

Permitted development and section 257

Barrister Anthony Gill looks at permitted development and where planning law meets highway law



Anthony Gill plus back-up

The General Permitted Development Order¹ ('the GPDO') is the 'spare room' of planning legislation: a cornucopia of obscure planning rights and little known procedures. And like any spare room, no one's quite sure where anything is.

The GPDO is also a nexus between planning law and the law of highways. It is somewhat peculiar in planning in that it engages with highways law provisions and concepts. This can make, more often than not, for an uneasy clash of regimes. So, as an advocate, one can face the challenge, as this writer has, of explaining the intricacies of Humpys² to a tribunal with no understanding of highways law.

The GPDO implements the power under s.59 of the Town and Country Planning Act 1990 ('the TCPA') for the Secretary of State to grant planning permission without the need for a planning application. These rights, unsurprisingly, are usually referred to as 'PD rights'. Article 3 of the GPDO constitutes an express grant of planning permission by the Secretary of State with the schedules to the GPDO laying out the detailed provisions. Those detailed provisions run to over 300 pages.

PD rights are an important part of the planning permission regime both for the individual householder and the providers of modern infrastructure. So, at one provision the GPDO permits your 'Grand Designs' extension whilst another provision allows for the erection of the telemast through which you 'tweet' pictures to all and sundry of the floor to ceiling windows. Beyond the flippant, the GPDO is essential to allow much needed development without the vagaries of the application process. Airports, ports, and rail providers all rely upon it to deliver development necessary in our increasingly interconnected lives. It is also the GPDO which permits a raft of 'changes of use', permissions which, for instance, allow flexible changes to high street shops or farm diversification development.

PD rights are also often the central component of a development 'fallback' position on application or appeal. The rights within the GPDO providing the basis upon which an applicant can ask for 'just a bit more' on a full planning application. It is therefore a very important component of the planning law.

As noted above, it also provides for development affecting public highways.³ Schedule 2, Part 2, Class B of the GPDO grants permitted development rights for,

B. Permitted development

The formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road, where that access is required in connection with development permitted by any Class in this Schedule (other than by Class A of this Part).

The rights under Class B are qualified by Article 3 of the GPDO.

3.— Permitted development ...

(6) The permission granted by Schedule 2 does not, except in relation to development permitted by Classes A, B, D and E of Part 9 and Class A of Part 18 of that Schedule, authorise any development which requires or involves the formation, laying out or material widening of a means of access to an existing highway which is a trunk road or classified road, or creates an obstruction to the view of persons using any highway used by vehicular traffic, so as to be likely to cause danger to such persons. (emphasis added)

That is, the tailpiece to Article 3(6) provides that exercising the PD rights under Class B cannot occur when it would lead to an obstruction of the view of a highway user.

There must, of course, be development requiring planning permission before there is any need to rely upon PD rights. The definition in s.336(1) of the TCPA, of "engineering operations," which constitute development requiring permission for the purposes of the Act, includes "the formation or laying out

¹ The most recent consolidating Order being the GPDO 2015/596

² HMPEs in Part 9 Class E – repairs to unadopted streets and private ways

³ 'Part 2 Class B – means of access to a highway'



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of means of access to highways.” But this requires some physical engineering operation: it does not extend to the simple removal of a hedge, or of a removable fence, in order to obtain access. This is outside the scope of planning control altogether.

As we all know the GPDO is not the only place where local planning authorities stumble into the law of highways. Section 257 of the TCPA 1990 provides that a competent authority (in this case a local planning authority) can authorise the stopping up or diversion of any footpath, bridleway or restricted byway if satisfied it is necessary to do so in order to enable development to be carried out. The power is a restricted version of the power granted under s.247 of the TCPA to the Secretary of State (for Housing, Communities and Local Government). The power granted to the local planning authority must be exercised for development not yet complete (*Ashby v SoS Environment* [1980] 1 WLR 673). It could not be said that such an order was necessary in a case where the development was complete before the order was confirmed. Such an order can be confirmed by the competent authority but if opposed goes to public inquiry.⁴

The question however arises as to what development the power under s.257 extends. Section 257 at subsection (1) provides that the development which necessitates the stopping up or diversion must be 'in accordance with planning permission granted under Part III, or by a government department'.

Part III (ss.55-106C) of the TCPA includes s.59 and so it seems to follow that planning permission granted by s.59 can be development for the purposes of s.257 which requires the stopping up or diversion of a footpath, bridleway or restricted byway. The recitals at the beginning of the GPDO confirm it is made 'in the exercise of powers conferred by sections 59, ...'. A plain reading of s.257 would suggest that in furtherance of permitted development rights a local planning authority can make an order to stop up or divert a footpath or bridleway or restricted byway.

However, this interpretation has led to more than a little discomfort amongst practitioners as it would appear to loosen the inviolability of public rights of way as local planning authorities can pursue diversion under s.257 stemming from an unpublicised planning permission without an application.

Indeed, in *Shepherd v SoSE*,⁵ the breadth of PD rights under Class B, Part 2 of Schedule 2⁶ was demurred from by the Court of Appeal for the same reason. The extent of the PD rights was under



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⁴ The author acted in a public inquiry for an LPA promoting an opposed bridleway diversion under s.257 early in his career.

⁵ (1998) 76 P. & C.R. 74

⁶ The GPDO 1995/418 which was in the same terms as in the GPDO 2015



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consideration in a case where a landowner who had hardstanding adjoining a public footpath sought to upgrade the quality (not the legal status) of the public right of way in order to secure a functional vehicular access to the nearest road. The landowners in Shepherd had resisted an enforcement notice at inquiry and into the High Court and Court of Appeal on the basis that their works to the public right of way were within their PD rights.

In the Court of Appeal, Buxton LJ concluded that the provisions of Class B should not be read so broadly as he considered them in conflict with the notification provisions under the General Development Procedure Order⁷ which under then Art 8 required publicising of an application for development affecting public rights of way listed under s.66 of the WCA 1981. He concluded that the general PD rights could not trump the specific publicity requirements.

He stated, *'The application of the General Development Order in this case is, in my view, inconsistent with the protection of particular public rights that is envisaged by other parts of the planning system. Where such inconsistency arises, the general cannot be interpreted so as to override the particular; or, to put the matter another way, the general must be read as limited by the other particular interests'*.

Later in the judgement he noted the first submission of the SoSE:

(1) Class B does not cover the construction of a means of access from one highway to another. Any permission contingent on the need for access to the hard standing was thus exhausted once a means of access had been provided to footpath 10, which is a highway, albeit not one along which vehicles are generally permitted to pass.

That is, the SoSE submitted that the PD rights so far as they went were exhausted when they met a highway and in this case it was the Shepherd's problem that the first highway 'hit' was a footpath.

However, Buxton LJ concluded his judgement with particular regard to 'the importance, recognised by the planning scheme, of public consultation, through the planning permission system in respect of works that affect footpaths'. Buxton LJ at 77.

His judgement is specifically focussed upon the purposive public good of consultation and the risk it is frustrated by a broad reading of PD rights. Buxton LJ's judgement acknowledges it relies upon 'a point of impression, albeit strong impression'.

He concludes, 'I see no difficulty in saying that Class B cannot extend to applications covered by article 8, whilst accepting that deemed permissions might exist that affect other classes of highways'. This final clause in response to the submission for the Shepherds that PD rights must exist as the effect of then Article 8 would prevent any PD rights existing under Class B.

This judgement is, I consider difficult to reconcile to the provisions. Firstly, the effect of Art 3(6) already narrows the applicability of Class B rights so that they do not pertain to trunk or classified road and read in conjunction with then Art 8 (now Art 15 of the DMPO) does seem to make the PD right moribund. Secondly, simply put the DMPO/GDPO provisions are drafted in terms of publicising 'applications' when no application exists in a PD context so that arguably there is no conflict between the GPDO and the DMPO.

The author will not be the only person to consider that judgements often seem to be written to arrive at a particular conclusion furnished by common sense rather than by application of the law: here the Shepherd's tarmacking of a long length of a public footpath could not sensibly have been lawful so the judgement reaches that conclusion. Whilst that seems common sense I think the SoSE's submission cut the Gordian knot in a more satisfying manner: the PD rights were to the public right of way not across it.

In the case of s.257, I think it is necessary to consider two particular backstops within the legislative provisions which, I consider, address the concern regarding public engagement in the process.

⁷ Now the Development Management Procedure Order 2015/595



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The power to divert under s.257 is discretionary, the local planning authority can only use it where necessary to enable development but that does not mean they must use it. It remains a 'may' provision which does not require a local planning authority to determine to use its discretion to divert. Further, whilst there is a concern about public engagement with activities affecting the highway, the s.257 diversion power has always been subject to public inquiry and consideration by the Secretary of State if opposed. In such an inquiry into a 'PD diversion' the public would have its views taken account of, including (one would assume) whether the power was being used in accordance with statutory provisions in the first place.

Within the GPDO there is a backstop, as noted above the Article 3(6) caveat means that if the exercise of PD rights under Class B of Part 2 of Schedule 2 obstructs a view such as to be a danger it does not have PD rights. Such a proviso empowers a local planning authority to act against PD it considers deleterious to the use of the highway. In such a case an enforcement notice would be the relevant lever to pull and an inquiry would allow a full hearing of the 'danger' issue. Indeed, Shepherd is a judgement stemming from an enforcement appeal.

Further, I think it necessary to consider the purpose behind the GPDO generally, it is there to enable development and to loosen the binds of planning control. It contains, for most provisions, limitations and conditions which contain the PD rights. So a local planning authority can take action by enforcement against development it considers not to have PD rights. But, the local planning authority must act. By putting the impetus on the local planning authority the GPDO is intentionally removing a burden from the developer to loosen the regulatory leash.

The judgement in Shepherd proceeds on the basis that it could never have been intended to grant planning permission for development affecting a public right of way so broadly. But, it seems to me entirely arguable that that is to underestimate the purpose and effect of the GPDO. It does grant

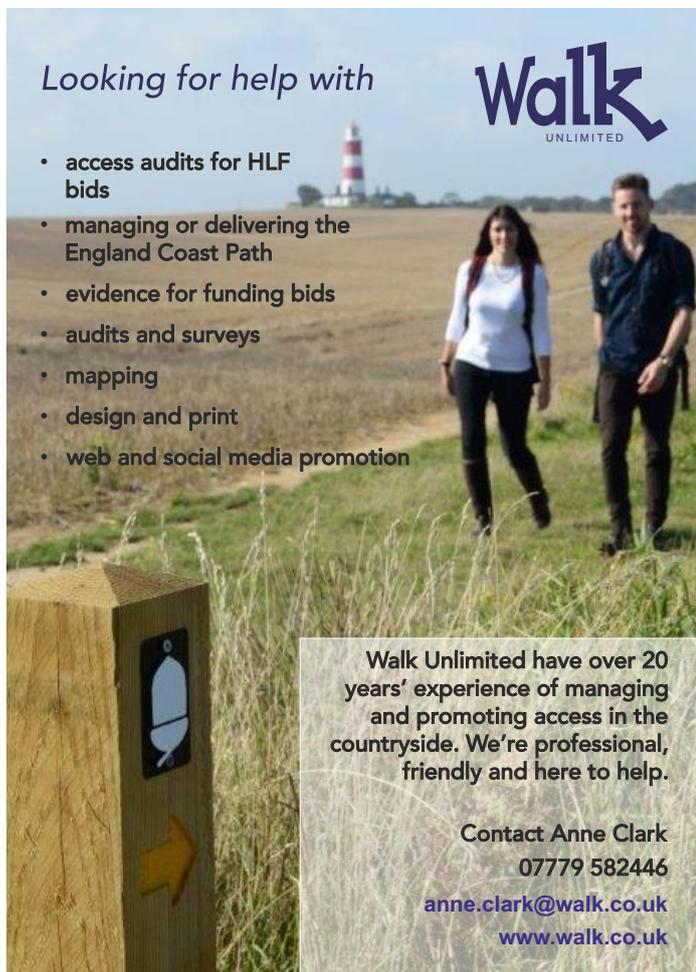
broad permission for a deregulatory purpose and when looked at as a whole it is clear it is intentionally extensive in the permissions it grants. The powers to develop granted to statutory undertakers, ports, and airports, agricultural units and even householders provide for substantial development.

Further, when one considers the caveat under Art 3(6) it is apparent that the draftsman was engaged and aware of the potential impact PD rights may have upon PROW. Art 3(6) limits (some) PD rights affecting highways; aware of the impact on higher order roads if those PD rights were not limited.

The applicability of s.257 to development permitted under the GPDO remains unsettled. I consider the plain reading of the GPDO to be relatively clear but of course the 'strong impression' of the Court of Appeal in an analogous matter is powerfully persuasive to the contrary. The reality is that I doubt the matter will ever arise; the discretion inherent in s.257 is such that I do not believe a local planning authority would deign to use it for PD rights at the risk of being criticised for either misunderstanding the law or acting contrary to principles of public consultation.

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This article is intended to inform, and to provoke debate and discussion. It does not constitute legal advice.



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