as "the most radical reforms to our planning system since the Second World War, making it easier to build better homes where people want to live."

Some of these reforms have already been introduced in detail, whilst others are yet to catch up with the speed of Ministerial press statements.

At a time when some sectors of the UK economy are still reeling from the shock of the lockdown, and others fearful still of the future and their ability to continue to trade effectively whilst precautionary measures remain in place, the Government has sent out a message that it wants to do all it can to get the economy back on its feet. According to the Government, there will be no return to the 'Austerity Budgets' of the post-credit crunch Cameronite policies. The plan is billed as Boris Johnson's answer to F.D. Roosevelt's post Great Depression reforms of 1933-1939.

However, what do we know, when will we know more and is it worth the hype?

New Storeys to Purpose Built Blocks of Flats

One of the first new reforms to be announced, the response to this reform amongst many developers has been muted to say the least.

The new law takes effect as an amendment to the Town and Country Planning (General Permitted Development) (England) Order 2015, and will come into force on 1 August 2020.

There are no minimum size limits to the new units that can be created, and affordable housing requirements will not apply. However, in order to take advantage of the opportunities provided by the new law, there are quite a few 'boxes to tick'.

These criteria raise a number of key challenges of which developers need to be aware (see box).

Location – pick your target carefully!

Many buildings will automatically rule themselves out of contention for any number of reasons, such as:

- Not detached – cannot share a party wall with another building at all
- Not built between July 1948 and March 2018
- Not purpose built as flats (e.g. converted from office or other commercial use) ▶

'10 Key Requirements List' for New Storey PD Rights:

- Block built as flats (not converted either under planning or PD)
- Block completed between 01/07/1948 and 05/03/2018
- No higher than 30 metres WITH the extra floors
- No listed buildings
- Not in Conservation Area
- Not within 3 km of perimeter of aerodrome
- Spare parking spaces on site or 'car-free' possible
- Flood Zone 1 (ideally!)
- Flat roofed block (ideally!)

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However, I would also strongly advise that the better buildings, and more easily converted, will be those with either spare car parking spaces or capacity on site or in areas very well-served by public transport.

The Parking conundrum

Many blocks of flats allocate their available parking spaces to their tenants according to the lease terms. Furthermore, in order to change these spaces, such as in order to re-plan them and achieve a more efficient layout that opens the way for possibly extra spaces for the new flats, then this can only be achieved in some cases subject to the agreement of the tenants. This may require either unanimity or majority, subject to the articles or terms of any such agreement.

This can get complicated and expensive very quickly. Indeed, several thousands of pounds may be spent in legal fees in trying to persuade tenants to accept such changes only to find out that they might not accept them and have a lawful right in their agreements to resist these changes.

Therefore, before embarking on a Prior Approval application for new storeys, you need to instruct your solicitor to look closely into this issue.

The alternative, if there are not sufficient spare and unallocated spaces, is to promise to the Council that these units would be car-free. If they are 2-bedroom units or smaller and in areas well-served by public transport, then the Council might accept this, but will likely need to see a full Transport Statement with the application.

Light, Overlooking, Appearance & Amenity

The application of a condition relating to "external appearance of a building" is not unusual in similar PD contexts; the PD rights to turn ground floor retail units into new homes is subject to a similar condition. However, this is a rather woolly and imprecise condition and it is not yet known how widely this may be applied. Will the Council restrict its assessment of how the new floors look when compared only to the host building? For instance, if a building has a pitched or mansard roof, it may be necessary to have to raise the side walls and replicate the roof on the additional storeys. For this reason, extensions to flat-topped buildings may be more straightforward.

On the other hand, will the Council then start to argue that the extra height makes the building appear 'too prominent' in its surroundings and harm the character of the local area, or even harm views out of neighbouring Conservation Areas, for instance.

These are relatively random examples of the uncertainty that may be encountered.

The new law also required "adequate natural light in all habitable room" [emphasis added], and that the local authority must refuse prior approval if this is not achieved. This may be problematic depending on the height of the building relative to its neighbours. Also, this requirement would suggest the need for absolute compliance with daylight and sunlight standards, when this is not required to such an exacting standard even in the case of normal application for full planning permission. For instance, the National Planning Policy Framework 2019 (NPPF) paragraph 123(c) advocates that a "flexible approach" should be taken to applying policies on sunlight and daylight standards, in order to optimise development densities. I would suggest that the standard in the new law would have to be applied with regard to the flexibility required by the NPPF, especially as the new law also states that this application would have to have regard to the NPPF "as if the application were a planning application". There is a potential inconsistency here that might lead to problems.

Issues of overlooking and privacy are also factors that have to be considered. However, these along with the light impact to neighbours can be overcome through setting the extensions back and providing screens to prevent overlooking if needed due to relative proximity of habitable room windows. This may also help with the 'external appearance' condition, as the extensions then appear more 'subordinate' in relationship to the host building.

Regardless, the law leaves open the possibility of Councils widening these conditions out toward other planning considerations by stating that: 'amenity' is "including" overlooking, privacy, etc. There are legal rules of interpretation that restrict the application of this word but it's not achieving the objective of these reforms if it is being left to the lawyers to resolve these points. Further, comprehensive, urgent and clear Government guidance is needed.

No 'Deemed Prior Approval'

The new law will not benefit from the right to claim that Prior Approval has been granted if the Council does not deal with the application within 56 days of receipt, as with other Prior Approval applications, such as office to residential.

In my opinion, I am fairly neutral about this at the moment. In the last 7 years, we have only experienced 3 cases that were granted via deemed approval, as it is usually quite rare for a Council to fail to notice it is coming up to the target date; internal systems are sometimes able to flag these sorts of things up. In any event, it has not always been straightforward afterwards to get the Council to acknowledge this status, whether the reluctance is through intransigence or ignorance of the law. This has sometimes led to concerns with funders who are anxious about an unchanged status to an application and want to see further assurance and a change in the planning record before releasing funds. In one client case, that I wrote about last month, it took several tens of thousands of pounds of the client's money in legal fees and several months of delay to go to the High Court to force the Council to grant deemed approval.

I won't pretend either that there is a heightened risk of a Council dithering and delaying in determining the application, sometimes weeks or months after the deadline. Both scenarios will add to frustration, cost and delay. On balance, it's better to still have the chance to get an agreed decision from the Council instead of having to resort to appeals and Court litigation.

Impact of Light: Prioritise external changes?

The Government's changes in reinforcing some of the changes to the new law have been echoed throughout other Prior Approval categories.

In particular, the desire to avoid conversions that give rise to potentially poor quality accommodation and windowless habitable rooms is reflected in the need for adequate light to habitable rooms in office, retail, agricultural and light industrial PD to residential use.

This creates a difficulty for many developers who see the opportunity to convert existing roof voids or provide new mezzanine floors to existing buildings.

As an example, the conversion of the office floors above Stanmore Library (Burnell House), included two full floors above the library. However, the principal reason that the client won the bid on this building was that they were able to count on including the space in the roof void as part of

the PD for change of use from office to residential – this added 11no extra studio units and lifted the purchase price to £4.25m:

An application for Prior Approval was subsequently made and officers at Harrow London Borough Council understood that they could not resist the application for lack of windows, albeit that they knew we would return with a separate full planning application to address this point by inserting rooflights later.

However, when these changes take effect to the new law from 1 August onwards, such a Prior Approval might not be possible and bids may have to be adjusted downwards to reflect the added risk of not obtaining Prior Approval for changes to incorporate new units in roof voids first, and then deal with new window openings later.

Currently, we are considering how we might deal with such matters. It would seem that an application for full planning permission would have to be made first for new window openings to the premises 'as though it remains in office use'. Once this permission has been obtained, then it is a debatable question as to whether one can then apply for the Prior Approval for the rooms in the roof space without having undertaken the works to provide the new windows first. We are seeking legal advice on whether planning conditions may be used to link the provision of the new openings as already approved to the grant of prior approval. As with all creative solutions to new legal problems, it will affect your risk tolerance and expert legal advice should be sought prior to proceeding; you may need to share any such Legal Opinion with officers who might not know the answer themselves!

Burnell House: Proposed View

Burnell House: Proposed Third Floor View

Summary of other changes

This article will only refer in brief to the other new reforms announced. With the exception of extensions to planning permissions, listed building consents and outline permissions to 1 April 2021, most of the other reforms are awaiting further detail and guidance from the Government.

A couple of matters in particular should be noted about the extension of time to permissions, which will be introduced 28 days after the Business and Planning Bill receives Royal Assent (probably becomes law around mid-July). Firstly, it is wholly unfortunate that it does not extend to Prior Approvals. Given that for a change of use to be saved it requires the works to be completed to a point that they are "ready for useable occupation" (Impey v Secretary of State for the Environment (1980)), it is likely that the lost time during lockdown puts such projects at greater risk of expiry than other consents. As a result, developers should try to make the most of the provisions for extending construction hours. Secondly, the provisions for seeking an extension are subject to procedures set out in the Bill, and will need to be followed by applicants. A further Guidance Note is available on the Government website, published 6 July 2020.

Other announcements that have caught the eye include:

- New flexible 'commercial use class' so that, for instance a building used for retail would be able to be permanently used as a café or office without requiring a planning application and local authority approval.
- A wider range of commercial buildings will be allowed to change to residential use "without the need for a planning application".
- New regulations to allow buildings and land in town centres to change use without planning permission and create new homes from the regeneration of vacant and redundant buildings
- Builders will no longer need a normal planning application to demolish and rebuild vacant and redundant residential and commercial buildings if they are rebuilt as homes.
- Property owners will be able to build additional space above their properties via a fast track approval process, subject to neighbour consultation. Although, if it only takes one neighbour to object, no matter how unreasonable the objection might be, it might not be of much use in many cases.
- The Home Building Fund to help smaller developers access finance for new housing developments will receive additional £450m boost. This is expected to support delivery of around 7,200 new homes.
- 'First Homes' and new Affordable Homes initiatives.

Pubs, libraries, village shops and other types of uses essential to the lifeblood of communities will not be covered by these flexibilities, and the Government has reiterated its focus is on trying to alleviate the pressure on 'greenfield' development (a tacit 'warning' to those with 'ambitious' schemes for developing on Countryside or Green Belt land!).

Overall, the bulk of the changes yet to filter through will keep us all busy but the 'devil is in the detail'. As can be seen from the new law on two additional storeys, it's open to question whether this was worth the hype; some think not. Of course, the ability of Councils to exercise their discretion through interpretation of new law may keep the Planning appeals process and the Courts occupied too, as well as lead to some local authorities seeking to resist new PD rights at a local level through introducing new Article 4 Directions where they can.

Whatever happens, it will certainly not be plain sailing and PD should not be assumed as a 'given' in any development case. PIN