

LAW AND DISORDER: PERMITTED DEVELOPMENT RIGHTS AND THE LOSS OF PROPORTIONATE CONTROL

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Abstract

The Conservative led coalition government in the UK identified regulation management as a key priority and intended to simplify and address the complexity in the system. From the perspective of Development Management a paradox has emerged however; the more the Government attempts to simplify the decision making system and facilitate development, the more complex the system has become. This can be clearly seen in the manner in which the Permitted Development rights planning permission arrangements have been revised and the application of decision making mechanisms extended.

This paper will explore how new Permitted Development rights have been created, existing rights extended (some permanently some temporarily), the prior approval process has increased in prominence and usage, and the use of Local Development Orders extended. The paper will present the impact of these changes, including the unintended consequences and potential to undermine the effective management of the built and natural environment,

Issues of regulation density and complexity will be highlighted, together with how some of these changes are potentially disrupting the fundamental principle of proportionality and justified local planning authority intervention in the public interest.

1. Introduction

The idea of regulatory control of the built and natural environment is not a new one. Although planning legislation requiring the creation of plans to guide development in a given area is relatively new, the use of legal controls to manage the built and natural environment can trace its origins in the UK back to medieval times. Although evidence suggests even earlier controls existed in London, an Assize of Nuisance in 1275 can certainly be highlighted as one of the earliest forms of control over buildings. This introduced various controls that are akin to basic building regulations and arguably all modern systems of control over the built environment, from planning through building regulations to environmental health legislation can trace its history back to this point (Booth, P. 2002).

From the Assize of Nuisance we can see the evolution of control, with further mechanisms introduced to regulate construction standards, layouts, fire prevention, public health and neighbour nuisance. This was not just a case of strengthening control though, some important changes took place to which planning today owes much. For example, Elizabeth I introduced systems to manage the growth of London, while James I and Charles I both created controls that influenced design and appearance. To the origins we can perhaps draw parallels to modern planning and policies to prevent over development and encourage high quality design (Booth, P. 2002).

The greatest change, however, took place in the early 1900s. From this point forward, various public health acts were passed in response to the challenges associated by the massive growth and change seen during the industrial revolution and soon legislation required the preparation and approval of plans for new housing growth, and strict standards in construction, design and layout. The

culmination of this period of development effectively occurred immediately after the Second World War (Booth, P. 2002).

During World War Two, even while the bombs were still falling on London, research was being undertaken into how the UK would emerge from the war. Evidence highlighted the need for large scale reconstruction, but also a change in the way spaces and places were managed to respond to the social and economic changes occurring across the country. In 1947 a Town and Country Planning Act was published and the system we have today still works in the same basic way. From this point forward control of land was nationalised (not ownership), plans were required to manage town and country, and permission was required to undertake new development.

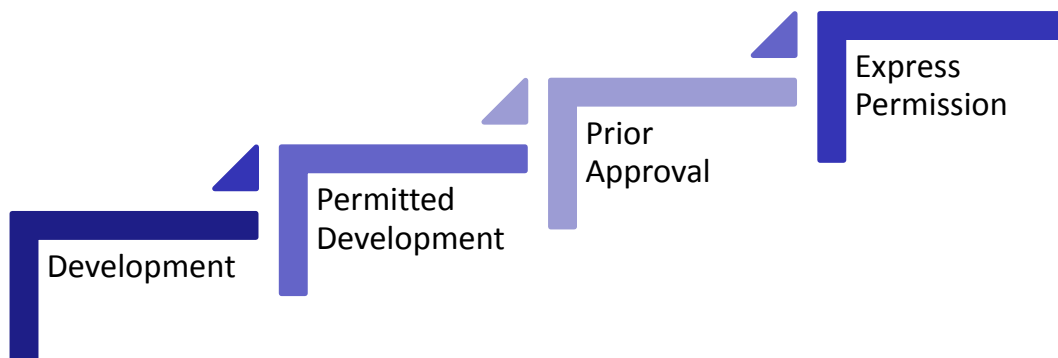
A planning system represents, from a first principles perspective, state intervention into a market. The story presented above is underpinned by a key phenomenon; necessity. The evolution of state intervention, and the broad acceptance of the justification for state intervention, was driven by the necessity of responding to events and circumstances that required address and that private arrangements either could not, or would not, respond to adequately alone (Gilg, A. 2005). From the earliest legislation concerning the prevention of fire, the state has intervened in the public interest and with some degree of a social justice motivation. Ultimately, as a result of the rapid development witnessed during the industrial revolution and the failure of previous health and planning legislation, land *rights* were nationalised and the modern planning system of the United Kingdom was born. As noted by Cullingworth, B and Nadin, V et al (2015), the urban growth witnessed during the later 19th and early 20th Century and the associated environmental, health and social challenges that resulted ultimately led to an appreciation and wide acceptance of the necessity of the state interfering into the market and private property rights in the public interest and with regard to social justice.

2. The proportionality hierarchy

Across the European Union, two key principles exist; subsidiarity and proportionality. These principles also underpin in some respects the recent liberal conservative government in the United Kingdom; from the perspective of planning the Government proceeded with a presented parallel objective of a more proportionate approach to intervention by reducing state control and procedural burdens, and ‘Localism’, which theoretically involved the further application of the subsidiary agenda through the development of the neighbourhood scale of planning (DCLG, 2011). It is beyond the scope of this paper to consider the reality of the Localism agenda as realised.

Returning to first principles, the manner in which proportionality is realised in the United Kingdom from the perspective of control over development is via a hierarchy modeled on the basis of increased state involvement set against the likelihood of impact/harm. This is delivered in the context of a discretionary, as opposed to codified, model of decision making and development management.

Figure 1: The proportionality hierarchy



(Sheppard, A. 2015)

Figure 1 above demonstrates the basic steps of intervention. In the first instance the question must be asked as to whether the activity occurring. As stated in Section 57 of the Town and Country Planning Act 1990:

‘...planning permission is required for the carrying out of any development of land.’

The definition of development is therefore an important first question. Development is defined as the carrying out of building, engineering, mining, or other operations in, on, over or under the land, or the making of any material change in the use of any building or other land (S.55, T&CPA 1990). A ‘building’ in this context is any structure or erection, the ultimate decision being based upon professional judgement informed by case law; matters such as size, permanence, physical attachment to the land have all be held as key in this respect. By defining ‘development’ a basic parameter is created with the identification of matters which fall under the control of the planning system, and those that do not. On the bottom step of the hierarchy we have effectively established a legitimacy in potential intervention, but it is the impact based approach of the hierarchy which gives the system its sophistication.

Permitted Development, with which Prior Approval is also based, resents the key tool of proportionality within the UK planning system. Permitted Development Rights are effectively identified forms of development that can be undertaken without the requirement for an express application to the Local Planning Authority for permission; effectively, they are forms of development that national government has pre-granted planning permission for, subject to adherence to the conditions prescribed. The Permitted Development system utilises a tool called a Development Order; this is the mechanism employed by national government to effectively grant permission for prescribed works on a national level. Currently it is under the Town and Country Planning Act (General Permitted Development) Order 2015 that national Permitted Development rights are prescribed. Local Development Orders (LDO) can also be used at the local level by Local Planning Authorities (LPA) to vary Permitted Development rights within an identified geographical space. The counter-tool against both LDOs and the nationally set Permitted Development rights are Article 4 Directions (under the Town and Country Planning Act (General Permitted Development) Order 2015).

Prior Approval is effectively a 'catch' on certain Permitted Development rights; usually more significant forms of minor development. The Permitted Development rights exist within the Prior Approval model, but intention to undertake development requires a Prior Approval notification to the LPA. The LPA are then able to review the proposal against specified and limited criteria and determine whether to approve the scheme or refuse it. The Prior Approval scheme is therefore something of a middle ground between Permitted Development rights, where the LPA have no ability to influence subject to adherence to the requirements and condition, and express permission, where LPA effectively have full discretion over the decision against a formal planning application.

The planning system in the UK is a discretionary model, meaning that where express permission is required from the local planning authority the decision is made in accordance with the provisions of the legally recognised Development Plan, unless 'other material considerations' indicate that another outcome is merited. Interestingly there, Permitted Development rights effectively represent a codified model of decision making embedded within a discretionary one.

3. Proportionality in context

The hierarchy presented above is modelled firmly on the basis of proportionality; where impact upon amenities may occur state intervention is justified in the public interest. The transition from recognition of 'development' through Permitted Development and prior approval up to the full express planning permission process is the realisation of this proportionate response in practice.

The system in place is not solely based around the amenity driver, there is also the parallel need to ensure that the system is able to operate effectively and efficiently; ensuring that the system is response, manageable, and does not represent an administrative burden is therefore also highlighted.

The above two drivers can be seen to be operating in conflict to one another in some respects; the state intervenes in the public interest but in doing so impacts upon the functioning of the market, in doing so implementation and delivery of change are influenced. The presentation of planning as a 'barrier' to implementation and delivery and as a 'burden' has become particularly commonplace since the 2010 General Election; from the earliest days of the new government it was made clear that planning would be a key focus of reform in an attempt to deliver economic growth. In the 'Plan for Growth' it was stated that:

'One of the most significant burdens highlighted consistently during the Growth Review has been the UK's overly slow and bureaucratic planning system'
(HM Treasury, 2011, pg. 21)

4. Barriers and implementation

"We're determined to cut through the bureaucracy that holds us back. That starts with getting the planners off our backs, getting behind the businesses that have the ambition to expand and meeting the aspirations of families that want to buy or improve a home." (Rt Hon. David Cameron MP, 2012)

The reliance upon the private sector for delivery is greater now than ever before with the retraction of the state as an actor since the latter part of the twentieth century. In the immediate post-war period, the state was a more active actor.

Gilg (2005) discusses the role of the state in the immediate post-war period and notes how a key feature of the newly emerged system was a presumption that the local authorities would be the developers, building a majority of the residences, employment opportunities and social infrastructure.

The move to a model of development almost completely reliant upon the private sector arguably makes question of delivery more pressing from the perspective of the market dynamics and the importance of the state facilitating an effective regulative and legislative implementation environment.

Barriers of implementation concerning delivery of policy objectives are discussed from a theoretical perspective by Peter Dorey (2005). Dorey builds upon the work of Hood (1976) to present a series of barriers to ‘perfect’ implementation. Dorey recognised the impossibility of creating a perfect implementation scenario but the barriers are presented to enable understanding and an ability to minimise impact. The theory also draws upon the work of Pressman and Wildavsky (1973) in relation to the concept of ‘street level bureaucrats’; those who administer and apply public policy. Public sector planning professionals are an example of such ‘street level bureaucrats’. The barriers to implementation as presented by Dorey are summarised below:

Table 1: The barriers to Implementation

1	External agencies or events impose major constraints – policies / remit of other organisations get in the way, or events, such as the performance of the economy.
2	There are too many dependency relationships – to administer the policy as intended requires the agreement or cooperation of others. This can lead to communication problems or different organisations / individuals pursuing their own particular goals.
3	There are too many decision points – once a policy is adopted there are too many stages in the delivery chain. The policy can change at each stage due to the involvement of street level bureaucrats at each stage of the process
4	Resources are inadequate: <ul style="list-style-type: none"> • There is insufficient time – to achieve the aims / objectives of the policy. • There are inadequate human resources – lack of staff or lack of suitably qualified personnel. • There are inadequate financial resources – lack of finance or funding.
5	The policy is based on an invalid theory of cause and effect – most policy is a response to a problem / situation, but are the policy makers’ assumptions about the underlying causes of a particular problem correct?
6	The objectives are unclear, incoherent and inconsistent – if there are too many objectives, inconsistencies will become apparent at the implementation stage, or unforeseen or unintended consequences can arise.
7	The objectives are not understood or accepted by street level bureaucrats – those who implement the policy may not fully understand the intent of the policy makers, or they may have different

	values or organisational goals.
8	Those to whom a policy is applied or targeted do not respond in the anticipated manner – will the majority of people accept the measures concerned and act accordingly?

(Dorey, P. 2005)

The planning system, and indeed planners (as ‘street level bureaucrats’), can be related to the barriers presented by Dorey, including from the perspective of the planning decision making process. The express planning permission routeway is challenged in relation to the dependency relationships, the number of decision points, the resource demands, and the behaviour of ‘street level bureaucrats’ for example.

Given the challenges facing any form of state intervention into a market it is to be expected that issues will exist with the effectiveness of any created ‘system’. It is therefore unsurprising that the government moved to address the presented planning barriers; the Plan for Growth (2011, pg. 23) stated an intention ‘To reform the planning system radically and fundamentally...’ including an intention to ‘bring forward proposals to extend Permitted Development rights...’ (ibid).

5. A flawed justification and approach?

The extension of Permitted Development rights is presented as solution to planning as a barrier because it is a way to remove some developments from requiring an express planning permission, instead allowing them to proceed subject to adherence to the stated conditions and parameters. This intention presumes that the extant balance of necessity of state intervention is incorrect and inappropriate.

In 2011, in response to the pressure facing the planning system, the Royal Town Planning Institute presented a paper entitled ‘The Top Five Planning Myths’ which considered in part the planning application process that reforms have sought to address as a suggested barrier to implementation and economic growth. The contents of this paper are summarised below:

Table 2: The Top Five Planning Myths

‘Myth’	Response
The Default Response to a Planning Application is “No”	<p>Over 80% of planning applications have been granted – higher (around 90%) for major commercial applications.</p> <p>Communities need the power to say ‘no’ to prevent harmful development and drive up built environment quality.</p> <p>Businesses want councils to say ‘no’ to inappropriate development that would harm their investments.</p>

<p>Planning is Slow</p>	<p>Councils as a whole meet or exceed the 8 or 13 week targets set for them. Only 0.7% of planning applications take longer than 12 months to reach a decision.</p> <p>The development industry often conflates planning with other consent regimes, such as licensing or environmental permits.</p> <p>The overall development process in England is among the quickest in western Europe</p>
<p>Planning is Costly</p>	<p>Planning creates wealth by promoting regeneration, securing funding for infrastructure and mitigating the negative effects of development.</p>
<p>Planning is a Drag on Economic Growth</p>	<p>“Planning is core to achieving a wide range of objectives for business and society, and for achieving sustainable development.” (CBI)</p> <p>In 2003, the then ODPM Select Committee Inquiry into Planning and Competitiveness, said “Claims that planning damages the nation’s competitiveness seem to have been made without evidence. The evidence that we have received suggests that businesses generally support the planning system and seek a number of changes in implementation, which do not necessarily require legislation.”</p>
<p>Planning Forces House Prices Up</p>	<p>House price inflation is not solely the result of a lack of housebuilding: the Barker Review found that the effect was marginal taking into account the other determinants of supply and price, i.e. the availability of finance and demand.</p> <p>The private sector has only ever been able to contribute around 150-200,000 new homes a year across Great Britain. Until the government ended mass council housing in the 1980s, the public sector helped to almost double this. If public sector housing had continued there might be at least 2 million more homes now.</p> <p>The current slump in housebuilding is the result of a lack of finance, both for homebuyers and housebuilders, prevalent since the “credit crunch”. The slow-down in planning permissions is the result of a lack of planning applications.</p> <p>There is not a lack of homes, premises to convert or sites to build on. In England, there are around</p>

	750,000 empty homes, nearly half of which have been empty for over 6 months, and developers have permission for around 300,000 homes they are not building.
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(RTPI (2011) ‘Top Five Planning Myths’)

In the first instance we must therefore consider the possibility that the very basis for the steps taken to increase the use and scope of Permitted Development are based upon a flawed assumption that it is the necessary and appropriate step for many of the reasons presented by government.

A fundamental issue exists here; the suggested driver for change pertained in part to the presented concerns associated with the planning application process and the implications of these upon the ability of the planning system to support implementation and delivery. The system was seen as a barrier to the delivery of economic growth. The response was not to consider further possible adjustments to the planning application system; rather it was to remove developments altogether from the requirement for express planning permission. Permitted Development rights were the focus of attention, with this mechanism seen as a way to provide an easy route through the planning ‘maze’, enabling a barrier free system to support implementation and delivery.

In accordance with the previously presented hierarchy, the behavior of the state was modeled on the basis of increased state involvement for justifiable public interest and social justice reasoning set against the likelihood of impact/harm, historic revisions to Permitted Development rights were undertaken based upon the desirability of removing unnecessary burdens associated with the planning system whilst preserving protections for amenities etc. This was the case with the revisions pursued in 2008 relating to householder extensions where it was made clear that the intention was to remove some forms of development from requiring express planning permission, but only in circumstances in which amenities are preserved (CLG. 2008). Revisions post 2010 have, it is suggested here, been approached differently, with economic growth the driver and scant consideration given to the wider implications.

6. Permitted Disorder

Within the contested space, change did occur. Change did not take place in a single measured step, instead a series of amendments were introduced in 2010, 2011, 2012, 2013, 2014 and 2015. It is beyond the scope of this paper to detail all of these revisions, but in each case the revisions each had the effect of extending the Permitted Development allowances in some way.

Through the attempts to extend Permitted Development rights and remove developments from the requirement for express planning permission it is suggested that a paradox has emerged however; the more the Government attempts to simplify the decision making system and facilitate development, the more complex and flawed the system has become (Sheppard, A. 2014).

The changes introduced have led to new Permitted Development rights being created, existing rights extended (some permanently some temporarily), the prior approval process becoming increasingly prominent and used, and Local Development Orders have been presented as a potential solution to the planning ‘barriers’ associated with everything from minor work to comprehensive brownfield land redevelopment. The nature and intentions of the changes are not in themselves necessarily all problematic, but the continuous and piecemeal manner in which these changes are being introduced is making for a very cumbersome, complex and confusing system which, conceptually, needs to be none of these things. As a result, it is suggested that we now find ourselves in an environment where regulation density and complexity is a real issue to the extent that the system is becoming

dysfunctional. It is also argued that in some cases the changes have failed to consider the important question of the necessity of state intervention and the system emerging does not necessarily represent a proportionate model based upon impact and controls existing where justified on the basis of social justice and the public interest. Some recent adjustments concerning, for example, changes of use, limit the potential for state intervention to manage impact and spatial planning where this is potentially very important (Sheppard, A. 2014).

7. Case Study: Office to Residential change of use

Introduction

On the 30th May 2013 the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 came into force. Included in this amendment was the right for a period of three years to change the use of a building from an office use to dwellings. This effectively allowed existing office buildings to be converted into dwellings without the requirement for express planning permission. This was a new step; previously such a change would have required the express permission of the Local Planning Authority. The intended effect of these amendments was to support an increase in housing supply, encourage regeneration of offices and bring empty properties into productive use.

Local Planning Authorities were given the opportunity to exempt themselves from this new arrangement where concern existed that such rights would lead to either the loss of a nationally significant area of economic activity or substantial adverse economic consequences at the local authority level not offset by the positive benefits the new right would bring. It was also a requirement that the office building was vacant prior to the point of the new amendment being introduced to ensure that buildings with a viable use were not inappropriately lost. The amendment also does not apply to protected heritage assets (Listed Buildings and Scheduled Monuments).

Although the amendment removes a change of use from office to residential from requiring an express planning permission, it was not completely without oversight. The system employs the 'Prior Approval' model whereby it is necessary apply to the local planning authority for a determination as to whether the prior approval of the authority will be required in relation to the acceptability of the proposal upon:

- (a) transport and highways impacts
- (b) contamination risks on the site;
- (c) flooding risks on the site.

The requirements associated with the prior approval process are not extensive though; applications only need to be accompanied by a written description of the proposed development; a plan indicating the site and showing the proposed development; contact details and any fee payable. Consultation with the necessary bodies is also required where significant traffic impacts are involved and/or when the development is within an area at risk of flooding.

Delivering change

The intention of the changes introduced were to increase housing supply and in parallel address weaknesses in the office supply market concerning both the amount of space available and its quality.

Research undertaken by planning consultancy GVA suggests that nationally over 11m sq ft of office space has left the market for alternative use (Morris, M. 2015). In 2014 some 6.8m sq ft of office space left the market and it is suggested that 17,500 homes could ultimately be provided through the policy (ibid). These changes can be seen as positive in some respects; surplus office space supply does exist in some areas, a surplus of lower grade office space does exist in some areas, and there is a national housing shortage. A report from planning consultancy Nathaniel Lichfield and Partners

(NLP) in May 2015 noted that the change had led to some positive effects in some areas, noting in particular that some poor quality office space has been removed and replaced with much needed residential accommodation and also that removing office space from the market has driven up rental values to the extent that new office development that was otherwise stalled was becoming viable again (NLP, 2015).

The cost of change

The introduction of the allowances for office to residential conversions has seen a mixed response however, and it has been controversial in some respects due to the impacts that appear to be resulting.

In some cases the arrangements are placing undesirable pressure on the office market. In London, Westminster City Council is seeking to protect its declining office supply because they have estimated 1.8million sq ft of space has been lost driving undersupply and higher rents (Estates Gazette, 2015). The NLP report highlights that the conversion of offices to homes since the right was introduced has caused problems in areas with a housing shortage because this is placing significant pressure upon vacant office space to the extent that the fasted decline in the availability of office space was being witnessed since 1998 and that this could lead to a potential supply crunch and unsustainable rising rental levels (NLP, 2015).

Conversions of office buildings to residential use that utilise the Permitted Development arrangements are not normally required to make planning gain contributions. Whereas a conversion pursued through the traditional planning application process could be required to make financial contributions towards infrastructure delivery and provide affordable housing, this is not the case through Permitted Development rights. The provision of affordable housing in the UK is dependent upon planning gain to a significant extent.

In addition to the affordable housing issue, the absence of planning gain means important resources are not provided to the local planning authority to support physical and social infrastructure provisions. Thus, not only is the change of use less open to scrutiny in the first instance from the perspective of the fundamental suitability of the location for the introduction of new residential accommodation, it also lacks planning gain resources to mitigate against the resulting impacts. Changes of use can therefore take place in less desirable locations from a social infrastructure perspective and further contribute to the challenges being faced in the area. This issue becomes magnified when development is possible in areas where social and physical infrastructure is inadequate to accommodate further residential development; a scenario entirely possible through the current arrangements. It is essentially only through arguments relating to transport and highways issues that less desirable locations can be resisted in the context of the sustainability of a given location; a more limited basis that would be the case where full permission was required.

Research undertaken in Bristol suggests that schemes that are coming forward in this City are broadly occurring in locations with good access to adequate infrastructure (Frost, A. 2015), but it remains the case that the legislative mechanism now in play does not provide an opportunity to prevent change from taking place with this not the case except in respect of a few very specific situations, the market is once more effectively the determinant of where these forms of changes of use occur, a situation which is suggested as being a regression to the pre-1947 Act environment of inadequate controls and where it must be remembered intervention became necessary because of the failure of the market to always deliver acceptable change (Gilg, A. 2005).

Finally, the resource question must be considered. The planning fee for a Prior Approval application £80. In contrast, the fee for a change of use full planning application can be significant:

Table 3: Planning Fees Extract

Change of Use of a building to use as one or more separate dwellinghouses, or other cases		
Number of dwellings	Not more than 50 dwellings	£385 for each
Number of dwellings	More than 50 dwellings	£19,049 + £115 for each in excess of 50 up to a maximum of £250,000
Other Changes of Use of a building or land		£385

(The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 – correct at April 2015)

A Prior Approval application has resource implications; the application still requires administration, consideration and investigation by the local planning authority team. The income associated with an application is insignificant however, meaning a significant cost is borne by financially stretched local planning authorities.

Most significantly perhaps, the Permitted Development allowances remove the ability of the local planning authority to strategically manage office and residential supply, nor can they influence the spatial distribution of new developments.

Summary

The office to residential allowances provided through the 2013 Permitted Development rights amendments were essentially introduced to increase housing supply and on the basis that some buildings that were previously in use as offices are now residential there is some success to be recognised. However, the cost of this is suggested as being significant; strategic management of office supply has been lost in areas without protection in place and importantly the Permitted Development regime does not allow local authorities to prevent/influence inappropriate development taking place in less appropriate locations without appropriate access to services and amenities except in more limited circumstances.

In parallel, planning gain is not supported, further undermining the ability of the local planning authority to act effectively in the management of the built and natural environment and their ability to support the delivery of required physical and social infrastructure. The fee model approach further impacts upon resources, making the system flawed from the local planning authority perspective in relation to process/system viability.

8. Conclusions

As noted at the beginning of this paper, the evolution of state intervention, and the broad acceptance of the justification for state intervention, was driven by the necessity of responding to events and circumstances that required address and that private arrangements either could not, or would not, respond to adequately alone. The hierarchy of intervention, employing the development, Permitted Development, prior approval and express permission steps supports proportionality conceptually, and historically change was predicated on an impact based approach with balanced consideration of costs and benefits (CLG, 2008).

The recent changes to Permitted Development rights in England, including the office to residential example provided, arguably renege on these principles. The economic growth motivation has primacy and inadequate consideration has been given to the implications of the changes pursued from the

perspective of the ability of local planning authorities to strategically and spatially manage change in the built and natural environment. It is suggested that the emerging system is flawed and potentially dangerous; in the case of the example presented local planning authorities lose effective control of strategic office floorspace management and residential dwelling distribution. In parallel, planning gain is absent and fee income is minimal making local planning authorities resource challenged and potentially unable to effectively mitigate impact and provide adequate social and physical and social infrastructure.

Effective proportionate control is at risk and although the system is only emerging, evidence is presenting itself already to suggest that effective planning is being lost in the drive to facilitate economic growth.

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