



Alley House
Carlton Crescent
Southampton
SO15 2EU

Telephone 023 8082 7400
Fax 01202 786110
DX 96882 Southampton
Direct Dial 02380827462
Matt.Gilks@LA-Law.com

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Leanne Richardson
Principal Planning Officer
Havant Borough Council
Havant Borough Council
Public Service Plaza
Civic Centre Road
HAVANT
PO9 2AX

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Dear Leanne

Advice to Officers: Blocks B, C and D Wellington Way, Waterlooville

Introduction

1. This is advice to Havant Borough Council ("HBC") in its capacity as local planning authority in respect of its duty to determine three applications for prior approval made pursuant to Schedule 2 Part 20 Class AB to the General Permitted Development) (England) Order 2015 (SI 2015/596) (GPDO) at Wellington Way Shopping Centre Waterlooville PO7 7ED. Class AB grants planning permission for works for the construction of new dwellinghouses immediately above the topmost storey on a terrace building in commercial or mixed use, subject to the limitations and conditions in the GPDO together with a requirement for the prior approval of the local planning authority. An extract from the legislation is at Appendix A.
2. The background is set out in the legal briefing note supplied by HBC, together with the annexed materials. The advice required is whether the identification of a side elevation of a building is a matter of planning judgement rather than planning law.
3. In summary, my view is that the identification of:
 - 3.1. the side, rear, principal or main elevations of a building is a matter of planning judgement

- 3.2. unfettered by the constraints of the GPDO a decision maker could quite properly identify a building as having the character of multiple main or principal elevations
- 3.3. an exercise of planning judgment by a decision maker is necessarily subordinate to the restrictions imposed by the legislation
- 3.4. the legislation requires the decision maker to identify a single principal or main elevation of the building
- 3.5. as a matter of planning judgement a building may have more than one main or principal elevation, more than one side elevation or may have more than one rear elevation
- 3.6. the court's only interpretation of the legislation is predicated upon the basis that the decision maker is prohibited from identifying more than one principal elevation of a building, albeit that the principal elevation may be formed by more than one wall
- 3.7. it follows that the legislation requires the decision maker to identify all other elevations of a building as rear or side elevations by reference to the location of the principal elevation
- 3.8. whether an elevation other than the principal elevation is a rear elevation or side elevation is a matter of planning judgement; but that consideration is necessarily be reference to the location of the principal elevation.

Applications

- 4. The prior approval applications are:
 - 4.1. APP/23/00105 - Prior Approval for development consisting of works for the construction of 15No. 1 and 2 bed dwellinghouses immediately above the topmost storey on a terrace building where that development comprises rebuild of first floor together with any associated works at Block B, Wellington Way, Waterloooville
 - 4.2. APP/23/00106 - Prior Approval for development consisting of works for the construction of 11No. new 1 and 2 bed dwellinghouses immediately above the topmost storey on a terrace building where that development comprises rebuild of first floor together with any associated works at Block C, Wellington Way, Waterloooville

- 4.3. APP/23/00107 - Prior Approval for development consisting of works for the construction of 14No. new 1 and 2 bed dwellinghouses immediately above the topmost storey on a terrace building where that development comprises rebuild of first floor together with any associated works at Block D, Wellington Way, Waterloooville.

Law

5. Under the Town and Country Planning Act 1990 ("the 1990 Act "), planning permission is generally required for the development of land (see section 57(1)). Planning permission may be granted by a development order, or by a local planning authority determining an application made under section 62 (see section 58(1)).
6. Section 59 empowers the Secretary of State to make a development order granting planning permission by the order itself. The current development order which generally applies in England is the GPDO. If a developer is entitled to rely upon the permitted development rights granted by such an order, he generally need not make an application for the grant of planning permission. Section 60(1) empowers the Secretary of State to impose conditions or limitations on permitted development rights. In particular, more recent development orders have made the grant of certain permitted development rights subject to the "prior approval" of the local planning authority.
7. Under the GPDO, Article 3(1) grants planning permission for the classes of development described in Schedule 2.
8. The general pattern is that the "permitted development" is described; then any exclusions from the right are defined; then, under art.3(2), conditions are imposed on the permission granted by art.3(1); and then, for some classes of development, interpretation provisions are added.
9. Some "permitted development" rights, but not all, are subject to either prior approval of certain matters being obtained from the local planning authority, or the authority's determination of whether prior approval is required, before the development may be begun. Each of the permitted development rights are in themselves, and operate as, individual grants of planning permission, either with or without a requirement, under a condition attached to that planning permission for prior approval to be obtained before implementation takes place.

10. Statutory Instrument 2020/755 article 4 amended the GPDO Schedule 2 Pt 20 by the insertion of four additional classes of "permitted development" rights—Class AA, Class AB, Class AC and Class AD.
11. The development in Class AB is the construction of an additional storey on a single-storey building, or two additional storeys above a terraced building used for the same purposes as in Class AA.

Difference between matters of law and planning judgement

12. The boundaries between matters of law and planning judgement were explored in the leading case of *Tesco Stores Ltd. v Secretary of State for the Environment and Others* [1995] 1 W.L.R. 759 per Lord Hoffman at [53]:

"...The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

Permitted Development Right

13. The key advice required is whether the identification of a side elevation of a building in the course of determining an application for prior approval is solely a matter of planning judgement. This is a significant consideration for the local planning authority because subparagraph AB.2(3) of Class AB in Part 20 of Schedule 2 to the GPDO provides:

(3) Any development under Class AB is permitted subject to the condition that the development must not include a window in any wall or roof slope forming a side elevation of the building.

14. The upshot of subparagraph (3) is that prior approval applications under Class AB in Part 20 of Schedule 2 to the GDPO (“Class AB”) that would result in a window or roof slope being permitted in an elevation identified as forming a side elevation of the building will not comply with a condition imposed by the GDPO and must be refused.

Plans and site visit

15. The plans reinforce the point that unfettered by the constraints of the language in the GPDO, there is more than one elevation on each of the buildings that might properly be characterized as a main elevation, or a main frontage. Indeed, it may be possible to identify more than one elevation that can be quite properly characterised as “the principal elevation” as a matter of planning judgement, and it may be readily conceded that the factors identified in the brief are all relevant in reaching that planning judgement.
16. The site visit was instructive and I took photographs of the relevant elevations. There is more than one principal elevation on all the relevant buildings. However, nothing in that observation of the planning situation in general terms overreaches the constraints of the GPDO, which I discuss elsewhere.

The factual circumstances

17. As a matter of fact and planning judgment, each building has more than one elevation that might be described as a “principal elevation” or main elevation. Each building has at least four elevations, raising the issue of how properly to describe each elevation by reference to their relationship with one another.

Defined term

18. At the outset it is significant that “side elevation” is not a defined term. The question of whether an elevation is a side elevation is a matter of fact applying planning judgement, subject to *Wednesbury* reasonableness (including the application of logic). As a matter of planning judgement, self-evidently a building may have more than one side elevation, more than one rear elevation and more than one principal or main elevation: see *Snowden v South Oxfordshire DC* [2021] P.A.D. 12.

Interpretation of the Order

19. Common words in permitted development rights should be given their common meaning. The ordinary meaning of the language used is to be ascertained in a broad, common sense manner (per Lindblom LJ in *R. (on the application of Mawbey) v Lewisham LBC* [2019] EWCA Civ 1016; [2020] P.T.S.R. 164 at paragraph 20; [2020] J.P.L. 18).
20. The approach to the interpretation of planning conditions is to ask what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole (per Lord Hodge in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74 at paragraph 34; [2016] J.P.L. 555).

Relevant caselaw on Class AB

21. The most relevant case law that deals with the interpretation of Class AB is *CAB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 208 (Admin), a judgement of the Presiding Judge of the Planning Court Sir David Holgate affirmed by the Court of Appeal in *CAB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWCA Civ 194 [2023] J.P.L. 1294 including Lord Justice Lindblom who in that instance gave the leading judgment. The quality of the bench in both cases is wholly unimpeachable.
22. The *CAB Housing* litigation centered upon a dispute between a local planning authority and an applicant for prior approval relating to Class AA of Part 1 of the GPDO, concerning permitted development rights to enlarge dwelling houses by the construction of additional storeys. It held that the scale of a proposed development could be a relevant consideration in the prior approval process under para.AA.2(3)(a); the words "adjoining premises" in para.AA.2(3)(a)(i) extended to properties which lay close to the subject property rather than only contiguous or abutting buildings; and a meaningful consideration of impact on amenity and external appearance under paras AA.2(3)(a)(i) and (ii) was not confined to the factors mentioned in those sub-paragraphs.
23. In respect of the relevance of the case to other provisions of the GPDO, the *Planning Encyclopedia's* commentary to the GPDO states:

"The interpretation of Class AA of Part 1 was considered in detail by Holgate J in *CAB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 208 (Admin). The analysis also has implications for the permitted development rights in Part 20. After rejecting it as "unhelpful" to make generalised statements to the effect that a permitted development right "establishes" the "principle of development" on account of the prior approval rules to which the right is subject (see [71]–[75]), Holgate J found at [80] that:

"The grant of the permitted development right in Class AA and paragraph AA.1 sets the outer limits, or parameters, of what may lawfully be put forward in an application for approval of a development on a specific site, applying paragraphs AA.2 and AA.3. Accordingly, not all development approved under Class AA may reach one or more of those maximum limits, because a developer may choose to seek approval for a lesser scheme, or the decision-maker may decide that the scale of the proposal (or some aspect of that scale) is too great, acting within the ambit of the prior approval controls in paragraph AA.2(3)(a)."

24. Significantly, the court treated the relevant wording in Part 1 of Schedule 2 to the Order as relevant to the interpretation of Part 20 of Schedule 2 to the Order throughout the judgment by finding:
 - 24.1. the phrases "adjoining premises" and "neighbouring premises" mean the same thing in Part 1 and Part 20 of Schedule;
 - 24.2. the use of the word "including" in either sub-paragraph (i) or (ii) of paragraph AA.2.(3)(a) was not to be read as limiting the matters which can be taken into account and the same interpretation was appropriate for Part 20 of Schedule 2 to the Order [92].
25. In the *CAB Housing* litigation the claimant sought to exercise permitted development rights under Class AA of Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 in respect of development consisting of the enlargement of a single dwelling house by the upwards addition of up to two storeys, or one storey above a single-storey building.
26. Although planning permission was not needed for such development, the permitted development right under Class AA was conditional on an application first being made to the local planning authority for "prior approval" of specified matters including, by

paragraph AA.2(3)(a) , “(i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light” and “(ii) the external appearance of the dwellinghouse”, *including the design and architectural features of its principal elevation and any side elevation* [italicised emphasis added] that fronted a highway. In each case the claimant's appeal against the refusal of prior approval by the local planning authority was dismissed by a planning inspector appointed by the Secretary of State.

27. On the claimants' applications for statutory review of those decisions, issues arose as to the proper interpretation of paragraph AA.2(3)(a) including: (i) whether the planning authority's control of impact on amenity was limited to effects on properties contiguous with, or abutting, the subject property, and was further limited to the effects of overlooking, privacy and loss of light, or whether it instead embraced all aspects of the amenity of neighbouring premises; and (ii) whether the authority's *control of the external appearance of the subject dwelling was limited to the design and architectural features of its principal elevation and any side elevation fronting a highway* [italicised emphasis added], and whether it was further limited to the effects of those matters upon the subject dwelling itself.
28. The Court held that since an application for prior approval under Class AA (or indeed under Classes AA to AD of Part 20) was required to include drawings showing all elevations of the building as proposed to be extended, and an approval, if granted, had to relate to those drawings so as to require the development to be carried out in accordance with them, it would be inconsistent with the nature of that approval if a local planning authority could grant it without considering all the submitted elevations and applying the controls in paragraph AA.2(3)(a) to the proposal as a whole.
29. The Court held that a proposal for an upwards extension of a building was capable of having a significant impact on the amenity of neighbouring premises which was not confined to overlooking, privacy or loss of light; that, therefore, there was no justification for reading down the words “impact on amenity” so as to limit them to overlooking, privacy or loss of light, or to read “external appearance” as confined to *the principal elevation* [italicised emphasis added] and any side elevation that fronted a highway; and that, moreover, in considering whether to grant prior approval for the “external appearance of the dwellinghouse”, the local planning authority was not limited to an assessment of the impact of that appearance on the subject property itself but could consider effects on the amenity of neighbouring premises.

30. The significance of CAB Housing is that it strongly indicates that the planning courts will continue to treat the interpretation of the phrases used in the Order under Schedule 2 to Part 1 and Part 20 as closely related if not indivisible; and it is significant that at no point do the advocates or the tribunal raise a question as to whether the term “the principal elevation” should be interpreted in a manner which enabled the local planning authority to identify more than one elevation of the building’s elevations as being a “principal elevation”.

31. In the first instance judgement at paragraph 6, the Court explained the significance of the litigation:

“These challenges raise important issues regarding the true interpretation of Class AA of Part 1 . [...] is the authority’s control of the external appearance of the subject dwelling limited to the “design and architectural features” of its principal elevation and any side elevation fronting a highway, and is it further limited to the effects of those matters upon the subject dwelling itself?”

32. Significantly, Holgate J.’s analysis is wholly predicated upon an interpretation of Part 1 and Part 20 that a local planning authority may only identify a single principal elevation:

“Classes AA to AD of Part 20, like Class A of the same Part, are all dealing with the creation of multiple new dwelling houses on top of existing buildings. Certainly, in the case of Classes A, AA and AB these buildings may be substantial. It would make no sense for the GPDO 2015 to allow LPAs to control all aspects of external appearance where an upwards extension is to be constructed on a block of flats, but to confine that consideration to the principal elevation and any side elevation fronting a highway where the existing building is a detached (or terraced) commercial or mixed use building.

90. Mr Streeten sought to address this difficulty in his argument by suggesting that the control of external appearance is different for upwards extensions to a purpose-built block of flats because that development would be more likely to be viewed from all sides. That suggestion is untenable. Commercial (or mixed use) buildings are no different in principle. They may or may not be freestanding. Both types of building may be visible on all sides. Indeed, both Class A and Class AA of Part 20 can only apply to detached buildings. There is no sensible reason why the external appearance of a commercial building should only be assessed in relation to its principal elevation and any side elevation fronting a highway, and a broader

approach taken to a purpose-built block of flats, given that they both deal for this purpose with additional development of essentially the same nature.

91. It should also be recalled that an application for prior approval under Class AA of Part 1 (or indeed under Classes AA to AD of Part 20) is required to include drawings showing all elevations of the building as proposed to be extended. An approval, if granted, must relate to those drawings and the development must be carried out in accordance with them. It would be inconsistent with the nature of that approval that a LPA should grant it without considering all the submitted elevations and applying the controls in paragraph AA.2(3)(a) to the proposal as a whole.

92. A proposal for an upwards extension of a building, whether under Class AA of Part 1 or Classes ZA, A and AA to AD of Part 20, is capable of having a significant impact on the amenity of neighbouring premises, which is not confined to overlooking, privacy or loss of light. Such impacts may include, for example, impact on outlook, noise and activity. There is no reason to think that the language used in the GPDO 2015 was meant to exclude such considerations from control by prior approval.”

33. Furthermore, Holgate J. dismisses a fortiori that there is any helpful or relevant distinction between the use of the word “dwellinghouse” and the use of the word “building” as between Part 1 and Part 20 of Schedule 2 to the Order. Indeed, the court takes quite the reverse view:

“46. There are, however, two different drafting styles when it comes to the control of external appearance. Like Class AA of Part 1 , the control in Classes AA, AB, AC and AD of Part 20 relates to the external appearance of the building “including (i) the design and architectural features of— (aa) the principal elevation; and (bb) any side elevation that fronts a highway”. The fact that these controls refer to the external appearance of a “building” rather than a “dwellinghouse” (as in Class AA of Part 1) is of no significance for the issues in this case. These terms simply refer to the structure which is being enlarged by the addition of one or two storeys.”

Use of English language in the GPDO

34. The definite article “the” is used to describe a specific noun, whereas “a” or “an” is used to describe a more general noun. For this reason, an ordinary interpretation of the use of the word “the” before the words “principal elevation” indicates that the legislation

intends the user to identify only one of the elevations of a building as a “principal elevation”.

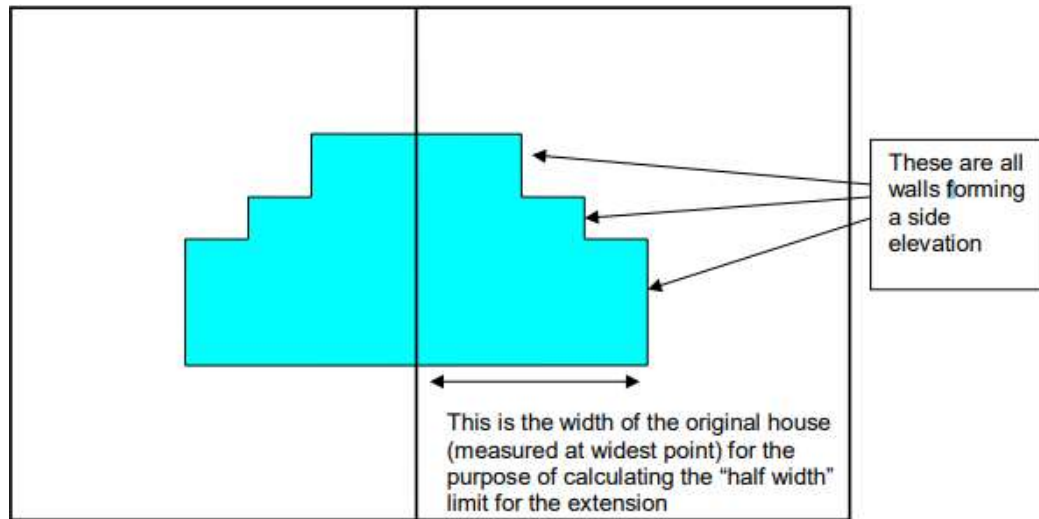
Other legislation

35. There is Scottish legislation that defines elevations (Appendix B), and while this is not any more than persuasive in an English court of law, it should be noted that the definition of a “side elevation” the elevation of the original dwelling linking the principal elevation with the rear elevation.

Departmental guidance

36. There is departmental guidance on the analysis of principal elevation but it is not helpful or appropriate to rely upon it as it is rarely amenable to the type of legal analysis by the courts that would be undertaken if the local planning authority’s determination were challenged: R (Solo Retail Ltd) v Torridge District Council [2019] EWHC 489 (Admin).
37. It must be accepted that the Planning Court takes the view that there is no useful distinction between the wording of Parts 1 and Part 20 of Schedule 2 to the Order in the interpretation of key phrases. The guidance published by the Secretary of State in respect of householder permitted development rights and the requirement to identify a single “principal development” has not been the subject of successful challenge despite the conventional interpretation being extremely restrictive of positive development.
38. In the Ministry of Housing, Communities & Local Government guidance “*Permitted development rights for householders Technical Guidance*” there is a description of side elevation as follows:

“A wall forming a side elevation of a house will be any wall that cannot be identified as being a front wall or a rear wall. Houses will often have more than two side elevation walls.”



39. The householder guidance uses the phrase “side elevation” and “side wall” interchangeably. The guidance also applies a uniform approach to the interpretation of “side elevation” in respect of all the classes of development under Part 1 to Schedule 2 to the GPDO.
40. On the relationship between a principal elevation and the other elevations, the guidance states “[t]here will only be one principal elevation on a house. Where there are two elevations which may have the character of a principal elevation, for example on a corner plot, a view will need to be taken as to which of these forms the principal elevation.”

Relevance of the plans

41. The plans submitted to the local planning authority are labelled with markings indicating “side elevations” that include fenestration. The plans would form an integral part of the planning permission and for that reason the plans could not be passed as they do not comply with the constraint imposed by paragraph AB.2.(3) of Class AB.
42. In reaching a planning judgement the plans are not determinative and should not fetter the local planning authority’s decision-making process, in respect of whether it would be content to receive revised plans.

Fenestration and prior approval permitted development

43. In the case of R. (on the application of LW Zenith Ltd) v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 3317 (Admin); [2023] J.P.L. 916, the court held it was lawful for a development granted permission by prior approval to attach a

negative condition requiring an extant planning permission for operational development be subsequently completed prior to occupation of the completed development granted prior approval.

Conclusion

The identification of which elevations of a building are side elevations are a matter of planning judgement. Frustratingly, it is the requirement to identify a single principal elevation for a building set out in sub-paragraph AB.1.(o)(ii),AB.2.(i)(aa) that fetters the exercise of that judgement as the GPDO makes it necessary to apply that planning judgement from the starting point that there is a single principal elevation. This is the constraint that applies even in circumstances are that but for the GPDO, it could readily be ascertained that the building was designed with multiple frontages all of which have the character of a principal elevation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lester Aldridge', is written in a cursive style.

LESTER ALDRIDGE LLP

Enc Appendices A & B: Legislation