

Decision Maker: **DEVELOPMENT CONTROL COMMITTEE**

Date: **14 July 2020**

Decision Type: Non-Urgent Non-Executive Non-Key

Title: **UPWARDS EXTENSION PERMITTED DEVELOPMENT RIGHTS**

Contact Officer: Ben Johnson, Head of Planning Policy and Strategy
E-mail: ben.johnson@bromley.gov.uk

Chief Officer: Assistant Director (Planning)

Ward: (All Wards);

1. Reason for report

- 1.1 The Government published new Permitted Development (PD) rights on 24 June 2020. These PD rights will allow purpose built blocks of flats to extend upwards by up to two storeys to provide new residential units. The PD rights are due to come into force on 1 August 2020. There are a number of restrictions on the use of the PD rights and prior approval is required in relation to a number of potential impacts. This report provides information on the new PD rights.
-

2. **RECOMMENDATION(S)**

- 2.1 **That Development Control Committee note the details of the new Upwards Extension PD right and the discussion of potential impacts as set out in this report.**

Impact on Vulnerable Adults and Children

1. Summary of Impact: No impact
-

Corporate Policy

1. Policy Status: Not Applicable
 2. BBB Priority: Regeneration
-

Financial

1. Cost of proposal: No upfront cost, but potential for loss of application fees. The regulations note that a fee is payable but the amount is not identified. The assessment of prior approval is likely to be akin to a full planning application in terms of complexity and resources required; however, based on fees associated with other prior approvals, the fee for the new upwards extension permitted development right is likely to be less than a full planning application fee.
 2. Ongoing costs: As above, there is potential for ongoing loss of planning application fees.
 3. Budget head/performance centre: N/A
 4. Total current budget for this head: N/A
 5. Source of funding: N/A
-

Personnel

1. Number of staff (current and additional): N/A
 2. If from existing staff resources, number of staff hours: N/A
-

Legal

1. Legal Requirement: Part 20, Class A of the Town and Country Planning (General Permitted Development) Order 2015 (as amended).
 2. Call-in: Not Applicable
-

Procurement

1. Summary of Procurement Implications: N/A
-

Customer Impact

1. Estimated number of users/beneficiaries (current and projected): N/A
-

Ward Councillor Views

1. Have Ward Councillors been asked for comments? N/A
2. Summary of Ward Councillors comments: N/A

3. COMMENTARY

Background

- 3.1 The Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 was published on 24 June 2020. These regulations include a number of amendments to the Town and Country Planning (General Permitted Development) Order 2015 (“the GPDO”), most notably the introduction of Part 20 which allows the construction of new dwellinghouses on detached purpose built blocks of flats (“upward extensions”). This new PD right comes into force on 1 August 2020.
- 3.2 Upwards extensions were first proposed by the Government in 2015¹. At this time, they were intended to be specific to London. The Government and the Mayor of London subsequently jointly consulted on detailed proposals in February 2016², featuring three potential options (which were noted at the time as not being mutually exclusive):
1. The introduction of a specific permitted development (PD) right to allow for upwards extensions in London.
 2. Encouragement of local development orders (i.e. PD rights introduced by local planning authorities covering a specific part of their area) for additional storeys in specific areas.
 3. A policy in the London Plan to support upwards extensions.
- 3.3 The Government published its response to the consultation in February 2017³, and also published a housing white paper⁴ in the same month. These documents noted the intention to take forward a policy option through the National Planning Policy Framework (NPPF) to support the delivery of additional homes by building up. The updated NPPF was published in July 2018; paragraph 118(e) supports upwards 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.
- 3.4 In October 2018, the Government then consulted⁵ on a new PD right to extend certain existing buildings upwards to provide additional, well designed, new homes to meet local housing need. The Government response to this consultation, published in May 2019⁶, noted the intention go ahead with the proposed PD right; this response recognised the need to respect the design of the existing streetscape, while ensuring the amenity of existing neighbours is considered.

¹ HM Treasury, Fixing the Foundations: creating a more prosperous nation (July 2015), Paragraph 9.21, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/443897/Productivity_Plan_print.pdf

²Department for Communities and Local Government & Mayor of London, Consultation on upward extensions in London (February 2016), available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/516952/160217_Consultation_on_Upward_Extensions_in_London.pdf

³ Department for Communities and Local Government, Summary of responses to the technical consultation on implementation of planning changes, consultation on upward extensions and Rural Planning Review Call for Evidence (February 2017), available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589747/Summary_of_responses_to_the_technical_planning_consultation.pdf

⁴ Department for Communities and Local Government, Fixing our broken housing market, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/590464/Fixing_our_broken_housing_market_-_print_ready_version.pdf

⁵ Ministry of Housing, Communities and Local Government, Planning Reform: Supporting the high street and increasing the delivery of new homes (October 2018), available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752222/Planning_reform_-_supporting_the_high_street_and_increasing_the_delivery_of_new_homes.pdf

⁶ Ministry of Housing, Communities and Local Government, Government response to consultation on Planning Reform: Supporting the high street and increasing the delivery of new homes (May 2019), available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799220/Government_Response_to_Planning_Reform_Consultation.pdf

New permitted development right

- 3.5 The new upwards extensions PD right (Part 20, Class A PD right) allows the construction of up to two additional storeys of new dwellinghouses immediately above the existing topmost residential storey on an existing purpose-built, detached block of flats. Prior approval is required in relation to a number of impacts (as outlined elsewhere in this report).
- 3.6 The term “Block of flats” is tightly defined in the regulations, meaning a building which is divided horizontally and consists of separate and self-contained premises constructed for use for the purposes of a dwellinghouse, and any ancillary facilities constructed solely for use by occupiers of the building. The term “Purpose built” is also defined, meaning a building that was built as and remains as a block of flats. These definitions would exclude blocks of flats which also feature commercial or other uses, for example as part of a ground floor frontage, and would also exclude blocks of flats which have been converted from other uses.
- 3.7 For the purposes of Part 20, Class A, the definition of a dwellinghouse includes flats, whereas it does not in relation to most other types of PD right. ‘Storey’ is not defined in the GPDO although it tends to be around 3 metres (measured floor to floor) for residential uses. The draft new London Plan requires a minimum floor to ceiling height of 2.5 metres for residential uses, which is likely to result in storey heights in excess of 3 metres when measured floor to floor.
- 3.8 The PD right allows any or all of the following engineering operations or work:
- engineering operations reasonably necessary to construct the additional storeys and new dwellinghouses;
 - works for the replacement of existing plant or installation of additional plant on the roof of the extended building reasonably necessary to service the new dwellinghouses;
 - works for the construction of appropriate and safe access and egress to the new and existing dwellinghouses, including means of escape from fire, via additional external doors or external staircases;
 - works for the construction of storage, waste or other ancillary facilities reasonably necessary to support the new dwellinghouses.
- 3.9 Development is not permitted in any of the following circumstances:
- The existing residential use was granted through the following PD rights.
 - Part 3, Class M (change from retail, financial and professional services, betting offices, pay day loan shops or launderettes to residential use)
 - Part 3, Class N (change from amusement arcade/centres or casinos to residential use)
 - Part 3, Class O (change from offices to residential use)
 - Part 3, Class P (change from storage or distribution centres to residential use)
 - Part 3, Class PA (change from light industrial to residential use)
 - Part 3, Class Q (change from agricultural buildings to residential use)
 - The existing building is less than 3 storeys in height, above ground level. As noted above, storey is not defined but 3 storey buildings would generally be around 9-10 metres in

height. The GPDO defines ground level as the level of the surface of the ground immediately adjacent to the building or plant or machinery in question or, where the level of the surface of the ground on which it is situated or is to be situated is not uniform, the level of the highest part of the surface of the ground adjacent to it.

- The building was constructed before 1st July 1948, or after 5th March 2018. This is the only restriction in the GPDO based on a specific construction date. Construction is not defined in the GPDO; regardless, information on definite construction dates is often limited, which means that assessment against this part of the regulations could be difficult.
- The additional storeys are constructed other than on the principal part of the building, defined as the main part of the building excluding any front, side or rear extension of a lower height, whether this forms part of the original building or a subsequent addition.
- The floor to ceiling height of any additional storey is more than 3 metres in height; or more than the floor to ceiling height of any of the existing storeys, whichever is the lesser, where such heights are measured internally.
- The new dwellinghouses are not flats. Houses are not eligible to use the PD right, although the explanatory notes which accompany the regulations state that Government also intends to introduce further permitted development rights for building upwards, including for new and bigger homes.
- The overall height of the roof of the extended building would be greater than 7 metres higher than the highest part of the existing roof (not including existing plant).
- The extended building (not including plant) would be greater than 30 metres in height (measured from ground level, the definition of which is set out above). 30 metres is the definition of a tall building as set out in the draft new London Plan.
- Any engineering operations to facilitate the new dwellinghouses would include the provision of visible support structures on or attached to the exterior of the building upon completion of the development. This means that the building itself must be structurally capable of accommodating the additional storey(s). The PD right allows some engineering operations to strengthen existing walls and foundations (see below).
- Any engineering operations would fall outside the existing curtilage of the building. Engineering operations are permitted within the existing curtilage to strengthen existing walls; strengthen existing foundations; or install or replace water, drainage, electricity, gas or other services.
- Works for the installation of additional plant on the roof of the extended building is not permitted if there is no existing plant on the building.
- Works for the replacement of existing plant or installation of additional plant on the roof of the extended building is not permitted if the height of any replaced or additional plant (as measured from the lowest surface of the new roof) on the principal part of the new building would exceed the height of any existing plant (as measured from the lowest surface of the existing roof) on the principal part of the existing building. "Principal part" has the same meaning as noted above.
- Works for the construction of appropriate and safe access and egress to the new and existing dwellinghouses, including means of escape from fire, via additional external doors or external staircases, would extend beyond the curtilage of the existing building.

- Works for the construction of storage, waste or other ancillary facilities reasonably necessary to support the new dwellinghouses would:
 - extend beyond the curtilage of the existing building;
 - be situated on land forward of a wall forming the principal elevation of the existing building; or
 - be situated on land forward of a wall fronting a highway and forming a side elevation of the existing building.
- The land or site on which the building is located, is or forms part of:
 - article 2(3) land, which includes conservation areas and areas of outstanding natural beauty (AONB). Bromley has 44 conservation areas and part of the Kent Downs AONB covers the south east of the Borough;
 - a site of special scientific interest (SSSI). There are six SSSIs in Bromley;
 - a listed building or land within its curtilage. There are 410 listed buildings in Bromley;
 - a scheduled monument or land within its curtilage. There are nine scheduled monuments in Bromley;
 - a safety hazard area;
 - a military explosives storage area; or
 - land within three kilometres of the perimeter of an aerodrome. Biggin Hill is defined as an aerodrome for the purposes of the GPDO.

3.10 Development is only permitted subject to the condition that before beginning the development, the developer must apply to the local planning authority for prior approval related to the following potential impacts (where they are relevant):

- transport and highways impacts of the development;
- air traffic and defence asset impacts of the development;
- contamination risks in relation to the building;
- flooding risks in relation to the building;
- the external appearance of the building;
- the provision of adequate natural light in all habitable rooms of the new dwellinghouses. The GPDO notes that the local planning authority must refuse prior approval if adequate natural light is not provided in all the habitable rooms of the dwellinghouses. The explanatory memorandum to the regulations notes that local planning authorities are expected to exercise their planning judgement when considering the detailed floor plans and elevations in their assessment of adequate natural light in habitable rooms;
- impact on the amenity of the existing building and neighbouring premises including overlooking, privacy and the loss of light; and

- whether because of the siting of the building, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15 March 2012 issued by the Secretary of State. None of the protected vistas identified relate to Bromley.
- 3.11 The local planning authority can refuse an application where, in the opinion of the authority, the proposed development does not comply with any conditions, limitations or restrictions set out in the GPDO; or where the developer has provided insufficient information to enable the authority to establish compliance.
- 3.12 Unlike a standard planning application, prior approval applications are not assessed against Development Plan policy under section 38(6) of the Planning and Compulsory Purchase Act 2004. However, the Development Plan (the Bromley Local Plan and the London Plan) may be a relevant material consideration where it is relevant to a particular prior approval category; for example, Local Plan policies which aim to prevent adverse impacts on the local road network may be relevant when assessing the transport and highways impacts of the development. The GPDO notes that the local planning authority must, when determining an application take into account any representations made to them as a result of any consultation; and have regard to the NPPF, so far as relevant to the subject matter of the prior approval.
- 3.13 The GPDO sets out detailed procedures for assessing prior approval applications. This includes:
- submission of information and documentation such as detailed floor plans. The local planning authority may require the developer to submit other such information as the authority may reasonably require in order to determine the application, including assessments of impacts or risks; and statements setting out how impacts or risks are to be mitigated, having regard to the NPPF. In order to assess whether an application is able to utilise PD rights in line with the GPDO restrictions, information will be required to, inter alia, identify floor to ceiling measurement and measurements of the proposal including the height of the proposed extension above any existing roof; and the height of existing and proposed plant (compared to the lowest point of the existing and proposed roof). Some of this information may require verification. As noted above, an application can be refused where insufficient information is provided to establish compliance with the GPDO requirements;
 - requirements to consult with various bodies in relation to particular prior approval categories, for example, the Environment Agency should be consulted in relation to development in certain flood zones; and
 - requirements to serve notice by site display (for a minimum of 21 days) and serve notice on all owners and occupiers of the flats within existing block of flats and any adjoining owner or occupier. Applicants are required to provide a list of all addresses of the flats within the existing block of flats but this may not identify all owners (i.e. where an occupier is not the owner). This could create additional procedural difficulty for the Council.
- 3.14 Any development that is permitted must be completed within a period of 3 years starting with the date prior approval is granted. Any prior approval will also be subject to the condition that 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 occupiers of the building and adjoining owners or occupiers will be mitigated.
- 3.15 Any new dwellinghouse created under Class A is to remain in use 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.

- 3.16 The development must not begin before the receipt by the applicant from the local planning authority of a written notice giving their prior approval. Unlike other PD rights with prior approval, there is no deemed approval if a decision is not made after 8 weeks; however, applicants could appeal non-determination.
- 3.17 The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.
- 3.18 There will be a specific fee for upwards extension applications. This will likely be set out in a future amendment of the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations. It is likely that this fee will be less than typical planning application fees, based on the level of fees for other forms of PD right and their equivalent planning application fee.
- 3.19 The Community Infrastructure Levy (CIL) will be payable on the new floorspace. The local planning authority can also require planning obligations, although national Planning Practice Guidance (PPG) states that any obligations should be limited only to matters requiring prior approval and should not, for instance, seek contributions for affordable housing.

Discussion

- 3.20 The upwards extension PD right sets out detailed requirements and limitations on use. The determination of these applications is likely to be akin to a full planning application in terms of required officer resources, although it is likely to attract a lower fee than an equivalent full planning application. These applications are likely to be contentious and complex, and it is envisaged that there will be significant procedural difficulties, for example related to information requests.
- 3.21 The PD right will heighten expectations of applicants about what development is permissible but it is important to note that there are numerous prior approval categories and that Development Plan policy will apply where related to these categories. This may result in an increase in appeals, which will further strain resources.
- 3.22 In terms of the built environment, the implications of the PD right are as yet unknown, and will only become evident once it comes into force. However, the potential impacts are significant, in terms of the impact on local character and amenity. As noted above, Development Plan policies could apply where related to prior approval categories, for example, policies covering non-designated heritage assets, areas of special residential character (ASRCs) and development adjacent to conservation areas could apply to the assessment of external appearance.
- 3.23 As noted above, there are a number of restrictions on the use of the upwards extension PD right. Bromley has a number of conservation areas, SSSIs and listed buildings, as well as a portion of the Kent Downs AONB and an aerodrome at Biggin Hill (which means that PD rights are restricted within 3km of its perimeter).
- 3.24 The Biggin Hill and AONB restrictions effectively rule out the use of the upwards extension PD rights across much of the south of the borough. In the rest of the borough, conservation areas will be the main restriction on use of the PD rights, which means that the upwards extension PD rights will be eligible, in principle, in large parts of every ward (except Chislehurst which is largely covered by a conservation area). The extent of existing purpose built flats across the borough is unknown, but they are generally not likely to be a particularly prevalent form of housing across large parts of the borough.

- 3.25 In terms of the minimum and maximum height restrictions, it is noted that buildings under 3 storeys (approximately 9-10 metres) cannot utilise the PD right; that the floor to ceiling height of any additional storey cannot be more than 3 metres in height or more than the floor to ceiling height of any of the existing storeys (whichever is the lesser); and that the extended building cannot exceed 30 metres. These restrictions will most likely mean that buildings ranging from 9-10 metres to around 26 metres (approximately three to eight storeys) will be eligible for the PD right.
- 3.26 Prior approval permissions have often been used as a 'fallback' position, whereby developers secure permission and then subsequently submit another planning application for a more comprehensive development on the same site, noting that if this permission was not granted then there is an extant prior approval that can be delivered. Fallback positions can be material considerations in the determination of planning applications although the weight given would depend on whether the applicant has secured the prior approval permission; it is not enough to just highlight that prior approval permission could be sought, as there is no guarantee prior approval will be granted. Where prior approval permission has been granted, an applicant would also need to demonstrate that there is a realistic intention to implement the prior approval, in order for the fallback to be given weight. It is noted that the upwards extension PD right must be completed within three years of the date of grant of prior approval, which will factor into any consideration of the weight given to a fallback position.
- 3.27 As noted above, the PD right allows various works to facilitate the addition of additional storeys, including works for the construction of appropriate and safe access and egress to the new and existing dwellinghouses, including means of escape from fire, via additional external doors or external staircases. Adding additional storeys to purpose-built blocks of flats may mean that existing internal means of access and escape, such as separate lift shafts and staircases, can be utilised. However, this does not mean that they will necessarily be able to meet building and fire safety requirements, which are covered by separate regimes. All development, whether granted permission following a planning application or through PD rights, is legally required to comply with relevant Building Regulations. Where additional storeys and homes are added to a building some aspects of the building as a whole may also be required to be upgraded under Building Regulations.
- 3.28 In principle, it is possible to withdraw the upwards extension PD rights through an Article 4 Direction. An Article 4 Direction does not prevent the development to which it applies, but instead requires that planning permission be first obtained from the local planning authority for that development. This gives a local planning authority the opportunity to consider a proposal in more detail, i.e. assessing against policies in the Development Plan. The upwards extension PD right requires prior approval of certain issues, but this determination is limited and does not allow for full consideration against adopted Development Plan policies.
- 3.29 As set out in the NPPF and PPG, the use of Article 4 Directions should be limited to situations where they are necessary to protect local amenity and / or the wellbeing of the area. These criteria are not further defined in the NPPF or the PPG. The PPG notes that the potential harm that a Direction is intended to address should be clearly identified.
- 3.30 Provided that the local authority considers it expedient, an Article 4 Direction can cover an area of any geographic size, from a specific site to a local authority-wide area. PPG advises that any Direction removing PD rights where prior approval powers are available to control PD should have particularly strong justification. The upwards extension PD right requires prior approval of a number of potential impacts, as noted above. Therefore, any Article 4 Direction removing the upwards extension PD right would need particularly strong justification.

3.31 An Article 4 Direction to remove upwards extension PD rights can only be made with non-immediate effect. Article 4 Directions can attract compensation liability based on abortive expenditure or other loss or damage directly attributable to the withdrawal of permitted development rights, which in the case of upwards extensions could be a significant amount. However, a non-immediate Direction with a 12 month notice period would remove any compensation liability. During the 12 month notice period, the upwards extension PD rights would continue to apply.

3.32 The Secretary of State for Housing, Communities and Local Government has the power to revoke or modify Article 4 Directions at any time. There is evidence of past Government interventions in other boroughs where a PD right allowing change to residential use is being withdrawn. Intervention is considered a strong possibility in relation to any upwards extension Article 4 Directions, given that it is a key Government policy. Justification in line with the PPG criteria identified above will be key to ensuring that any proposed Direction stands up to scrutiny.

4. POLICY IMPLICATIONS

4.1 The upwards extensions PD right has the potential to significantly undermine policies in the Development Plan, most notably policies which look to protect local character and amenity. Development Plan policies are material to the determination of prior approval applications where the policies relate to relevant prior approval categories.

4.2 An Article 4 Direction can be put in place to remove PD rights, as noted in the report. Any decision to put in place a Direction will be subject to a separate decision.

5. FINANCIAL IMPLICATIONS

5.1 As noted in the report, prior approval applications do require a fee, but this is not yet known and will be published in separate legislation. The fee is likely to be less than an equivalent planning application but the level of resources needed to assess the application are likely to be similar to a full planning application.

6. LEGAL IMPLICATIONS

6.1 The Town and Country Planning (General Permitted Development) Order 2015 (as amended) sets out the statutory requirements of upwards extension PD right, which are discussed in this report.

6.2 There will be specific considerations for individual upwards extension prior approval applications, as they come forward in future, for example which Development Plan policies would apply to the determination and what evidence might be needed to enable proper assessment.

6.3 An Article 4 Direction can be put in place to remove PD rights, as noted in the report. The statutory requirements for putting in place an Article 4 Direction are set out in Town and Country Planning (General Permitted Development) Order 2015 (as amended). Any decision to put in place a Direction will be subject to a separate decision.

Non-Applicable Sections:	N/A
Background Documents: (Access via Contact Officer)	The Town and Country Planning (General Permitted Development) Order 2015 (as amended).