Neutral Citation Number: [2022] EWHC 208 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2022

Before :

THE HON. MR JUSTICE HOLGATE

Case No: CO/2763/2021

Between :

CAB HOUSING LIMITED **Claimant**

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF BROXBOURNE **Defendants**

Case No: CO/3135/2021

Between :

BEIS NOEH LIMITED

Claimant

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF HARINGEY

Defendants

Case No: CO/3921/2021

Between :

MATI ROTENBERG

Claimant

-and-

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) LONDON BOROUGH OF HARINGEY

Defendants

- -
- -

Charles Streeten (instructed through **Direct Public Access**) for the **Claimants**
Thea Osmund-Smith (instructed by **Government Legal Department**) for the **First Defendant**
The Second Defendants in each case did not appear and were not represented.

Hearing date: 18 January 2022

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Approved Judgment

Mr. Justice Holgate:

Introduction

1. The Town and Country Planning (General Permitted Development) (England) Order 2015 – SI 2015 No. 596 ("GPDO 2015") grants planning permission for the Classes of permitted development set out in Schedule 2. Where a landowner is entitled to rely upon such rights, he does not need to make an application for a grant of planning permission to the local planning authority ("LPA") under s.62 of the Town and Country Planning Act 1990 ("TCPA 1990"). However, some permitted development rights are dependent upon an application being made to a LPA for the "prior approval" of a specific proposal. Without that approval, the rights granted by GDPO 2015 cannot be exercised. If a proposal is approved, the development rights granted by the order can only be exercised in accordance with the details approved by the LPA.

2. An application for prior approval is not the same as an application for planning permission. The authority is not entitled to have regard to all material considerations, as is the case of an application for planning permission (contrast s.70(2) of TCPA 1990). The GDPO 2015 specifies those planning matters for which approval must be sought and obtained and hence the details which the landowner must submit in his application. Those specified matters delimit the controls which the LPA is able to exercise and the considerations it is entitled to take into account, when determining an application for prior approval.

3. Where an LPA refuses to grant prior approval, or fails to determine an application within the relevant time limit, the applicant may appeal to the Secretary of State, the defendant. These three applications under s.288 of TCPA 1990 challenge the decisions of three Planning Inspectors to dismiss appeals against the refusal of prior approval under Class AA of Part 1 of Schedule 2 to the GPDO. That Class provides for the enlargement of a single dwelling house by the upwards addition of up to two storeys, or one storey above a single-storey building.

4. Paragraph AA.2 of Part 1 of Schedule 2 to the GPDO 2015 sets out the conditions subject to which the permitted development right in Class AA and paragraph AA.1 is granted. The enlarged dwellinghouse must be used as a single dwelling (see the condition in AA.2(2)(d)).

5. Paragraph AA.2(3) sets out the matters for which prior approval must be obtained:-

> "(3) The conditions in this sub-paragraph are as follows –
>
> (a) before beginning the development, the developer must apply to the local planning authority for prior approval as to –
>
> (i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;
>
> (ii) the external appearance of the dwelling house, including the design and architectural features of –
>
> (aa) the principal elevation of the dwelling house, and

(bb) any side elevation of the dwelling house that fronts a highway;

(iii) air traffic and defence asset impacts of the development; and

(iv) whether, as a result of the siting of the dwelling house, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State."

6. These challenges raise important issues regarding the true interpretation of Class AA of Part 1. First, are the claimants correct in saying that a planning authority's control of impact on amenity limited to effects on properties contiguous with, or abutting, the subject property and are those effects limited to overlooking, privacy and loss of light? Alternatively, does that control embrace impact upon all aspects of the amenity of neighbouring premises, as the Secretary of State contends? Second, 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? The claimants contend for that interpretation and they say that the authority is not allowed to consider the effects of external appearance upon any property outside the subject dwelling. Alternatively, is the correct interpretation, as the Secretary of State contends, that the control covers (1) all aspects of the external appearance of the proposed development, and not simply the two elevations specifically referred to in AA.2(3)(a)(ii)) and (2) impact upon other premises, and not simply the subject dwelling itself?

7. In the decisions challenged in these proceedings, the Inspectors took the broader approach in relation to external appearance and, in two cases, to amenity. It is common ground that if the claimants' construction of the GPDO 2015 is correct, then each of the decisions must be quashed as *ultra vires*. The decisions would have been taken outside the ambit of the powers exercisable by the Inspector. But, if the defendant's interpretation is correct, then it is also common ground that each of the three Inspectors reached decisions which fell within their powers, their decisions are not otherwise open to legal challenge and the applications for statutory review must be dismissed.

8. The claimants point out that other Inspectors have taken a different view upon the scope of the controls exercisable in the determination of an application for prior approval under Class AA of Part 1. It has been said that the decision-maker is not allowed to assess the impact of the external appearance of a proposed addition of 1 or 2 storeys on any area outside the subject building, for example, the streetscape. It has also been said that the principle of an upwards extension of up to 2 storeys is "established" by the permitted development right itself, so that the decision on the application for prior approval should not frustrate, or resile from, that principle. Such statements have even been made in relation to other permitted development rights where the GPDO 2015 requires "external appearance" to be controlled, without going on to refer to specific elevations (see e.g. the decision letter dated 6 July 2021 on Kings Gate, 111, The Drive, Hove). If the Secretary of State's interpretation of the GPDO 2015 is correct, then all these decisions were potentially liable to be quashed on an application under s.288 brought within time. Plainly there are differences of interpretation which need to be resolved. There is also the question: to what extent is it correct to say that the principle

of development is established where a permitted development right is subject to prior approval?

9. The issues in this case also affect the proper construction and ambit of permitted development rights granted by GPDO 2015 under Classes ZA, A, AA, AB, AC and AD of Part 20. These provide for up to two storeys of multiple units of residential units to be erected on top of an existing purpose-built block of flats, or on top of detached or terraced buildings in commercial or mixed use or residential use.

10. The claimants' narrower approach to the legal scope of prior approval in these Classes also has implications for non-residential permitted development rights. For example, the right to erect or extend an agricultural building under Class A of Part 6 of Schedule 2 to the GDPO 2015 is potentially subject to control by prior approval in respect of the "external appearance" of the building proposed. If, as some decision-makers have said, that control is limited to assessing the effects of that appearance on the building itself, then it would follow, for example, that the effects of that external appearance on the setting of a listed building nearby could not be controlled. Can this really be right?

11. The remainder of this judgment is set out under the following headings:

    - A summary of the decision letters
    - The statutory framework
    - A summary of the claimants' submissions
    - Principles of statutory interpretation
    - Discussion.

12. I am grateful for the considerable assistance I have received from Counsel in their written and oral submissions.

A Summary of the Decision Letters

31 Gaywood Avenue. London N8

13. The challenge brought by Cab Housing Limited relates to the decision letter dated 15 June 2021 dismissing its appeal against the refusal of prior approval for the addition of a single storey to the existing single storey dwelling.

14. The Inspector concluded that the proposed development would have an adverse impact in terms of both the amenity of adjoining premises and the external appearance of the dwelling (i.e. paragraph AA.2(3)(a)(i) and (ii)).

15. The appeal property is a detached bungalow within a cluster of bungalows towards the end of a cul-de-sac. There are two-storey terraced dwellings to the south and east of the appeal site, semi-detached two-storey dwellings to the west, and rows of bungalows to the south and south-east. The area has a mixed suburban residential character with some variety of building form, size and style (DL8). Viewed from the front and side of the building, the proposed enlarged dwelling would be assimilated into that character. (DL10).

16. But the front and rear elevations are relatively wide at 19.3m (DL9 and DL14). The garden areas of number 31 are concentrated to its front and sides. A plan shows that number 31 is set at right angles to its neighbour, number 29, and there is only a narrow strip separating the rear elevation of number 31 from the side boundary and garden of number 29, along which that rear elevation would run (DL9).

17. The Inspector said that the design and external appearance of the rear elevation was a relevant consideration under paragraph AA.2(3)(a)(ii) (see DL6). He also said that the effect of the proposed additional storey across the width of the new elevation on the *outlook* of the occupiers of number 29, and whether that effect would be "overbearing", were relevant considerations in the assessment of impact on the amenity of adjoining premises under paragraph AA.2(3)(a)(i) (DL7).

18. The Inspector concluded that the proposal would not harm the amenity of adjoining occupiers under AA.2(3)(a)(i) in terms of overlooking, privacy or loss of light (DL11 to DL13).

19. However, he judged that the heightened bulk of the proposal, in combination with the substantial width of its rear elevation (19.3m), would appear "over dominant" when viewed from the adjacent garden of number 29 (DL14). Moreover, the extent of the row of 5 sets of obscure glazed windows across the first floor rear elevation would "stand out discordantly within the residential suburban scene", which "would draw further attention to the bulk of the proposed and enlarged building, and contribute to its visually jarring impact" (DL14). The Inspector drew together these findings in DL15:

> "The above adverse impacts would largely be contained to views of the proposed rear elevation from neighbouring premises, and so would be relatively localised. Nevertheless, given the substantial width of the proposed building mass and its close proximity to No29, the impact would be substantially discordant in terms of both appearance and outlook, viewed from neighbouring premises".

Those conclusions went to paragraph AA.2(3)(a)(i) and (ii) of Part 1 of Schedule 2 to the GPDO 2015 and formed the reasons for the dismissal of the appeal. Perfectly properly, the claimant makes no attempt to challenge in this court the Inspector's conclusion on the planning merits, which were a matter for him.

20 Franklin Street, London N15

20. The challenge brought by Beis Noeh Limited relates to the decision letter dated 8 September 2021, dismissing its appeal against the refusal of prior approval for the addition of a single storey to a two storey end of terrace dwelling, in a terrace of four houses. In this case the appeal failed solely on the Inspector's assessment of the external appearance of the subject dwelling as proposed to be enlarged (paragraph AA.2(3)(a)(ii)).

21. The Inspector noted that Franklin Street also contains single-storey detached dwellings. Three storey purpose-built blocks of flats lie to the side and rear of the appeal site (DL8).

22. The Inspector rejected the claimant's contention that the assessment of the external appearance of the proposal was confined to its effect on the appeal building, stating at DL10:

> "Moreover, whether the external appearance of a dwelling is acceptable is inherently linked to how it would be seen in relation to neighbouring buildings and the wider street-scene or landscape, as it may be. Appearance is not, therefore, a matter to be assessed in a vacuum or in isolation, particularly in this case where the appeal building is located within a terrace of closely related properties. I therefore consider that it is reasonable, in the planning judgment under paragraph AA.2(3)(a)(ii) to take account of the effect of the proposed external appearance of the dwelling on the wider character and appearance of the area."

23. The Inspector judged that the proposed development would, particularly when seen from Franklin Street and one other road, appear as a dominant, bulky and incongruous addition, disrupting the otherwise homogeneous character of the terrace. The sudden increase in height would jar with the rest of the terrace (DL12).

24. He concluded that the proposed development would materially detract from the consistency and balance of the lower level development within the wider terrace, which is positioned around the three storey blocks of flats to the side and rear. Because these blocks were purpose-built and of a considerably different appearance, their presence could not be relied upon to justify granting prior approval (DL13). Once again, those planning judgments were for the Inspector, not the Court.

2 Lemsford Close, London N15

25. The challenge brought by Ms Rotenberg relates to the decision letter dated 10 November 2021 dismissing an appeal against the refusal of prior approval for the addition of a flat-roofed single storey to the existing two-storey, flat-roofed dwelling.

26. The Inspector decided that the proposal would be acceptable in terms of its impact on the amenity of adjoining premises, which included the maintenance of a relatively open outlook from within adjoining gardens (paragraph AA.2(3)(a)(i) of Part 1 of Schedule to the GPDO 2015 and DL9-11).

27. As regards paragraph AA.2(3)(a)(ii), the Inspector decided that, disregarding any effect on adjoining properties, the proposed second floor extension closely reflected the architectural style of the existing property and accorded "with the design of the host property" (DL3).

28. The appeal property is one of eight terraced houses. The Inspector found that they all share the same two storey design; the streetscene in this part of Lemsford Close displays a high degree of architectural consistency; and nearby taller buildings are of a different design and visually distinct from the terrace in which the appeal building is situated. (DL4).

29. The Inspector concluded that the additional storey on the appeal building would clearly protrude above the adjoining flat roofs, giving the terrace an uneven profile. The appeal

property would appear inconsistent with its neighbours. This disruptive effect would be particularly noticeable because of the open aspect of the streetscene directly facing parkland. The side elevations would be clearly visible above the adjoining flat roofs (DL5). The proposed extension would be out of keeping with the external appearance of the appeal property in the context of the adjoining terrace (DL6 and DL12).

The statutory framework

30. The statutory framework has been set out in some detail by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing and Local Government* [2021] PTSR 553 at [19] to [43] and [46] to [61]. There is no need for that analysis to be repeated in this judgment. Neither party raised any issue concerning those passages. But they need to be read together with the further elucidation provided by the Court of Appeal in the same case ([2021] EWCA Civ 1954 (see below).

31. The grant of the permitted development right in Class AA of Part 1 comes about through article 3(1) of the GPDO 2015 and the description of that right in Class AA read together with the exclusions in paragraph AA.1 (*Keenan v Woking Borough Council* [2018] PTSR 697 at [33] et seq. and *R (Rights: Community: Action)* [2021] EWCA Civ 1954 at [27]). Prior approval is not a free-standing development consent. It is one element of the consent for the development. The grant of planning permission by the GPDO 2015 and the grant of prior approval together comprise that development consent. The prior approval procedure is embedded in the consent granted by the Order; it forms an inextricable part, or a "necessary component" of the permitted development right. A developer's ability to implement that permission remains latent until prior approval is granted for a specific proposal on a specific site [64] and ([68]). Accordingly, in a prior approval case, planning permission accrues or crystallises upon the grant of that approval, not before [28]).

32. Class AA of Part 1 to Schedule 2 to the GPDO 2015 is set out in the Annex to this judgment.

33. The permitted development defined by Class AA is for the enlargement of a dwelling-house by constructing up to two additional storeys where the existing property consists of two or more storeys, or one additional storey where the existing property has only one storey, immediately above the current uppermost storey. The right also includes any engineering operations reasonably necessary for that construction.

34. But paragraph AA.1 excludes certain forms of development from the right, notably:

    (i) Land falling within Article 2(3) and Schedule 1 to the GPDO 2015 (e.g. National Parks, areas of outstanding natural beauty, conservation areas, etc.) and any site of special scientific interest;

    (ii) A dwelling-house built before 1 July 1998 or after 28 October 2018;

    (iii) A dwelling-house which has already been enlarged upwards by one or more storeys since it was originally built (Article 2(1));

    (iv) Development where the height of the highest part of the roof would exceed 18m above ground level (Article 2(2)), or would exceed the highest part of the roof

of the existing dwelling by more than 3.5m for a single storey dwelling or 7m for a dwelling with two or more storeys;

(v) Development where the highest part of the roof would, in the case of a semi-detached house, exceed by more than 3.5m the highest part of the roof of the building having a shared party wall or an adjoining main wall or, in the case of a terraced house, the highest part of the roof of every other building in the terrace;

(vi) Any storey constructed other than on the "principal part" of the dwelling (see para.AA.4(i));

Paragraph AA.1 also excludes an upwards extension where "visible support structures" would be provided on the exterior of the dwelling when the works are completed.

35. The right in Class AA is subject to the conditions in paragraph AA.2. So, for example, the external materials must be similar in appearance to those used in the exterior of the existing dwelling, side elevations must not include any window, and the roof pitch of the principal part of the dwelling as enlarged must be the same as that of the existing dwelling (paragraph AA.2(2)). Paragraph AA.2(3)(a) sets out the matters for which prior approval must be obtained (see [5] above).

36. Paragraph AA.3 deals with applications for prior approval. Sub-paragraph (11) prohibits the carrying out of any development before prior approval is obtained. Sub-paragraph (12) requires the development authorised by Class AA to be carried out in accordance with "the details approved" by the LPA, referring back to the application described in paragraph AA.3(1) and (2).

37. Under paragraph AA.3(2) the application must describe the details of the proposed works and provide plans showing "the proposed development", and "the existing and proposed elevations of the dwelling-house" and the position and size of windows.

38. The LPA may refuse an application if they consider that the proposal does not comply with paragraph AA.1 and AA.2, or if they consider that the developer has provided insufficient information to enable them to determine that question (paragraph AA.3(3)). If the authority does not refuse the application on that basis, then it must notify "each adjoining owner or occupier" about the proposed development (para. AA.3(5)) and must take any representations they make into account (para. AA.3(12)). Where the application relates to prior approval of impact on air traffic or defence assets or impact on "protected views" (see AA.2(3)(a)(iii) and (iv)), the LPA must consult with certain specified consultees, such as the Secretary of State for Defence and Historic England (para AA.3(6) to (10)).

39. By paragraph AA.3(11), the LPA may require the developer to submit information to enable it to determine the application, including assessments of impacts and risks and statements as to how they are to be mitigated, having regard to the National Planning Policy Framework ("NPPF").

40. When determining the application, the LPA is obliged to have regard to the NPPF so far as relevant "to the subject matter of the prior approval" (para.AA.3(12)(b)).

41. The issues in this case regarding the true construction of the prior approval controls on external appearance and impact on amenity need to be seen in the context of similar permitted development rights in Part 20 of Schedule 2 to GPDO 2015. In summary, those rights are:

> Class ZA
>
> Permission is granted for the demolition of a purpose-built block of flats or a detached building within the B1 Use Class (use for offices, light industry or research and development) and its replacement by a single purpose-built block of flats or a detached dwelling-house.
>
> Class A
>
> Permission is granted for the construction of up to two additional storeys of new dwellings immediately above the highest storey of a detached, purpose-built block of flats.
>
> Class AA
>
> Permission is granted for the construction of up to two additional storeys of new dwellings immediately above the highest storey of a detached building in commercial or mixed use (i.e. Use Classes A1, A2 or A3 or offices, or a mixture of those uses with or without dwellings).
>
> Class AB
>
> Permission is granted for the construction of new dwellings as a single additional storey above an existing single-storey building, or up to two additional storeys above a building with two or more storeys, where that existing building is terraced and in commercial or mixed use (as defined in Class AA of Part 20).
>
> Class AC
>
> Permission is granted for the same new development as in Class AB, but above a terraced building in use as a single dwelling.
>
> Class AD
>
> Permission is granted for the same new development as in Class AB, but above a single detached dwelling.

42. These seven Classes of permitted development rights were introduced within a short period of time. First, Class A of Part 20 was introduced by SI 2020 No. 632 which was made on 23 June 2020 and came into force on 1 August 2020. Second, Class AA of Part 1 and Classes AA, AB, AC and AD of Part 20 were introduced by SI 2020 No. 755, which was made on 20 July 2020 and came into force at 9am on 31 August 2020. Third, Class ZA was introduced by SI 2020 No. 756, which was made on 20 July 2020 and come into force at 10am on 31 August 2020.

43. The structure of these permitted development rights is similar to Class AA of Part 1 of Schedule 2 to the GPDO 2015. They each describe the permitted development right as a Class which is subject to exclusions. The following paragraph sets out conditions subject to which the permission is granted. Those conditions include a requirement to apply for and obtain prior approval for specified matters before development may lawfully be commenced and a further requirement that the development be carried out in accordance with those details approved by the LPA (para. B(16) and (17)). The procedural provisions governing prior approval in paragraph B of Part 20 serve very similar functions to paragraph AA.3 of Part 1.

44. The prior approval controls for the six Classes summarised in [41] include additional matters appropriate for the more substantial forms of development involved. For example, prior approval is required in relation to transport and highways impacts, flooding risks, and the provision of adequate natural light in all habitable room of the new dwellings to be created. But the four matters needing prior approval in the case of Class AA of Part 1 (see paragraph AA.2(3)(a)) also have to be approved under each of those six Classes.

45. The control of impact on amenity is essentially the same as that applied in Class AA of Part 1. As I explain below, the use of the phrase "neighbouring premises" in those six Classes does not have a different meaning to "adjoining premises" in Class AA of Part 1.

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 "dwelling-house" (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.

47. But in the case of two Classes of permitted development, Classes ZA and A of Part 20, the control simply refers to the "external appearance" of the new building or the building, without any further text which includes the design and architectural features of the principal elevation and any side elevation fronting a highway. The question is whether the ambit of these two formulations, read properly in context, should be construed differently, one covering external appearance in general and the other limited to those matters which are expressly stated to be "included".

48. There is one difference between the drafting of the external appearance controls for Class AA of Part 1 compared to Classes AA to AD of Part 20. The latter (along with Class A of Part 20) allow the creation of multiple additional dwelling houses and so the permitted development rights include works for the construction of (a) access to those units, including fire escapes via external staircases and (b) storage, waste or other ancillary facilities to support the new dwelling-houses. In Classes AA to AD of Part 20 the requirement to obtain prior approval of external appearance includes the "impacts" of those works. Plainly in some cases such works may not be located on a principal elevation, or on a side elevation fronting a highway or public streetscene.

A summary of the submissions

49. Mr. Streeten for the claimants refers to Government announcements and a public consultation exercise in order to identify the objectives of these additional permitted development rights introduced in 2020.

50. In October 2018 the Ministry published a consultation paper "Planning Reform: Supporting the high street and increasing the delivery of new homes". Paragraph 1.1 referred to the use of permitted development rights to contribute to the supply of new homes. Paragraph 1.2 relied on such rights as providing "a more streamlined planning process with greater planning certainty while at the same time allowing for local consideration of key planning matters". Paragraph 1.5 stated that views were sought on a new permitted development right for making use of airspace above existing buildings to create new homes "which fit within the existing streetscape".

51. The proposals were described in further detail in paragraph 1.13 to 1.29 of the document. This section made it clear that the aim was not only to increase the size of the housing stock, but also to increase the supply of larger homes, the latter being relevant to Class AA of Part 1.

52. Both Counsel relied upon paragraph 1.26 of the consultation document which states:

> "Prior approval would consider the design, siting and appearance of the upward extension and its impact on the amenity and character of the area, taking account of the form of neighbouring properties. This may include considering whether the proposed development is of good design, adds to the overall quality of the area over its lifetime, is visually attractive as a result of good architecture, responds to the local character and history of the area and maintains a strong sense of place, as set out in paragraph 127 of the National Planning Policy Framework. We expect prior approval on design to be granted where the design is in keeping with the existing design of the building"

53. Mr. Streeten emphasised the last sentence in support of his contention that the effect of the external appearance of a proposal should be confined under paragraph AA.2(3)(a)(ii) to the building itself. However, Ms. Osmund-Smith for the defendant said that the paragraph, read as a whole, is concerned with broader considerations. Prior approval could involve considering whether a proposed development is of good design, adds to the overall quality of the area, is visually attractive, responds to the local character of the area and maintains a strong sense of place, relying upon paragraph 127 of the version of the NPPF then current.

54. The corresponding policy in paragraph 130 of the current NPPF states:

> "Planning policies and decisions should ensure that development:
>
> (a) will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development;

(b) are visually attractive as a result of good architecture, layout and appropriate and effective landscaping;

(c) are sympathetic to local character and history, including the surrounding built environment and landscape setting, while not preventing or discouraging appropriate innovation or change (such as increased densities);

(d) establish or maintain a strong sense of place, using the arrangement of streets, spaces, building types and materials to create attractive, welcoming and distinctive places to live, work and visit;

(e) optimise the potential of the site to accommodate and sustain an appropriate amount and mix of development (including green and other public space) and support local facilities and transport networks; and

(f) create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users; and where crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion and resilience "

55. Ms. Osmund-Smith also drew attention to paragraph 120(e) of the NPPF:

"Planning policies and decisions should:

…….

(e) support opportunities to use the airspace above existing residential and commercial premises for new homes. In particular, they should allow upward extensions where the development would be consistent with the prevailing height and form of neighbouring properties and the overall street scene, is well-designed (including complying with any local design policies and standards), and can maintain safe access and egress for occupiers".

56. The Government's response on the consultation exercise was published in May 2019. Paragraph 35 stated (inter alia):

"…… As set out in the Planning Update Written Statement we intend to take forward a permitted development right to extend upwards certain existing buildings in commercial and residential use to deliver additional homes. We want a right to respect the design of the existing streetscape, while ensuring the amenity of existing neighbours is considered. The review of permitted development rights for change of use of buildings to residential use in respect of the quality standard of homes delivered announced in the Written Statement will inform this work. We

> recognise the complexity of designing a permitted development right to build upwards and will continue to engage with interest parties on the technical details"

Ms. Osmund-Smith emphasises the references in that passage to respect for the design of the existing streetscape and the "amenity of existing neighbours".

57. Of course, the intention of the legislature in creating Class AA of Part 1 is to be ascertained from the language used in the legislation itself, read properly in context and as a whole. Mr. Streeten submits that the height, width and mass of an extension under Class AA of Part 1 are prescribed by the Order and "cannot in and of themselves result in the refusal of prior approval", when considering either external appearance or impact on amenity. He submits that there can be no rowing back on that matter of principle which, he suggests, is analogous to the consideration of reserved matters relating to an outline planning permission (citing on the latter point *Paul Newman New Homes Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1054 at [17]).

58. In this respect, Mr. Streeten submits that Class AA of Part 1 establishes as a matter of principle "scale", which is to be distinguished from "appearance". He says that in Class AA these two concepts are treated as mutually exclusive. But he seeks to advance this argument, not by an analysis of the language used in the GPDO 2015, but by relying upon the definitions of "scale" and "appearance" forming part of the code in the Town and Country Planning (Development Management Procedure) (England) Order 2015 – SI 2015 No 595 ("DMPO 2015") for outline planning permissions and reserved matters. In that context he also prays in aid the decision of Simon J (as he then was) in *MMF (UK) Limited v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin) at [11]:

> "Scale and Appearance (as defined) are concerned with two different aspects of a building. As Mr. Cannock submitted, at the most simple analysis, if one considers a building as a simple three-dimensional shape, a box, the size of the box and importantly its relationship with other buildings, is a question of Scale. How the box is designed within that overall shape is its Appearance. That too may involve a consideration of its relationship with other buildings, but if so, it is applying a different criterion to one of Scale".

In *Crystal Property (London) Limited v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1265 the Court of Appeal approved the part of that passage which deals with the meaning of "scale" as a reserved matter.

59. Mr. Streeten relies upon certain canons of construction, to which it is convenient to refer by their Latin labels. First, he relies primarily upon the principle that to express one thing is exclude another – *expressio unius est exclusio alterius* (see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition) at Section 23.12). He submits that because the draftsman has expressly referred to certain specific matters, namely overlooking, privacy and loss of light in the case of impact on amenity and the specified elevations in the case of external appearance, any other aspects which would otherwise fall within amenity or external appearance are excluded. He cites *Dilworth v The*

Commissioner of Stamps [1894] AC 94 at 105-6 for the proposition that a definition may "include" certain terms in order to confine that definition to those terms rather than to enlarge it.

60. Mr. Streeten submits that the express references to specified matters in paragraph AA.2(3)(a)(i) and (ii) do not serve to extend the natural meaning of "external appearance" and "impact on amenity". Their natural meaning is sufficiently broad to cover those matters without needing to "include" them within those terms. He then says that it follows that if those matters are not treated as exhaustive of the meanings of "external appearance" and "impact on amenity", the express references to them are superfluous.

61. Mr. Streeten seeks to reinforce his submission by referring to Classes ZA and A of Part 20 which impose controls in relation to amenity and external appearance without any additional wording. He suggests that the difference in drafting is deliberate, so that the ambit of "external appearance" and "impact on amenity" in Class AA of Part 1 is limited to the specific matters said to be "included" in those controls. But Mr. Streeten accepts that the construction for which he extends would also have to be appropriate for Classes AA to AD of Part 20.

62. Mr. Streeten also relies on the *ejusdem generis* principle ("of the same kind"). He submits that "amenity" in paragraph AA.2(3)(a)(i) is limited to a genus solely concerned with the living conditions of private individuals and that paragraph AA.2(3)(a)(ii) is limited to a genus solely concerned with the appearance of public, as opposed to private, facing elevations.

Principles of statutory interpretation

63. In *R (Mawbey) v Lewisham London Borough Council* [2020] PTSR 164 Lindblom LJ held at [20] that common words used in a permitted development right are to be given their common meaning, unless there is something in the legislative context to displace that meaning; the ordinary meaning of the language used is to be ascertained in a broad, common sense manner. The language which has to be construed in the present case uses common words.

64. Mr. Streeten rightly accepted that the ordinary meaning of the phrase "A includes B" is that B forms part of, rather than exhaustively defines, A. He is relying upon canons of construction in order to arrive at a different understanding; one which amounts to saying that "including" has been used in paragraph AA.2(3)(a) of Part 1 in the sense of "meaning". So, for example, as Ms Osmund-Smith pointed out, sub-paragraph (i) would be read as if it had said "impact on the amenity of any adjoining premises through overlooking, privacy and the loss of light".

65. *Bennion* points out at Section 20.1 that canons of construction are not to be rigidly applied but provide useful tools for analysing the language used. In *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022 Lord Neuberger PSC said that canons of construction have a valuable part to play, but "as guidelines rather than railway lines". Although those canons embody logic or common sense, they exist to illuminate and help, but not to constrain or inhibit ([57] to [60]).

66. Legislation is to be read as a whole, so that a provision within an enactment is not to be read as if it stood alone, but in its context as part of that instrument (*Bennion* Section 21.1).

67. There are presumptions that every word in an enactment is to be given meaning; that where the same word is used more than once it has the same meaning, and that different words have different meanings unless the context indicates otherwise (*Bennion* at Sections 21.2 to 21.3). But it has also been said that redundancy seldom carries great weight in statutory interpretation. It is not unusual for Parliament to say expressly what the courts would have inferred anyway (Lord Hoffmann in *Walter v Centaur Clothes Group Limited* [2000] 1WLR 744, 805D). Sometimes language which is strictly unnecessary is included out of an abundance of caution, or for the avoidance of doubt (*Re section 14(5)(d) of the Land Compensation Act 1961* [2018] 2 P & CR 6 at [79] and *Bennion* at p.643).

68. The Explanatory Memorandum to a statutory instrument may be used to explain its context, or the mischief at which it is aimed, or to assist in resolving an ambiguity in the legislation (*Bennion* at Section 24.24 and *Coventry and Solihull Waste Disposal Company Limited v Russell (Valuation Officer)* [1999] 1 WLR 2093, 2103).

69. Mr. Streeten cited *R (Smolas) v Herefordshire Council* [2021] PTSR 1896 at [33] for the proposition that the prior approval procedure is intended to be a "light touch" process. In fact that passage only summarised submissions made by the claimant in that case. The judge did not endorse that notion as an interpretative tool (see [82]). No doubt the *procedural* steps in applying for prior approval are to involve the "minimum of formalities" and are intended to be simple to operate (*Murrell v Secretary of State for Communities and Local Government* [2011] 1 P & CR 6 at [29]). But there the Court was not dealing with the interpretation of the subjects which a LPA may consider and control when making substantive decisions on whether to grant or refuse prior approval. That must depend upon the language used, read in context and as part of the legislation as a whole.

70. The Court may consider a consultation paper as part of the contextual setting for legislation, or to help identify the mischief at which it is aimed. But plainly a consultation paper which seeks views on a subject without at the same time putting forward a draft of the legislation to be enacted will carry little weight and, indeed is likely to be irrelevant to the meaning of the words used in the statute or statutory instrument subsequently drafted and enacted (see e.g. *Bennion* Section 24.9 at pp.731-2).

Discussion

To what extent does Class AA of Part 1 establish a principle of development?

71. In *Murrell* the Court of Appeal accepted that the grant of permitted development rights in the GPDO 2015 involves a decision on an issue of principle which is not for consideration in the prior approval procedure, "if the GPDO requirements [i.e. the prior approval requirements] are met" (see [45]). Likewise, in [46] the Court stated that a permitted development right which is subject to prior approval does not crystallise until that procedure is completed. Rights of this kind do not accrue in relation to any land unless and until a particular proposal complies with the prior approval procedure and,

at that point, the right may only be exercised in accordance with that proposal as approved (or, in some cases, deemed to be approved). As Lindblom LJ stated in the *Rights: Community: Action* case, the prior approval procedure is embedded in the permitted development right and the approval is an essential component of the consent granted ([64] and [68]).

72. It is therefore unhelpful simply to state the bald proposition that the permitted development right *establishes* the principle of that development without more. The right, and the principle it recognises, is contingent upon the grant of prior approval for a specific proposal. *Murrell* illustrates this point and how it is necessary to be careful, both in defining the principle and how it intersects with the prior approval procedure.

73. That case was concerned with the erection of an agricultural building in the open countryside under Class A of Part 6 of the Order. The Inspector had refused to grant prior approval, relying upon (inter alia) settlement and general countryside policies (see [19] – [20]). The Court of Appeal accepted that it would have been permissible for the Inspector to rely upon those policies in order to reject the proposal on the grounds of impact on visual amenity. But it was impermissible for her to rely on those policies in order to reject it as conflicting with their objectives (see [47] – [49]). That reasoning did not involve a site-specific assessment of a proposal falling within the parameters of the permitted development right. Instead, it involved a policy objection to the principle of such development taking place in the countryside in general.

74. If the Inspector in that case had confined herself to rejecting the proposal because of its harmful visual impact on that particular rural location, that would have fallen within the control of "external appearance" under the prior approval provisions and would not have involved any improper challenge to what is authorised by Class A of Part 6. The reasoning in *Murrell* shows that it is not helpful to make the generalised statement that a permitted development right of that kind *establishes* a principle of development. That ignores the prior approval controls to which the right is subject. There is no justification for putting any such gloss on the text of the GPDO 2015, instead of just applying the language actually used in the Order.

75. The same approach applies to the interpretation and application of Class AA of Part 1. Class AA defines the *maximum* number of storeys which may be erected above a dwelling, and paragraph AA.1 sets out a number of parameters for defining the *maximum* height to which a proposal may be built, subject in each case to obtaining prior approval for a particular proposal. Paragraph AA.1(i) also confines the footprint of an extension to the principal part (as defined in paragraph AA.4) of the existing dwelling. By implication the right may be exercisable laterally *up to* the extent of that footprint. The form of the new roof is further constrained by the condition in paragraph AA.2(c), which requires its pitch to be the same as that of the roof of the existing dwelling.

Can scale be controlled by the prior approval code for Class AA of Part 1?

76. In paragraph 51(1) of his Skeleton Mr. Streeten accepted that the height, bulk and mass of the extension could form a reason for refusal of prior approval under, for example, paragraph AA.2(3)(a)(i), if they would "result in unacceptable overlooking, loss of privacy or loss of light". In other words, the prior approval process may be used to restrict the height or the bulk of a proposed extension within the ambit of the relevant

control in paragraph AA.2(3)(a). A LPA might, for example, require a new storey to be set back so as to avoid an objectionable loss of light to a neighbouring property. This straightforward line of reasoning does not involve any impermissible questioning of the development right granted by Class AA of Part 1 or the "principle" of that right.

77. The same analysis also applies to the other limbs of paragraph AA.2(3). Mr. Streeten accepted that this is so in relation to sub-paragraphs (iii) and (iv). Plainly, impacts upon air traffic and defence assets and upon protected vistas may be affected unacceptably by both the height and bulk or scale of a proposed extension. Mr. Streeten also accepts that the height and bulk of a proposal may also be controlled under sub-paragraph (ii) (external appearance) but, he says, only in relation to its impact on the subject building itself. I return to that issue below.

78. Given that height and bulk may be controlled within the ambit of paragraph AA.2(3)(a), and that that may be done without any unlawful conflict with the grant of the permitted development right, Mr. Streeten's reliance upon the decisions in *MMF* and *Crystal Property* falls away. In *MMF* outline planning permission had been granted approving the "scale" of the proposal, but leaving "appearance" to be dealt with as a reserved matter. Because of the way in which that express grant of planning permission had separated "scale" from "appearance", it was necessary for the Court to explain how those two aspects should be distinguished. It was relevant to do so in the context of the predecessor of the DMPO 2015 then in force and its definitions of those two terms. "Scale" was defined so as to refer to the height, width and length of a building in relation to its surroundings. "Appearance" concerned the visual impression made by a building, including its external built form. Because Simon J was forced to draw a line between the two, he concluded that "appearance" excluded height in so far as it was concerned with a building's relationship with its surroundings (see [8]). He did not decide as a general principle that the "appearance" of a building only concerns the effects of that appearance on the building itself and not on its surroundings. Indeed, the judge explicitly came to the opposite conclusion in [11] (see [58] above). The context for the decision in *Crystal Property* was very similar.

79. Neither *MMF* nor *Crystal* were concerned with a prior approval scheme for a permitted development right such as Class AA of Part 1. They do not assist in the interpretation of paragraph AA.2(3)(a)(ii). As explained above, it is clear that Class AA does not grant a permission for any particular "scale" of development and scale can be controlled under the prior approval provisions. The dichotomy between "scale" and "appearance" in the outline planning permission granted in *MMF*, whereby scale was already approved by that permission and could *not* be controlled as a reserved matter, does not exist in Class AA of Part 1, nor indeed in any of the related Classes of permitted development.

80. 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).

"Adjoining premises"

81. Counsel helpfully made submissions on the meaning of the phrase "adjoining premises" in paragraph AA.2(3)(a)(i), although none of the challenges to the decision letters turn on this specific point. But its meaning does nevertheless form part of the context for the issues which do need to be determined.

82. I cannot accept the narrower construction advanced by Mr. Streeten that the amenity control only concerns those properties which abut, or are contiguous with, the subject property. The normal meaning of the word "adjoining" includes "adjacent" or "neighbouring". I do not regard the express use of the word "neighbouring" in the comparable controls in Class ZA, A and AA to AD of Part 20 as indicating that a different meaning should be given to "adjoining" in Class AA of Part 1 (see below). Of more significance is the fact that where in the GPDO 2015 the draftsman meant to say "immediately adjoining", he has used that express language (see e.g. Paragraph D3 of Part 9, paragraph N2 of Part 17).

83. Paragraph 7.12 of the Explanatory Memorandum to SI 2020 No.755 states:

> "The right is subject to obtaining prior approval from the local planning authority, which will consider certain matters relating to the proposed construction of additional storeys. These are consideration of the impact on the amenity of neighbouring premises, including overlooking, privacy and overshadowing; the design, including the architectural features of the principal elevation of the house, and of any side elevation which fronts a highway; and the impacts a taller building may have on air traffic and defence assets and on protected vistas in London"

Thus, it is plainly stated that one of the matters to which the permitted development right is subject is prior approval in respect of a proposal's impact on "the amenity of neighbouring premises".

84. The claimants' submission also has implications for the operation of the prior approval procedure. Paragraph AA.3 requires the LPA to notify each "adjoining owner or occupier" of the proposal and to take into account their representations when determining the application. That expression is defined by article 2(1) to mean "any owner or occupier of any premises or land adjoining the site". The same obligation is imposed on LPAs in relation to the prior approval procedure under Classes ZA, A and AA to AD of Part 20 (see paragraph B(12)). It would make no sense for the legislation to require the authority to assess the impact of a proposal on the amenity of "neighbouring" premises, but to consult only a narrower class of neighbours, namely those living in dwellings contiguous with the subject property. It is plain that in the statutory instrument the draftsman uses the words "neighbouring" and "adjoining" interchangeably and with the same meaning. It would also make no sense in Class AA of Part 1 to confine the obligation to consult, or the control of impact on amenity, to occupiers of dwellings contiguous with the subject premises. Issues concerning, for example, overlooking and privacy may well affect other neighbouring properties as well.

85. Lastly on this topic, Mr. Streeten referred to s.60(2B) and (2C), which authorises a development order to include a provision that where the owner or occupier of adjoining premises objects to a development on land which is a dwelling house or within its curtilage, the LPA must be satisfied that it will not have an unacceptable impact on the amenity of "adjoining premises" (defined so as to refer to the dwelling concerned or the boundary of its curtilage). The control which applies to development falling with paragraph A.4 of Part 1 in Schedule 2 to the GPDO 2015 is authorised by this provision. The prior approval controls for Class AA of Part 1 and related Classes are not authorised by s.60(2B) and (2C). In any event, where those provisions are engaged, I do not accept that the reference to "boundary" should be taken to imply that "adjoining" requires contiguity. Adjoining premises could be neighbouring premises in relation to that curtilage.

Is control of external appearance or impact on amenity limited to the matters included?

86. I do not consider that the word "including" in either sub-paragraph (i) or (ii) of paragraph AA.2(3)(a) is to be read as limiting the matters which can be taken into account under "amenity" or "external appearance" to those which are expressly specified as being included. The word "including", read in the context of this legislation, does not have an exhaustive effect. Indeed, as Ms Osmund-Smith said, if the intention had been to limit prior approval controls to the matters specified, the obvious course would have been to say so directly. There would have been no need to refer to "amenity" or "external appearance", or to introduce the specified matters by the word "including".

87. *Dilworth* was a case dealing with the construction of an interpretation section (see also *Bennion* at Sections 18.2 and 18.3). Here we are dealing with the construction of a power to control details of a proposed development. The *obiter* passage in *Dilworth* at p.106 relied upon by Mr. Streeten puts forward two possible explanations for the use of the word "including" in an interpretation section. First, it may enlarge the natural meaning of the word being defined. Second, where that is not the *sole* purpose, the word "including" *may* be equivalent to *"mean and include,* so as to introduce an exhaustive explanation of the word being defined. So it is plainly implicit in that passage in *Dilworth* that there may be other explanations for the use of the word "including".

88. *Bennion* at Section 17.4 refers to the drafting technique of including examples in a statutory provision such as a power. In my judgment, there is no reason to think that the specific terms in paragraph AA.2(3)(a)(i) and (ii) were intended to delimit the scope of that part of the power, rendering the broader language "amenity of any adjoining premises" and "external appearance of the dwelling house" effectively otiose. Instead, they are examples of the matters which are to be controlled by the decision-maker. The rejection of the claimants' submission that the matters "included" are exhaustive as to the scope of the LPA's power does not render the language describing those matters superfluous. That language makes it plain that the matters "included" are to be taken into account by the LPA. *Bennion* provides illustrations of this drafting technique (see, for example, *Inland Revenue Commissioners v Parker* [1966] AC 141, 160 E – 161 F).

89. I am reinforced in this approach to the use of the word "including" by comparing Class A of Part 20 with Class AA of Part 1 and Classes AA to AD of Part 20. The latter group all refer to the same matters as being "included" in external appearance. The former simply refers to "external appearance"[1]. If the claimants' construction in relation to Class AA of Part 1 is correct than it must also apply to Classes AA to AD of Part 20. But Classes AA to AD of Part 20, like Class A of the same Part, are all dealing with the creation of multiple new dwellinghouses 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 Order 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 an 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.

93. Accordingly, I reject the claimants' primary submission based upon *Dilworth* and the *expressio unius est exclusio alterius* canon of construction.

Is the control of external appearance or impact on amenity restricted to a genus?

94. The claimants' case is not assisted by the *ejusdem generis* principle. First, where it applies, the specific language of the legislation is not treated as being exhaustive. Instead, it operates so that the broader language used, here "impact on amenity" and

[1] Class ZA is different in that it deals with the erection of an entirely new building following the demolition of an existing building.

"external appearance", is read down by reference to the "genus" identified from the specific language used (see *Bennion* at Section 23.2). So, for example, impact on amenity would not be limited to overlooking, privacy and loss of light, as in the claimants' primary submission, but, according to Mr. Streeten, would deal with the living conditions of private individuals. That interpretation would allow impact on outlook for such individuals to be considered under paragraph AA.2(3)(a)(i), as in the appeal decision on 31 Gaywood Avenue.

95. Second, and in any event, the *ejusdem generis* principle generally only applies where specific terms are followed by wider terms and not where, as in this case, general language is followed by specific language (*Bennion* at Section 23.5 and 23.7).

96. Third, for the *ejusdem generis* principle to apply there must be a sufficient indication in the legislation of a category properly described as a *genus.* The classes upon which Mr. Streeten based his argument are not justified. In the control of "external appearance" paragraph AA.2(3)(a)(ii) does not insist that the principal elevation should be one facing a highway, although it may often do so. There is no basis for restricting the general expression "external appearance" to public facing elevations. The same applies to the prior approval controls of the external appearance of development within Classes AA to AD of Part 20 (see [48] above). There is also no basis for restricting "impact on amenity" to the "living conditions of private individuals". "Adjoining premises", the amenity of which may be impacted, is not confined to residential premises, or to premises used for living or occupied by private individuals. The control relates to adjoining premises generally.

97. Fourth, the *ejusdem generis* principle is subject to context. For the reasons already given, there is no justification for reading down the words "impact on amenity" and "external appearance" in the way the claimants seek to do. The principle invoked by the claimants does not help in the interpretation of the prior approval code in Class AA of Part 1 or the related Classes.

Whether control of external appearance is limited to its effects on the subject property

98. I also reject the claimants' submissions that the "external appearance" control is confined to an assessment of the impact of that appearance on the subject property itself, as opposed to its surroundings. There is nothing in the language of the GPDO 2015 to justify this construction. Paragraph AA.2(3)(a)(ii) simply requires a developer to obtain prior approval of the "external appearance of the dwelling house…". The Order does not contain any language to the effect that the decision-maker may only assess the impact of that external appearance *on* the dwellinghouse itself. That interpretation involves reading additional words into the legislation when there is no legal justification for doing so. The LPA is therefore empowered to assess and control all relevant aspects of that external appearance, and not simply those which impact on the subject building.

Consultation documents and the NPPF

99. The conclusions on interpretation to which I have come are consistent with the overall tenor of the consultation material the Court was shown. They are also consistent with the relevant provisions in the NPPF.

Conclusions

100. Because I have rejected the claimants' construction of Class AA of Part 1 in Schedule 2 to the GPDO 2015, it follows that all three claims for statutory review must be dismissed.

101. The decision of each Inspector was entirely lawful. That is as far as the Court's function permits this judgment to go. Individual decision-makers will make their own planning judgments applying the prior approval controls, correctly interpreted, to the materials before them. This judgment does not mean that individual decision-makers would be bound to determine the appeals on the three properties the subject of these proceedings in the way that in fact occurred. That is always a matter of judgment for the person or authority taking the decision. I would also add that there is no evidence before the Court to show that the correct interpretation of Class AA of Part 1, along with the related Classes in Part 20, will in practice make it impossible or difficult for developers to rely upon these permitted development rights, as Mr. Streeten began to suggest at one point in his oral submissions.

102. I summarise the court's main conclusions on the interpretation of Class AA of Part 1 of Schedule 2 to the GPDO 2015:

(i) Where an application is made for prior approval under Class AA of Part 1 of Schedule 2 to the GPDO 2015, the scale of the development proposed can be controlled within the ambit of paragraph AA.2(3)(a);

(ii) In paragraph AA.2(3)(a)(i) of Part 1, "impact on amenity" is not limited to overlooking, privacy or loss of light. It means what it says;

(iii) The phrase "adjoining premises" in that paragraph includes neighbouring premises and is not limited to premises contiguous with the subject property;

(iv) In paragraph AA.2(3)(a)(ii) of Part 1, the "external appearance" of the dwelling house is not limited to its principal elevation and any side elevation fronting a highway, or to the design and architectural features of those elevations;

(v) Instead, the prior approval controls for Class AA of Part 1 include the "external appearance" of the dwelling house;

(vi) The control of the external appearance of the dwelling house is not limited to impact on the subject property itself, but also includes impact on neighbouring premises and the locality.

Annex – Class AA of Part I of Schedule 2 to the GPDO 2015

Class AA - enlargement of a dwellinghouse by construction of additional storeys

Permitted development

AA. The enlargement of a dwellinghouse consisting of the construction of—

(a) up to two additional storeys, where the existing dwellinghouse consists of two or more storeys; or

(b) one additional storey, where the existing dwellinghouse consists of one storey, immediately above the topmost storey of the dwellinghouse, together with any engineering operations reasonably necessary for the purpose of that construction.

Development not permitted

AA.1. Development is not permitted by Class AA if—

(a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of Class G, M, MA, N, O, P, PA or Q of Part 3 of this Schedule (changes of use); (b) the dwellinghouse is located on—

(i) article 2(3) land; or

(ii) a site of special scientific interest;

(c) the dwellinghouse was constructed before 1st July 1948 or after 28th October 2018;

(d) the existing dwellinghouse has been enlarged by the addition of one or more storeys above the original dwellinghouse, whether in reliance on the permission granted by Class AA or otherwise;

(e) following the development the height of the highest part of the roof of the dwellinghouse would exceed 18 metres;

(f) following the development the height of the highest part of the roof of the dwellinghouse would exceed the height of the highest part of the roof of the existing dwellinghouse by more than—

(i) 3.5 metres, where the existing dwellinghouse consists of one storey; or

(ii) 7 metres, where the existing dwellinghouse consists of more than one storey;

(g) the dwellinghouse is not detached and following the development the height of the highest part of its roof would exceed by more than 3.5 metres—

(i) in the case of a semi-detached house, the height of the highest part of the roof of the building with which it shares a party wall (or, as the case may be, which has a main wall adjoining its main wall); or

(ii) in the case of a terrace house, the height of the highest part of the roof of every other building in the row in which it is situated;

(h) the floor to ceiling height of any additional storey, measured internally, would exceed the lower of—

(i) 3 metres; or

(ii) the floor to ceiling height, measured internally, of any storey of the principal part of the existing dwellinghouse;

(i) any additional storey is constructed other than on the principal part of the dwellinghouse;

(j) the development would include the provision of visible support structures on or attached to the exterior of the dwellinghouse upon completion of the development; or

(k) the development would include any engineering operations other than works within the curtilage of the dwellinghouse to strengthen its existing walls or existing foundations.

Conditions

AA.2.—(1) Development is permitted by Class AA subject to the conditions set out in subparagraphs (2) and (3).

(2) The conditions in this sub-paragraph are as follows—

(a) the materials used in any exterior work must be of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse;

(b) the development must not include a window in any wall or roof slope forming a side elevation of the dwelling house;

(c) the roof pitch of the principal part of the dwellinghouse following the development must be the same as the roof pitch of the existing dwellinghouse; and

(d) following the development, the dwellinghouse must be used as a dwellinghouse within the meaning of Class C3 of the Schedule to the Use Classes Order and for no other purpose, except to the extent that the other purpose is ancillary to the primary use as a dwellinghouse.

(3) The conditions in this sub-paragraph are as follows—

(a) before beginning the development, the developer must apply to the local planning authority for prior approval as to—

(i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;

(ii) the external appearance of the dwellinghouse, including the design and architectural features of—

(aa) the principal elevation of the dwellinghouse, and

(bb) any side elevation of the dwellinghouse that fronts a highway;

(iii) air traffic and defence asset impacts of the development; and

(iv) whether, as a result of the siting of the dwellinghouse, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State;

(b) before beginning the development, the developer must provide the local planning authority with a report for the management of the construction of the development, which sets out the proposed development hours of operation and how any adverse impact of noise, dust, vibration and traffic on adjoining owners or occupiers will be mitigated;

(c) the development must be completed within a period of 3 years starting with the date prior approval is granted;

(d) the developer must notify the local planning authority of the completion of the development as soon as reasonably practicable after completion; and (e) that notification must be in writing and include—

(i) the name of the developer;

(ii) the address of the dwellinghouse; and (iii) the date of completion.

Procedure for applications for prior approval

AA.3.—(1) The following sub-paragraphs apply where an application to the local planning authority for prior approval is required by paragraph AA.2(3)(a)

(2) The application must be accompanied by—

(a) a written description of the proposed development, including details of any works proposed;

(b) a plan which is drawn to an identified scale and shows the direction of North, indicating the site and showing the proposed development; and

(c) a plan which is drawn to an identified scale and shows—

(i) the existing and proposed elevations of the dwellinghouse, and (ii) the position and dimensions of the proposed windows.

together with any fee required to be paid.

(3) The local planning authority may refuse an application where, in its opinion—

(a) the proposed development does not comply with, or

(b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,

any conditions, limitations or restrictions specified in paragraphs AA.1 and AA.2.

(4) Sub-paragraphs (5) to (8) do not apply where a local planning authority refuses an application under sub-paragraph (3); and for the purposes of section 78 (appeals) of the Act, such a refusal is to be treated as a refusal of an application for approval.

(5) The local planning authority must notify each adjoining owner or occupier about the proposed development by serving on them a notice which—

(a) describes the proposed development, including the maximum height of the proposed additional storeys;

(b) provides the address of the proposed development; and

(c) specifies the date, which must not be less than 21 days from the date the notice is given, by which representations are to be received by the local planning authority.

(6) Where the application relates to prior approval as to the impact on air traffic or defence assets, the local planning authority must consult any relevant operators of aerodromes, technical sites or defence assets and where appropriate the Civil Aviation Authority and the Secretary of State for Defence.

(7) Where an aerodrome, technical site or defence asset is identified on a safeguarding map provided to the local planning authority, the local planning authority must not grant prior approval contrary to the advice of the operator of the aerodrome, technical site or defence asset, the Civil Aviation Authority or the Secretary of State for Defence.

(8) Where the application relates to prior approval as to the impact on protected views, the local planning authority must consult Historic England, the Mayor of London and any local planning authorities identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State.

(9) The local planning authority must notify the consultees referred to in sub-paragraphs (6) and (8) specifying the date by which they must respond, being not less than 21 days from the date the notice is given.

(10) When computing the number of days in sub-paragraphs (5)(c) and (9), any day which is a public holiday must be disregarded.

(11) The local planning authority may require the developer to submit such information as the authority may reasonably require in order to determine the application, which may include— (a) assessments of impacts or risks;

(b) statements setting out how impacts or risks are to be mitigated, having regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in July 2021; and

(c) details of proposed building or other operations.

(12) The local planning authority must, when determining an application—

(a) take into account any representations made to them as a result of any notice given under sub-paragraph (5) and any consultation under sub-paragraph (6) or (8); and

(b) have regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in July 2021, so far as relevant to the subject matter of the prior approval, as if the application were a planning application.

(13) The development must not begin before the receipt by the applicant from the local planning authority of a written notice giving their prior approval.

(14) The development must be carried out in accordance with the details approved by the local planning authority.

(15) The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.

Interpretation of Class AA

AA4.—(1) For the purposes of Class AA—

"defence asset" means a site identified on a safeguarding map provided to the local planning authority for the purposes of a direction made by the Secretary of State in exercise of the powers conferred by article 31(1) of the Procedure Order or any previous powers to the like effect;

"detached", in relation to a dwellinghouse, means that the dwellinghouse does not—

(a) share a party wall with another building; or

(b) have a main wall adjoining the main wall of another building;

"principal part", in relation to a dwellinghouse, means the main part of the dwellinghouse excluding any front, side or rear extension of a lower height, whether this forms part of the original dwellinghouse or is a subsequent addition;

"semi-detached", in relation to a dwellinghouse, means that the dwellinghouse is neither detached nor a terrace house;

"technical sites" has the same meaning as in the Town and Country Planning (Safeguarded Aerodromes, Technical Sites and Military Explosives Storage Areas) Direction 2002;

"terrace house" means a dwellinghouse situated in a row of three or more buildings, where—

(a) it shares a party wall with, or has a main wall adjoining the main wall of, the building on either side; or

(b) if it is at the end of a row, it shares a party wall with, or has a main wall adjoining the main wall of, a building which fulfils the requirements of paragraph a.

(2) In Class AA references to a "storey" do not include—

(a) any storey below ground level; or

(b) any accommodation within the roof of a dwellinghouse, whether comprising part of the original dwellinghouse or created by a subsequent addition or alteration,

and accordingly, references to an "additional storey" include a storey constructed in reliance on the permission granted by Class AA which replaces accommodation within the roof of the existing dwellinghouse.