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Permission (Already) Granted: Eliminating 'Prior Approval' for Upward Extension Permitted Development Rights

Introduction

Since the Town and Country Planning Act 1947, the English planning system has been premised on the idea of local discretion. The starting point is that X is *not* permitted to build in the absence of permission. The concept of 'permitted development' (PD), first introduced in the Town and Country Planning (General Development Order) 1948, turns this idea on its head: in certain circumstances, X *is* allowed to build on the basis that a nationally granted *general* permission already exists. Until 2013, these systems operated in tandem with each serving its own distinct function. Whilst the permission-based system was designed to deal with the majority of development, the PD-system was intended to ease the administrative burden on local governments by stating that for certain forms of minor development, permission had already been granted. Indeed, their primary purpose was to 'assist the routine operations of local authorities and statutory undertakers' by relieving them from dealing with trivial applications. [1] However, the introduction of the requirement for 'prior approval' in the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 has raised an existential question for the PD-system: is it simply a 'shadow' planning apparatus which is neither community-based nor administratively efficient?

This paper makes the case for reforming upward extension permitted development rights (PDRs) through removing the requirement for prior approval. Instead, local

[1] Ministry of Local Government and Planning, *Town and Country Planning 1943–1951: a Progress Report* (1951b).

development orders (LDOs) should be used to set out the circumstances in which a scheme should fall within the PD-system. Part 1 outlines the problem of prior approval and why upward extension PDRs merit specific consideration in this context. Part 2 sets out this paper's reform proposal, which includes amendments to both the Town and Country Planning Act (TCPA) 1990 and The Town and Country Planning (General Permitted Development) Order (GPDO) 2015, along with a proposed draft LDO.

1. The Problem of Prior Approval and The Case for Upward Extension

(a) The Problem of Prior Approval

In August 2020, the Government added Part 20 to the GPDO, which introduced a new set of PDRs (Classes A, AA, AB, AC, and AD) for the creation of new dwellings above existing buildings.[2] Importantly, these are all subject to prior approval: that is, the developer applies to the local planning authority (LPA) for approval of specified elements of the development that are specified in the GPDO. An example from the prior approval criteria is the development's 'impact on the amenity of the existing building and neighbouring premises'.[3]

On the face of it, prior approval seems to be a sensible way of returning to a degree of development control to LPAs which could lead to potential democratic and strategic benefits. However, with such control comes the time-cost of deliberation and determination, which is the mischief that PDRs were originally created to remedy. This creates the paradoxical situation where a process strikingly resembling a planning application is embedded within a mechanism which was introduced precisely to avoid

[2] The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020, SI 2020/755.
[3] The Town and Country Planning (General Permitted Development) (England) Order (GPDO) 2015, SI 2015/596.

it. As suggested by the Town and Country Planning Association, the regime has now acquired the identity of ‘a new shadow planning system which prevents positive planning.’[4] This is without mentioning the ‘endless appeals’ that are consequently generated from the prior approval process and flood the Planning Inspectorate.[5]

The recent decision of *Cab Housing Ltd*, concerning the interaction between upward extension and prior approval, illustrates this paradox.[6] The issue in that case was the extent to which LPAs should have regard to planning matters when dealing with prior approval, and the decision illustrates the broad nature of LPAs discretion in this regard. Firstly, Holgate J confirmed that LPAs had a wide discretion to consider all matters set out in the prior approval conditions.[7] Secondly, the court found that notwithstanding that the PDR was introduced to allow extensions of up to two-storeys, this did not in itself establish a ‘principle of development’. [8] Thirdly, the judge cautioned in his concluding remarks that each development must be decided on its particular facts.[9] Whilst this is unsurprising given that a simple word search of the GPDO returns no fewer than ten instances where the ‘opinion’ of the LPA is recruited, *Cab Housing Ltd* illustrates an irony at the heart of prior approval: seeking to gain the expedience afforded by a rule-based permitted right whilst at the same time imposing a discretionary element is incoherent and ultimately self-defeating.

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[4] Written evidence submitted by the TCPA, Housing, Communities and Local Government Committee, *Permitted Development Rights* (HC 2021-22, 32).
[5] Written evidence submitted by Mr Michael Fearn, Housing, Communities and Local Government Committee, *Permitted Development Rights* (HC 2021-22, 32).
[6] *Cab Housing Ltd & Ors v Secretary of State for Levelling Up, Housing and Communities & Ors* [2022] EWHC 208 (Admin).
[7] ibid [101].
[8] ibid [71].
[9] ibid [101].

(b) Upward Extension as the Solution to the Housing Crisis

The Gordian knot of prior approval that besets the PD system's operation is difficult to reconcile with the 'Build, Build, Build' agenda of the Boris Johnson Government. Behind the claims of whittling down bureaucracy and red tape, the intention of that policy was clear: to increase housing supply. The housing shortage that formed the backdrop and impetus to the 2013 PDR changes had all but abated. In 2020/21, only 216,000 new homes were provided, which continued to fall short of the 2019 manifesto promise to build 300,000 per annum.[10]

However, increasing housing supply through *outward* rather than *upward* extension is fraught with environmental and political difficulties. Not only is 13% of the country's total land area designated as green belts,[11] but as the 2020 Chesham and Amersham by-elections have shown, they are fiercely defended and can be a deeply contested issue. Furthermore, as the OECD point out, urban sprawl can have social consequences which can contribute to less inclusive cities.[12] Policy has therefore rightly looked elsewhere, and we often hear of brownfield regeneration through infill developments, adaptive re-use, or change of use. However, more so than any of these mechanisms, airspace developments through upward extensions facilitate a key process for land use in the UK: urban and suburban intensification. This is somewhat different to the effect of 'change of use' PDRs, where one use (often office or retail) is *displaced* in place of another (often residential). By developing unused airspace above an existing building footprint, upward extensions directly drive a more intensive and efficient use of the same footprint of land through *addition*, not *replacement*. Given

[10] Cassie Barton & Wendy Wilson, *Tackling the under-supply of housing in England* (Research Briefing CBP-7671, 2022) 9.
[11] Cassie Barton & Felicia Rankl, *Green Belt* (Research Briefing 00934, 2022) 5.
[12] OECD, *Rethinking Urban Sprawl: Moving Towards Sustainable Cities* (OECD Publishing 2018), 11.

that UK cities routinely lag behind their European counterparts in terms of built-up, or 'lived' density,[13] there is a strong normative argument for land intensification through upward development.

Airspace development has also been the subject of careful study and analysis by developers, designers, along with government itself. The National Policy Planning Framework explicitly acknowledge the opportunities latent in 'airspace above existing residential and commercial premises for new homes'.[14] Within London alone, HTA Design have suggested over 170,000 new homes can be provided with extensions up to 3-storeys.[15] Setting considerations of skyline aside, this figure can be as high as 630,000 through 6-storey extensions to London's municipal buildings.[16] These figures illustrate the potential of one of the most underexplored land banks in the UK.

The quality of housing can also be better safeguarded by virtue of the new homes being of new-build construction, rather than potentially unsuitable commercial premises being forced into use as homes.[17] This would avoid the problem that beset 'change of use' PDRs, which Nick Raynsford described as leading 'directly to the creation of slum housing',[18] notwithstanding that one of their key intentions was to increase the supply of liveable homes. By the same reasoning, newly built homes

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[13] Valentine Quinio and Guilherme Rodrigues, *Net zero: decarbonising the city* (Centre for Cities 2021), 15-17. <https://www.centreforcities.org/wp-content/uploads/2021/07/Net-Zero-Decarbonising-the-City.pdf> accessed 16 Oct 2022.
[14] Ministry of Housing, Communties and Local Government (MHCLG), *National Policy Planning Framework* (2021) para 120e.
[15] HTA Design LLP, *London's Rooftops: Potential to Deliver Housing* (HTA Design LLP 2016) 23.
[16] Knight Frank LLP, *Skyward: Identification of Rooftop Development* (Knight Frank LLP 2017) 2.
[17] The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013, SI 2013/1101.
[18] TCPA, *Planning 2020 'One Year On' – 20th Century Slums?* (2020) 11.

through upward extension PDRs afford more scope to explore housing mix, to cater for families, children, and the elderly.

Architects and urban designers have long noted the need to move towards the Compact City model in the UK.[19] Such a move would bring environmental benefits too, which should be of interest to a country that has pledged to meet a net zero target by 2050.[20] Denser cities naturally lead to lower car ownership and reduced transport emissions,[21] and apartment living has been shown to have benefits for domestic emissions compared to that of detached houses.[22] The case for densification is therefore a strong one, and the PDRs for upward extension are unique in their ability to deliver this. However, in order to achieve the desired increase in housing supply, the requirement for prior approval must be removed.

2. Replacing Prior Approval with Local Development Orders

(a) The Case for Upward Extension PDRs

The impetus to build upwards is clear, yet the case might be made that this ought to be done through the permission-system, and that such PDRs present a step too far towards deregulation. Some have even called for PDRs to be revoked outright, citing their undemocratic nature and potential to undermine the ability of LPAs to shape and account for their environments.[23] However, the urgency of the housing crisis and the 'endemic' nature of delays to planning determination stand in stark contrast to each

[19] Richard Rogers, *Architecture for Sustainable Cities: "London, Paris + The Compact City"* (Urban Age Istanbul Conference, 2009).
[20] HM Government, *Net Zero Strategy: Build Back Greener* (2021).
[21] Quinio & Rodrigues (n 12), 20.
[22] Ibid, 22.
[23] Shelter, 'An open letter on Permitted Development Rights' (2019); Levitt Bernstein, *Why the government should end permitted development rights for office to residential conversions* (2019).

other.[24] The intrinsic virtue of PDRs, that is their ability to simplify and streamline the planning process, is especially pertinent at a time where funding for local government has fallen in real terms by over 50% in the past decade.[25] Abandoning PDRs, only to further burden an already over-stretched discretionary planning system, is not the solution.

Furthermore, the advantage of PDRs to generate certainty and expedience to housing providers ought not be overlooked. Whilst the English discretionary system offers flexibility and elasticity, the wide remit of LPAs over any considerations deemed 'material' creates uncertainty for developers. It has invited the characterisation of English planning control as a 'rationing system'.[26] Such rationing, argues Antony Breach of the Centre for Cities, is also the cause for developers' perverse practice of landbanking, which further contributes to housing shortage.[27] Upward extension PDRs present an opportunity to encourage densification free from the inherent drawbacks of the permission-based system, by allowing compliant developments to take place as of right.

PDRs therefore remove planning risk and incentivise developments. Nevertheless, the prior approval process as it currently stands negates any benefit that PDRs might offer. The procedure has been shown to be an unsuitable method for returning control to

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[24] Alpa Depani, 'Why planning delays are endemic in our cash-strapped councils' (*Architects' Journal*, 29 March 2022) <https://www.architectsjournal.co.uk/news/opinion/why-planning-delays-are-endemic-in-our-cash-strapped-councils> accessed 16 Oct 2022.
[25] House of Commons Committee of Public Accounts, *Local Government Finance System: Overview and Challenges* (HC 2021-22,646), 9.
[26] Anthony Breach, 'We need a flexible zoning system to end the housing crisis' (*Red Brick*, 27 August 2020) <https://redbrickblog.co.uk/author/antbreacg/> accessed 16 Oct 2022.
[27] Anthony Breach, 'No, landbanking does not cause the housing crisis – here's why' (*Centre for Cities*, 17 July 2020) <https://www.centreforcities.org/blog/no-landbanking-does-not-cause-the-housing-crisis-heres-why/> accessed 16 Oct 2022.

LPAs.[28] Furthermore, over half of the LPAs in England sought some form of exception from the PDRs changes when they were first introduced in 2013, showing unpopularity of the requirement at a local level.[29] Numerous LPAs have also used Article 4 directions extensively to remove PDRs from certain areas, notwithstanding government guidance recommending that they only do so in exceptional circumstances.[30] Reform is therefore necessary to make upward extension a workable mechanism for densifying our cities.

(b) An Alternative to Prior Approval

The proposal for reform relocates the point at which local control is exercised. Rather than allowing central government to set a blanket list of limited criteria on which LPAs across the country then judge proposed development, it is proposed that LPAs define their own conditions through an LDO, made under Section 61A of the TCPA 1990.

To allow this, a new paragraph (2A) would be inserted after s.61A(2) TCPA 1990:

> *(2A) A local planning authority may by order (a local development order) prescribe additional conditions relating to any permitted development right granted under Part 20 of the Town and Country Planning (General Permitted Development) (England) Order 2015.*

Within the GPDO, amendments would be made to all upward extension PDRs under Part 20 (Classes A, AA, AB, AC, and AD). For simplicity, Class Ø is used to denote any of the aforementioned classes.

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[28] See Part 1, sub-paragraph (a) above.
[29] John Geoghegan, 'Office politics' (*Planning Resource*, 6 September 2013) <https://www.planningresource.co.uk/article/1210440/office-politics> accessed 16 Oct 2022.
[30] MHCLG (n 14) para 53.

The key reform comes under the heading **Conditions**, where paragraph Ø.2. which is substituted with:

> *(1) Development is permitted by Class Ø subject to the conditions prescribed in the corresponding upward extension local development order.*

Paragraph B, under the heading **Procedure for applications for prior approval under Part 20,** can be altogether removed.

(c) Operation of the LDO

Paragraph Ø.2.(1) empowers an LPA to tailor how the Part 20 PDRs 'land' in their area. In addition to the nationally set restrictions under Ø.1., which define generic limits at the broadest level, a PDR would be subject to additional safeguards which shape its operation to suit a specific townscape or local housing requirements. Importantly, given the absence of a prior approval procedure, the conditions within the LDO would be prevented from taking on their currently open-ended form. For example, the current criteria regarding 'the provision of adequate natural light in all habitable rooms of the new dwellinghouses'[31] could be set against robust and recognised standards provided by the Building Research Establishment and framed as numerical requirements within the LDO.[32] This would be a welcome and economising departure from the case-by-case appraisal through prior approval.

The criteria concerning 'the external appearance of the building',[33] which has attracted considerable debate and appeals since the introduction of the PDRs, can also be given

[31] GPDO 2015.
[32] Paul Littlefair, Stephanie King, Gareth Howlett, Cosmin Ticleanu and Adam Longfield, *Site layout planning for daylight and sunlight: a guide to good practice* (BR209, 2022).
[33] GPDO 2015.

much needed elaboration at a local level. In most cases, given the nature of upwards extensions, the design required will almost always be one that is sympathetic to the existing building underneath. The householder PDR guidance for Part 1 GPDO, which is a well-tested area, offers potential conditions for an LDO:

> *Development is permitted subject to the following conditions—*
>
> *(...)*
>
> *(x) The materials used in any exterior work of the additional storeys of new dwellinghouses must be of a similar appearance to those used in the construction of the exterior of the existing building;*
>
> *(xx) The fenestration and detailing must, so far as practicable, correspond or relate to that of the existing building below.*
>
> *(...)*

In any event, an LPA would be able to fine-tune the conditions to ensure that any airspace development would be congruent with specific streetscape characteristics.

Most importantly, perhaps, this devolution of power would allow LPAs to designate appropriate sites with both the capacity and suitability for airspace development. Compared to central government, LPAs are far better placed to identify such sites. Currently, their only means of doing so is through the blunt instrument of Article 4 directions, which has the potential of triggering liability to pay compensation. [34] Through designating zones in which the PDR would have effect, some current prior

[34] The Town and Country Planning (Compensation) (England) (Amendment) Regulations 2017, SI 2017/392.

approval criteria such as flooding and contamination risks can also be readily considered by the LPA itself from the outset.

Absent of a prior approval mechanism, the LDOs would have to specify the requirements for complying with a PDR. Each LPA, of course, would be free to define its preferred method, but one possibility would be based on the procedure for domestic PDRs. Developers may be asked to submit a written description or application form which addresses how each of the requirements under Ø.1., along with those in the LDO, have each been satisfied. The checklist of supporting documents may also include a construction management report, setting out the proposed development hours of operation and how any adverse impact from the works to existing and adjoining parties will be mitigated. The fundamental difference from the current procedure is that these are all submitted not for *approval*, but rather for *monitoring* purposes to ensure that the development is in conformity with both the GPDO and LDO.

(d) Local Agency and Accountability

In contrast with the purely responsive approach of prior approval, where LPAs exercise judgment once an application for approval is made, this reform places LPAs in the active role of positively planning PD through LDOs. This acts on recommendations for PDRs made in The Raynsford Review, which called for a 'return to the local level powers that have been centralised.'[35] Significantly, the structure of the reformed law is designed to incentivise LPAs to implement upward extension LDOs. Since the right to development will continue to be granted by the GPDO, rather than the LDO, the

[35] TCPA, *Planning 2020 – Final Report of the Raynsford Review of Planning in England* (2018) 93.

upward extension PDs will not be subject to local safeguards unless an LDO is enacted by the time the amendments take effect. Compared to the heel-dragging that has beset the creation of up-to-date Local Plans across the country,[36] LPAs would have every reason to get ahead of the legislative change and check future development by drafting the local PD regime.

Importantly, this reform addresses the issue of local accountability, which has frustrated both local communities and local government since the expansion of PDRs. LPAs, which are tasked with managing development on behalf of their communities, have often felt powerless in the face of PD laws imposed by central government.[37] Limited to the 'checklist approach' based on prior approval criteria decided by others, the act of refusing prior approval has often become the only means of exerting their influence. Viewed in this light, the fact that over 60% of Part 20 prior approval applications were refused in 2020-21 is unsurprising.[38] Rather than leaving LPAs with the binary choice of approval or refusal, the reform places LPAs squarely in a position of responsibility for planning how upward extensions take place in their areas, whilst operating under a national agenda of densification and housing provision. The focus on conversations between the community and local government, rather than on individual prior approval decisions, would inform a more sustained discussion about the local regime of PD.

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[36] CPRE, *What's the plan?: An analysis of local plan coverage cross England* (2020).
[37] Written evidence submitted by the TCPA, Housing, Communities and Local Government Committee, *Permitted Development Rights* (HC 2021-22, 32).
[38] Rob Sellen, 'Using permitted development rights for upwards extensions' (*Paris Smith*, 12 April 2022) <https://parissmith.co.uk/blog/using-permitted-development-rights-for-upwards-extensions/> accessed 16 Oct 2022.

At the time of writing, the Levelling-up and Regeneration Bill is at committee stage in the House of Commons. Within the Bill, the Government has proposed 'street votes' to allow residents on a street to acquire planning permission through a two-thirds majority vote.[39] Whilst this appears at face-value to democratise planning, the proposal has been met with considerable criticism, with some questioning its efficacy in tackling the housing shortage.[40] More importantly, however, the focus placed on residents means that local government is prevented from being at the helm of shaping development. It fails to harness the abundance of 'tacit knowledge' that LPA professionals possess over sites, buildings, and opportunities across their local authority, built up through both professional training and embedded practice within the planning system.[41] The reform proposed above places this valuable resource at the centre of the densification agenda.

Conclusion

There is little question that densification of the urban and suburban fabric is necessary to address the housing and environmental crises. Upward extension PDRs are a viable opportunity for doing so, but their potential is currently limited by a contradictory prior approval process. This law reform not only returns agency to local authorities to facilitate densification, but also crucially ensures that a permitted right lives up to its namesake.

Word count: 2997

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[39] Levelling-up and Regeneration HC Bill (2022-23) [169].

[40] Robert Booth, 'Street votes on England planning rules 'will not increase affordable housing' (*The Guardian*, 11 May 2022) <https://www.theguardian.com/society/2022/may/11/street-votes-on-planning-rules-will-not-increase-affordable-housing> accessed 16 Oct 2022.

[41] Kevin Muldoon-Smith and Paul Greenhalgh, 'Greasing the wheels, or a spanner in the works? Permitting the adaptive re-use of redundant office buildings into residential use in England' (2016) 17 Planning Theory & Practice 175, 186-187.