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# From a Tired Suburban Office Into a £7m Residential Conversion

**David Kemp**, Director at DRK Planning Ltd, comments

Art Williams said: "I'm not telling you it is going to be easy – I'm telling you it is going to be worth it."

### Office to Residential Prior Approval

This is often touted as the 'low hanging fruit' of the property development world. However, as such rights have been around since 2013, agents and land owners have come to realise they can use it to increase their asking prices, and Councils have become more resistant to it and familiar with the 'grey areas' they can exploit to stand in the way of a scheme.

One of the most interesting cases we have dealt with recently relates to the conversion of Fountain House, Leatherhead, Surrey, to 30 flats with parking. The estimated final value of the conversion is around £7m; a value that my client, Westmede Properties Ltd, could so easily have walked away from, as I explain below.

### Article 4 & the overall strategy

In September 2017, fresh off the back of another office to residential scheme where we obtained permission for 39 apartments in North London, the client asked me if I was interested in working on another Prior Approval scheme – just one snag. There was an Article 4 Direction due to come in soon.

Article 4 Directions withdraw permitted development rights, which can be especially problematic for office to residential schemes, as some Councils have a policy that seeks to prevent the loss of office accommodation in order to protect the local economy. They normally have to be marketed for use as offices only for at least 12 months in many cases before the Council will even consider a conversion to residential use. Basically, it all but strips any short-term development value from a site, making it really only worth considering as an investment hold for office use. As you can imagine, compared to its value as flats, a suburban and tired old office block in Leatherhead would hardly be exciting in terms of its existing use value and likely yield!

We had to therefore make sure that we obtained any Prior Approval on the scheme before the Article 4 Direction came into force on 16 December 2017. So we worked 56 days back from this date to work out the latest date to submit the application (20 October 2017) and then aimed to submit the application at least 1-2 weeks before this for good measure.

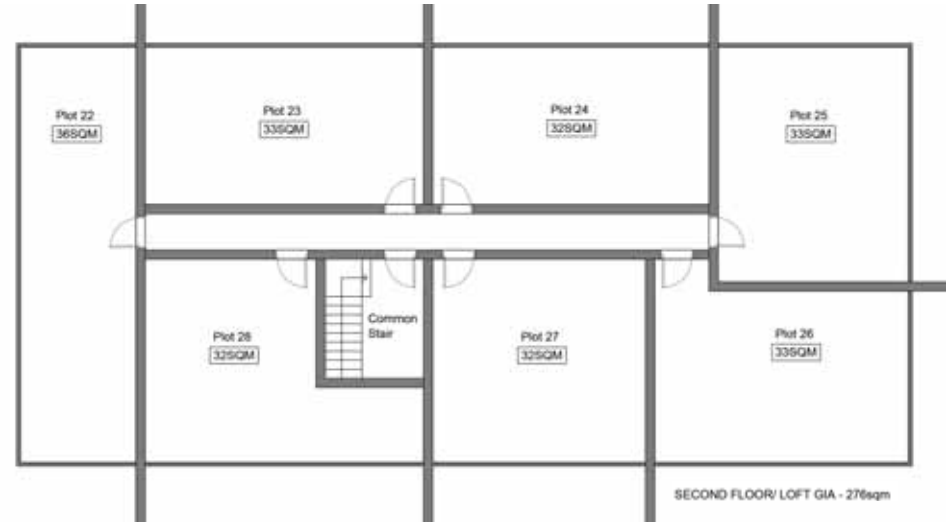
As we were looking at developing into the roof, we had five different floor plans, as each layout reflected a different floor to ceiling height in the roof depending on what extent of change to the roof would be allowed in any later application to the Council. For instance, if they would not allow dormers but only roof lights or if they would allow a mansard or crown or lantern-style roof.

We could not test each of these different schemes consecutively – there just was not enough time before the Article 4 Direction would come into effect. So, we had to submit all five separate prior approval applications at the same time.

### The importance of checking the initial Planning Permission

A lot of developers looking at these sorts of schemes only look to see if there is an Article 4 Direction, but give no thought to the prospect of problems thrown up by the initial consent for the building being converted.

In some cases, this can mean that the developer misses the fact that there is a planning condition on this permission, preventing its loss to any use outside of office use. Such a condition has to be removed through a separate application first (s.73 of the Town and Country Planning Act 1990) before you can apply for Prior Approval. The Council will not normally grant such applications if the reasons for the condition initially ▶




related to seeking to protect the local office economy, so great care needs to be taken before throwing oneself into such 'opportunities'.

However, in our case, there was a different problem. The initial consent was not for office use. It was actually granted for R&D instead, and then when the building was built, the use commenced as an office building instead. This was a breach of planning control and within the first 10 years of this happening was not lawful change of use to offices. However, by the time that we were applying for consent, it had since become lawful.

Fortunately, we caught this very early and put together evidence to prove that this was now lawful. Furthermore, unlike the situation where a planning condition has to be removed first, there is no need to put in an application to the Council first to determine that the intervening change of use to office use has since become lawful.

If you are in such a situation then I would recommend the following to bolster your application before you submit it:

Speak to the selling agent and any managing agents used during the past 10 years to get confirmation that they remember its use as offices over the whole time.

Speak to the vendor and try to ensure their cooperation through written and sworn statements as a condition of sale.

Look through business rates and planning records over this time for floor plans, and references to ongoing office use in application forms and material and officers' reports.

List the current tenants or occupiers and a copy of their leases.

Check that leases all refer to the 'permitted use' as being for B1 office purposes.

Check websites, social media and general internet pages for all occupiers to ensure they all could be regarded as conducting officer based activities – if in any doubt (e.g. medical consultancy services that use the premises for office / clerical activities), then try to obtain a statement from the occupier to explain what they do and that it is essentially an office.

The five prior approval applications were all submitted at least nine weeks before the Article 4 Direction was due to come into force with all of this information (it took about two weeks to prepare including the evidence), comfortably leaving eight weeks for the decision to be made.

**Deemed approval – failing to notify the applicant of a decision**

The 56-day target date for this application was 1 December 2017 and so a decision had to be taken by 30 November 2017 at the latest. It was, however, clear that the officer had left his review of these applications until the last minute (as often happens with over-stretched Planning Departments).

Anxious to ensure that he made a decision in any event before the 56 days expired, the officer rushed out refusals on all five applications on the very last day!

However, not making a decision properly, and within the law, means that the decision is unlawful and has to be 'quashed' or set-aside. The effect of this is to leave the application without any decision having been taken. According to the General Permitted Development Order 2015, if no decision has been taken, the only result can be a 'deemed approval' – as such, you automatically get approval by law.

It is worth noting that deemed approvals do not automatically get entered on the local land charges register. Therefore, if solicitors acting for purchasers of your flats or your funder's lawyers go looking for these and cannot find them, they may raise an issue. In which case, if you obtain a deemed approval, you should also look at doing the following (but speak to your funding lawyer first, if necessary, to check what they would be satisfied with):

Make sure that the Council changes the status of the application on the Planning Register online, such as from 'Pending Consideration', to say 'Deemed Approval Granted' or similar, AND

EITHER:

Apply for a Certificate of Lawfulness of Proposed Use or Development (CLOPUD) to lawfully confirm that deemed approval is valid – but takes up to another eight weeks and costs more fees, OR

Obtain an email from the Council to confirm that Prior Approval would be lawful


– not as conclusive in law as a CLOPUD but cheaper and quicker to obtain, OR

Obtain an Opinion from a Planning Barrister and/or your Planning Consultant to confirm the same – again, will cost fees but not as much time, OR

You may also need to consider the need for insurance against the Council taking enforcement action for a future change of use to residential, but this should not be necessary if any or all of the above have been actioned first.

**'Council of war' & officer relationship**

In order to turn the Council's position into a reliable and valid deemed approval we had only one course of action in this case – legal action by way of Statutory Review against the Council.

Normally, such a decision would have to go via a Planning Appeal first as the Courts will not normally hear cases on legal points unless they have been considered by a Planning Inspector first. However, when a case goes before a Planning Inspector, the Inspector issues a decision based on the law and policy at the time of the appeal. This would not have helped as the Inspector would have had to take into account the Article 4 Direction, which was by then in force.

On the other hand, by going to the High Court first, the Court considers the matter as at the time of the original decision (i.e. they turn the clock back), so that the case is heard as if the Article 4 is not yet in force.

It did not take long – only a couple of months – before the Council indicated it was prepared to concede it had erred in law on five decisions. The Council's officers were wrong in claiming that a lawful use application had to be made to confirm the office use was lawful before the Prior Approval application, and wrong in therefore not considering any other Prior Approval issues because of their insistence that Westmede should jump through other hoops first. As such, the Court held that no lawful decision had been taken in the 56 days – this then led automatically to the only conclusion then open to the Court: deemed approval on all of the applications had to be granted.

Westmede (the developer) were understandably anxious about whether pursuing the Council through the Courts on this might prove counter-productive to the relationship between us and the officers. However, there was no need to worry about this.

**All friends again!**

It so happened that not long after the Court case we had to meet with the case officer again and discuss further proposals for development of the site, particularly a new roof and possible new houses in part of the car park.

Through the pre-application exercise, we met with the same officer who handled our Prior Applications.

It's always important that the whole client and development team maintain respect and professionalism throughout – especially when the heat gets turned up through Court litigation. Most, if not all, seasoned planning officers will respect that you were merely fighting your corner and recognise this as part of the process. At the end of the day, we all just have to accept a decision and move on.

Meeting with the officer during pre-application helped us to be face-to-face and get to know each other, to come across as open and transparent, and put the previous result to bed. Currently, online meetings with officers have become the 'new normal', but I still feel as though it is not quite as good as being 'in the flesh' in front of officers, which builds a stronger rapport.

**Forging ahead together**

Our approach to this relationship has paid dividends for what has been a challenging development over time:

Open channels and familiarity with us and the scheme has helped minor amendment applications to be approved in roughly 2-3 weeks of submission.

Clear and reliable feedback and design steer was given to the application for the new roof and external changes, giving us a sense that the officer wanted to help us overcome objections from some difficult neighbours.

The removal of most of the walls to the building during the construction of the external works that had been approved led to a neighbour complaint to the planning officer. We promptly obtained legal advice in our support and senior officers agreed to give us the benefit of any doubt on this occasion; rather assisted I think by the fact that we had won our last legal battle with them!

Cooperation and good engagement continues into our proposal for three new houses on part of the car park, with the officer helping to facilitate constructive dialogue with local Councillors.

Therefore, don't be afraid to fight your case with officers if you have to. They will respect the fight as long as it's done in the right way. It is always though a good idea to use the opportunities you have along the way to have as many 'touch points' with your officer as you reasonably can. It brings them in, helps them to feel involved, pays them some respect and can help when you need them to take a more benevolent approach to matters of planning judgement or discretion.

We would be happy to help you if you are looking at a possible commercial to residential conversion (or any other development for that matter), and want expert planning advice, with over 20 years' experience combining planning, legal and development experience. PIN