IN THE MATTER OF ALEXANDER HOUSE, 205-207 KING'S ROAD, READING RG1 4LS

ADVICE

1. I am instructed to advise Burleigh Estates Limited on a proposed residential conversion and extension of an office building, Alexander House, 205/207 King's Road, Reading RG1 4LS.

Summary

2. Development, including physical works and changes of use, may be carried out on a building under several planning consents simultaneously. A common combination is of a change of use from office to residential use under permitted development rights and a planning permission granted on application for external alterations, including windows for the new flats. The requirement that the operational development is carried out before the use commences is secured by the details submitted or approved for the prior approval and can be reinforced by a condition. Each planning permission would be capable of being carried out in accordance with its own terms and so be able to accommodate a fourth floor extension.

Background

3. Alexander House is a two storey office building constructed in the late 1980s or early 1990s. It is roughly L-shaped in plan form, with a roof consisting of pitched roofs leading to flat roofs on both limbs of the 'L'. The slopes of the pitched roofs lead to the external walls of the building. The internal roof space is a significant volume, with high headspace and is mainly used for plant.

4. An application for a prior approval determination has been made in respect of a proposed conversion of the ground and first floor from office to residential use under permitted development rights in Part 3, Class O. That application, reference 210536, is still under consideration by Reading Council.

5. Advice is sought on the conversion of the existing roofspace to residential under permitted development rights, a planning application for external alterations to that roof level to facilitate the conversion, and an application for planning permission for the

construction of a new residential floor on top of the roof. The proposal is to build up from the existing first floor walls to provide vertical walls for the new second floor accommodation. The bulk of each new second floor flat will be entirely within the existing roofspace. There will be an element of each flat which will be within the shallower parts of the roof slope. Whilst the floors in these areas will be within the existing building some volume will be added by the external works. Balconies are also proposed for these flats.

6. The proposed new third floor will be on top of the newly occupied second floor. It will be set back from the second floor walls, allowing a terrace around the vertical walls of the third floor flats. This floor will be served by the extensions of the lift and staircases for both the existing floors and the converted third floor. The flat-roof on this floor will be used as a roof terrace, accessed by a new staircase.

Legal matters

7. Planning permission is required for the carrying out of development.[1] 'Development' means 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'.[2] Alterations carried out which affect only the interior of an existing building do not constitute development.[3]

Permitted development rights

8. Planning permission may be granted following an application being made to the local planning authority or under permitted development rights. Permitted development rights are set out in Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO").

9. Office to residential permitted development rights under Part 3, Class O of the GPDO only authorise the making of a material change of use:

> "*Development consisting of a change of use of a building and any land within its curtilage from a use falling within* Class B1(a) *(offices) of the* Schedule *to the Use Classes Order, to a use falling within* Class C3 *(dwellinghouses) of that Schedule."*

[1] Town and Country Planning Act 1990, s 57(1).
[2] Town and Country Planning Act 1990, s 55(1).
[3] Town and Country Planning Act 1990, s 55(2)(a).

10. Building or engineering works which amount to development and are part of the change of use would require separate planning permission even if they relate to matters in respect of which a prior approval application has to be made in respect of the change of use:[4]

(a) transport and highways impacts of the development,

(b) contamination risks on the site,

(c) flooding risks on the site,

(d) impacts of noise from commercial premises on the intended occupiers of the development, and

(e) the provision of adequate natural light in all habitable rooms of the dwellinghouses,

11. If prior approval is not required by the local planning authority, the permitted development has to be carried out in accordance with the submitted details.[5] If prior approval is granted it must be carried out in accordance with the approved details[6] then conditions may be imposed.[7]

Combining permitted development rights and a planning permission granted following an application to a local planning authority

12. Works to and existing building and any change of use may be carried out simultaneously or in sequence under different planning permissions, one or more of which may be permitted development rights: see *Watts v Secretary of State for the Environment, Transport and the Regions*.[8]

13. A planning application and a prior approval determination may be sought at the same time. The Fees Regulations[9] set out a fee for prior approval applications.[10] However that fee does not apply if an application for planning permission is made for the site on

[4] Condition O.2(1).
[5] GPDO, Schedule 2, Part 3, para W(12)(b).
[6] GPDO, Schedule 2, Part 3, para W(12)(a).
[7] GPDO, Schedule 2, Part 3, para W(13).
[8] [2002] EWHC 993 (Admin), [2002] JPL 1473.
[9] Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012.
[10] Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012, reg 14(1).

the same date (by the same applicant).[11] That envisages that a project on a site may involve a combination of development which can be approved on a planning application and other permitted development which is subject to prior approval. Whilst the planning application development might not always be needed to facilitate the prior approval (or vice versa), that would be a common situation. the fee exemption would apply in such a case.

14. The Planning Practice Guidance recognises that a change of use permitted development might also require planning permission in respect of physical works:[12]

> **"Do permitted development rights for change of use also allow for physical development?**
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> Where associated physical development is required to implement the change of use, developers will need to consider whether it constitutes development and ensure they have planning permission if necessary. Some permitted development rights for change of use allow for limited physical works to carry out the change. Full details can be found in Part 3 of Schedule 2 to the General Permitted Development Order."

15. A need for planning permission for physical works does not prevent those details being considered and accepted in the prior approval process.[13] The applicant simply needs to secure another planning permission for the works, if they do not have it already. The prior approval could be conditioned to prevent occupation of the new units before those works are carried out.

16. So planning permission for any works needed for the prior approval can be obtained before, after or at the same time as the prior approval application. There just needs to be sufficient clarity as to what is proposed that the prior approval issue can be considered. The permitted development must be carried out in accordance with the details approved by the local planning authority or where no prior approval is required or the time for determination is allowed to pass, the details submitted in the application. If prior approval is granted, the local planning authority may also impose conditions to

[11] Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012, reg 14(1A).
[12] ID: 13-055-20140306.
[13] APP/H5390/W/17/3187381. 50 Brook Green, London W6 7BJ at para 30 to 32.

either require the proposed physical works to have been carried out before occupation or to require that works would have been carried out in accordance with further details.

Avoiding conflicting permissions

17. It is possible for there to be more than one planning permission authorising development on a particular piece of land but it is not possible to develop under inconsistent planning permissions. To do so could create a different form of development from that envisaged. The classic case, which has become the shorthand description for the issue, is *Pilkington v Secretary of State for the Environment*.[14] In that case Lord Widgery CJ said:[15]

> "One looks first of all to see the full scope of that which has been done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented."

18. He emphasised that 'I base my decision on the physical impossibility of carrying out that which was authorised' under the first permission and not on the condition in the second permission.[16] The question whether it is physically possible to carry out the development in accordance with the terms of the particular permission under which it is to be carried out having regard to what has been done under the other permission has been endorsed by the Court of Appeal,[17] most recently in *Hillside Parks Limited v Snowdonia National Park Authority*.[18] This remains the critical question.

Assessment

Permitted development for the roof conversion

19. The roof space is part of the office building. Whilst used for plant, storage or vacant its use in planning terms is as an office. The use can therefore be changed to residential under the Part 3, Class O permitted development rights set out above.

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[14] [1973] 1 WLR 1527.
[15] At 1532.
[16] At 1532–1533. The court followed dicta of Erskine Simes QC in the Lands Tribunal in *Ellis v Worcestershire County Council* (1961) 12 P&CR 178 at 183.
[17] *Durham County Council v Secretary of State for the Environment* (1989) 60 P & CR 507 at 513; *Staffordshire County Council v NGR Land Developments Ltd* [2003] JPL 56.
[18] [2020] EWCA Civ 1440.

20. Prior approval may be required for certain matters related to the change of use. These include 'the provision of adequate natural light in all habitable rooms of the dwellinghouses'. The roof space is largely windowless so achieving that natural light will need to be secured by external alterations.

21. The prior approval application describes the windows which would be installed. Planning consent for these would be granted by the external works planning application submitted simultaneously. Under the prior approval application the residential units would not be occupied until those windows had been provided. This would therefore be a detail which would have to be complied with if prior approval was granted or a decision was taken that it was not required. On a grant of prior approval this can be conditioned.

The form of the alterations

22. The planning application for alterations at the roof level includes new vertical walls. That is permissible for the purposes of being combined with the permitted change of use. The office building will remain, even if there are extensive alterations to the roof.

23. The new third floor external walls create new space within the building which will have a residential use. In this case it is not literally floorspace, since the floor already exists, but volume immediately above the floor above the previous roof slopes. Such increases in volume are not unusual in planning applications which work with permitted development rights. Dormers or greater roof heights are often introduced. In another scheme in inner London an office block had serrated walls (the windows being set at an angle between the front of one column and the rear of the next). Planning permission was granted for new windows to run between the fronts of the columns, and the additional floorspace created to be residential, alongside the permitted development conversion of the existing office floorspace to residential. In the present case the external works permission would authorise the residential use of that volume. The bulk of each new flat will comprise the permitted development change of use and so it is that which will create the new units. The external alterations at the roof level do not amount to the creation of new dwellings for the purpose of affordable housing calculations since those units arise from the permitted development changes. The use element of the external alterations permission would be a modest addition to the building.

24. The planning application for the fourth-floor comprises the works involved and the new use on that floor. The three applications – the fourth floor, the third floor works and the prior approval are prepared such that none of them was rendered physically impossible by the other and they acknowledge each other's role. By continuing the existing access cores, the second floor is arranged in the prior approval so that it can accommodate the staircases and lift for the third floor.

25. By recognising in each application the other proposals it is physically possible for the proposed planning permissions and prior approval to be built out in accordance with their own terms.

26. If any matters arise out of this advice, please do not hesitate to contact me in Chambers.

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Richard Harwood QC

27th May 2021