Planning Factsheet – Permitted Development & the 'Planning Fallback'

Hedge End Retail Park, Tolbar Way, Southampton, SO30 2UH

If permitted development rights provide for a fallback position to proposed development, then that is a strong material consideration that requires full and transparent consideration by the decision maker when considering any of the following:

- 'Loss' of existing parking
- Controlling hours of operation
- Design, character and appearance
- Heritage
- Noise, lighting and amenity

Part 2 of the GPDO is entitled 'Minor Operations'. That is important for decision makers to bear in mind. The Government classifies EV chargers and the equipment housing to be as minor and commonplace as fences, gates, walls, exterior painting and CCTV on buildings.

If a planning application is submitted, and any proportion of the proposed development would otherwise be or is comparable to, permitted development, decision makers need to recognise they are dealing with development that is only slightly more significant than a 'minor operation'.

Part 2 Class E of the General Permitted Development Order 2015 (as amended) has been recently expanded and provides for the following:

Part 2, Minor Operations, Class E of the 2015 GPDO.

Permitted development E.

(1) The installation, alteration or replacement, within an area lawfully used for off-street parking, of an upstand etc. with an electrical outlet mounted on it for recharging electric vehicles.

(2) The installation, alteration or replacement, at ground level within a non-domestic area lawfully used for off-street parking, of

(a) equipment necessary for the operation of an upstand the installation of which would be permitted by this Class;

(b) a unit of equipment housing for the storage of equipment necessary for the operation of an upstand the installation of which would be permitted by this Class

Development not permitted

E.1

(1) Development is not permitted by paragraph E.(1) if the upstand and the outlet would—

(a) in relation to an upstand and outlet—

(i) within the curtilage of a dwellinghouse or a block of flats, exceed 1.6 metres in height from the level of the surface used for the parking of vehicles; or

(ii) in any other case, exceed 2.7 metres in height from the level of the surface used for the parking of vehicles;

(b) be within a site designated as a scheduled monument;

(c) be within the curtilage of a listed building; or

(d) result in more than 1 upstand being provided for each parking space.

(2) Development is not permitted by paragraph E(2)(a) if the equipment would not be contained within equipment housing the installation of which would be permitted by this Class.

(3) Development is not permitted by paragraph E(2)(b) if—

(a) it would result in there being more than 1 unit of equipment housing within a non-domestic area lawfully used for off-street parking;

(b) the unit of equipment housing would—

(i) have a volume exceeding 29 cubic metres;

(ii) exceed 3 metres in height from the level of the surface used for the parking of vehicles;

(iii) be within 5 metres of a highway;

(iv) be within 10 metres of the curtilage of a dwellinghouse or block of flats;

(v) be within a site designated as a scheduled monument;

(vi) be within the curtilage of a listed building

E.2 Conditions

Development is permitted by Class E subject to the conditions that when the development is no longer needed as a charging point for electric vehicles—

(a) the development is removed as soon as reasonably practicable; and

(b) the land on which the development was mounted or into which the development was set is, as soon as reasonably practicable, and so far as reasonably practicable, reinstated to its condition before that development was carried out.

When Government previously consulted on the recent broadening of permitted development rights for EV charging infrastructure, it was clear that the changes were necessary because of its national priority status. The changes were implemented on 29th May 2025.

The Government previously said the following of the changes:

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5. Changes to the permitted development rights for the installation of electrical outlets and upstands for recharging electric vehicles

55. Existing permitted development rights (under Class D and E of Part 2) allow for the installation of electric vehicle (EV) charging infrastructure in an area lawfully used for off-street parking. The rights allow for the installation, alteration or replacement of a wall-mounted electrical outlet and an upstand with an electrical outlet mounted on it for the purpose of recharging EVs. The rights are subject to limitations and conditions, for example, they do not apply in the curtilage of listed buildings or within a site designated as a scheduled monument. They do however apply in article 2(3) land, which includes conservation areas, World Heritage Sites, National Parks, the Broads and Areas of Outstanding Natural Beauty.

56. The government supports the rollout of EV charging points. As set out in the Net Zero Strategy, *we will make sure that any changes to the planning system support our efforts to combat climate change and help bring greenhouse gas emissions to net zero by 2050. This includes supporting the transition to zero emission cars and vans. The recently introduced zero emission vehicle (ZEV) mandate, combined with the commitment to end the sale of new diesel and petrol cars and vans in 2035, is the most ambitious national regulatory framework for ZEVs anywhere in the world.*

57. Reliable and comprehensive charging infrastructure is needed to support this transition. The majority of EV charging takes place at home and we expect this to continue. As the number of EVs on the road increase, government must ensure that legislative frameworks support charge point installations in a timely and affordable manner.

The existing and incoming permitted development are material considerations. Officer's reports will need to be very clear on the considerations of permitted development rights in case the matter finds itself in a planning appeal.

It is essential for planning officers to understand and consider what the full extent of development that could be delivered under PD rights is, because that may exceed what is actually being applied for.

The existing permitted development rights may well constitute legitimate fall-back positions for any of our applications in car parks.

Having regard to the judgement given in Mansell v Tonbridge and Malling BC ([2016] EWHC 2832 Case No: CO/1001/2016) the key consideration for the Local Planning Authority in such as case is whether the fallback position represents a preferrable form of development for the site or whether there are advantages inherent within any alternative scheme that would indicate that it should be supported over the fallback position.

For any reader not familiar with the caselaw on the planning fallback position, the following should be of interest.

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Fallback

246. The parties may present you with a 'fallback' position which indicates what might be done (whether by the applicant or otherwise) with the land without the express grant of planning permission if the appeal proposal does not go ahead. This may include previous extant planning permissions, the exercising of permitted development rights, the resumption of a lawful use, or long user of land where enforcement would now be time barred. A fallback position will normally be used to justify (or help justify) a proposal. In such cases it is likely to be argued that the alleged fallback would have similar or worse effects than the appeal proposal.

247. When presented with a fallback position, it is important to ensure that it has been clearly defined. If necessary, this may need to be clarified by the parties to avoid any misunderstanding.

248. However, there is no duty on an Inspector to consider whether hypothetical fallback positions might exist if they have not been put forward by the parties. The corollary is that if a fallback or alternative planning outcome has been put forward, even if accompanied by limited detail, then it will need to be addressed. This is especially if it is part of the case made by the losing party.

249. Various court cases have considered the concept of a fallback development as a material consideration. It is described in *Mansell v Tonbridge and Malling BC & others* [2017] EWCA Civ 1314 as "familiar". Paragraph 27 of that judgment by the Court of Appeal confirms that there should be a "real prospect" of a fallback development being implemented and that the decision-maker should exercise their planning judgment as to whether that would be the case depending on the particular circumstances. There is, for example, no legal requirement for a landowner or developer to say precisely how any available permitted development rights would be utilised.

250. In *Gambone v SSCLG* a two stage approach was set out, where a determination must first be made concerning whether the fallback position is a material consideration, before weight is ascribed. The following two questions should be considered:

1) Is there greater than a theoretical possibility that the development might take place (the "real prospect" test)?

2) If there is a greater than theoretical possibility, what weight should be ascribed?

251. The first stage of this exercise should be undertaken even when there is an extant planning permission in place. In the case of *R (Spedding) v Wiltshire Council [2022] EWHC 347 (Admin)*, the Judge held that although the long standing use was as a poultry farm, the use had ceased and as there was no evidence to conclude that the land would be used as such again, it could not be considered as a true fallback option.

252. In *R (SPVRG Ltd) v Pembrokeshire CC* [2022] EWHC 143 (Admin) it was argued that a 2016 permission could not be used as a fallback position because it was unimplementable. However, the judge held that although it may not be possible to implement a planning permission due to other restrictions or matters outside planning legislation, it does not mean that it cannot be considered as a fallback position. The weight to be attributed to a fallback in those circumstances would be a matter for the decision-maker.

- In order to determine the first stage of this exercise, you will need to consider: information on the nature and content of the alternative uses or operations in comparison to the appeal proposal, and evidence as to the likelihood of the alternative use or operations being carried on or carried out
- would the fallback be significantly more harmful than the appeal scheme or would the effect be similar or less harmful?
- if a genuine fallback exists is this a sufficient justification for a proposal which would cause significant harm (particularly if the degree of harm would be similar)?

253. In *Schneck v SSHCLG & West Berkshire DC* [2022] EWHC 3335 (Admin) the Court held that "the prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Although the possibility of the fall back position happening may be very slight, this is sufficient to make the position a material consideration.

254. You might conclude that a fallback would be more harmful than the appeal proposal and so would help justify it. If so, consider:

- Would there be a physical possibility that both the appeal proposal and the fallback could be carried out – thus negating the fallback argument?
- Would there be anything to prevent an extant permission being implemented as well as the appeal proposal? See the section on 'revoking' an existing planning permission in 'Conditions'.
- If critical to the decision would there be anything to prevent existing permitted development rights being exercised before the permission for the appeal scheme is implemented? A condition removing permitted development rights would only take effect once the permission is implemented. Consequently, this outcome could only be prevented by means of a S106 obligation - for example, in which the appellant covenants to forgo relevant permitted development rights immediately upon the issue of the planning permission.

255. A party may argue that an existing or potential use or development is lawful and / or would be permitted development notwithstanding that there is no Certificate of Lawfulness of Existing Use or Development (CLEUD) or of Proposed Use or Development (CLOPUD) under s191 or s192 TCPA 1990. In these circumstances it is not the role of the Inspector dealing solely with an application for planning permission to determine whether a use or operation is lawful in order to decide whether the appellant might be able to rely on permitted development rights as a fallback (see *Saxby v SSSE*. This can only be formally determined by a lawful certificate application). However, an Inspector should not simply ignore arguments over lawfulness in the absence of a CLEUD or CLOPUD. Rather the Inspector should carry out some assessment of the weight that should be ascribed to the evidence presented about the lawfulness of the use or operation. The absence of a CLEUD or CLOPUD is therefore not determinative of itself. Where a dispute arises in a written representations appeal as to the factual basis for a claim of lawfulness, the Inspector may need to consider inviting further written submissions from the parties in order to be able to attribute weight to the potential fallback. Alternatively, it may be necessary to convert it to an oral event. An inquiry (not a hearing) would be necessary if determining the facts would involve taking evidence on oath.

256. Clear reasoning will be required to explain the weight given to the alleged fallback position as part of the overall decision, especially if this is important to the outcome or to deal with the case of the losing party. The weight to be attributed to potential fallback should be the main focus when considering such issues.

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