ECO-SCHOOLS SOLAR PROGRAMME

PLANNING PERMISSIONS & PERMITTED DEVELOPMENT

OPINION

PURPOSE

1. I have been instructed by Watson, Farley & Williams (Neil Budd) to advise whether the installation of solar PV panels on school roofs falls within Class A of Part 32 of Schedule 2 to the Town and Country (General Permitted Development) Order 1995 (as amended) ("the GPDO"). Class A applies to the "erection, extension or alteration of a school, college, university or hospital building" without restriction. Given that the Proposals could also constitute development by a local authority I have also considered the application of Class A of Part 12 of the GPDO.

THE PROPOSALS

2. I have been forwarded a large amount of technical material as to the various mounting options. From it, as matter of general approach, for flat roofs the PV panels will be positioned using ballasted structures to which they will be physically attached. They will then be sited at an appropriate angle. For pitched roofs it is intended that they will be attached to the existing roof covering, usually tiling, by clip fastenings. In both types of location a cable work network will connect the PV panels to the existing electrical housing of the school building. It is intended that these electrical connections will be "hard wired" with junction boxes and other relevant apparatus affixed to the walls. It is intended that the installation will be a durable and permanent one intended to be in operation for the long-term.

LEGAL PRINCIPLES

3. The essence of permitted development rights is to make lawful certain works which would otherwise require planning permission. Accordingly, the starting point is to ascertain whether the works in question amount to "development".

4. **The meaning of development**: Section 55(1) of the Town and Country Planning Act 1990 ("the TCPA") defines "*development*" as meaning "*the carrying out of building, engineering, mining and other operations in, on, over or under land*". Sub-section 55(1A)(c) further defines "*building operations*" as including "*structural alterations of or additions to buildings*".

5. It is also of note that as sub-section 55(2) excludes the carrying out for the maintenance, improvement or other alterations of any building of works which do not materially affect the external appearance of the building then works that do affect the external appearance constitute "development".

6. The word "*building*" is defined by section 336(1) of the TCPA as including *"any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building"*. It is of note in this context that exclusion of plant and machinery is expressed to be "in" and not "on" a building. It is for this reason that, often times, for example, express planning permission is required for external, permanently mounted air conditioning units.

7. Issues of size, permanence and degree of physical attachment are also relevant. The decision of the Court of Appeal in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions and Harrow LBC (No.2)* [2000] JPL 1025 ("*Skerritts (No.2)*")[1] provides helpful and recent guidance in this type of context. Whether *'building operations'* have occurred involves the application of a legal test, originating from a much earlier decision, *Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen and Baldwin's Iron and Steel Co.Ltd* [1949] 1 KB 385. That test is whether three factors are met – size, permanence and degree of

[1] See Para. 14 below for reference to *Skerritts (No.1)*

physical attachment. Although the case was concerned with rating its appropriateness to planning legislation was confirmed in *Barvis Ltd v Secretary of State for the Environment* [1971] 22 P&CR 710. In *Skerritts No.2*, Pill LJ approved the approach adopted by Bridge J in *Barvis,* that the question of whether there had been a building operation was to consider, first, whether there was a building. If there was a building, applying the test set out in *Cardiff Rating Authority*, then what had created it was a building operation. All of the circumstances have to be taken into account.

8. The facts of the *Skerritts No.2* case concerned the annual erection of a marquee on a hotel lawn for eight months each year. Due to its ample dimensions, permanent rather than fleeting character and the secure nature of its anchorage a planning inspector had determined that it was a "building". That determination was upheld by the Court of Appeal. The same approach and consequent finding was made by Sullivan J. in respect of agricultural polytunnels used for soft fruit production in the later case of *Hall Hunter Partnership v First Secretary of State* [2006] EWHC 3482 (Admin).

PART 32 OF THE GPDO

9. Class A of Part 32 permits the "erection, extension or alteration of a school, college, university or hospital building".

10. However, Paragraph A.1 of Part 32 identifies the following development as not permitted under Class A:

(a) if the cumulative gross floor space of any buildings, erected, extended or altered would exceed (i) 25% of the gross floor space of the original school or (ii) 100 square metres, whichever is the lesser

(b) if any part of the development would be within 5 metres of the boundary of the curtilage of the premises;

(c) if, as a result of the development, any land used as a playing field at any time in the five years before the development commenced and remaining in that use could no longer be so used;

(d) if the height of any new building erected would exceed five metres;

(e) if the height of the building as extended or altered would exceed (i) if within 10 metres of a boundary of the curtilage of the premises five metres; or (ii) in all other cases, the height of the building being extended or altered;

(f) if the development is within the curtilage of a listed building; and

(g) unless the predominant use of the existing buildings on the premises is for the provision of education.

11. In any event, Paragraph A.2 sets out express conditions which must be met for the development to be permitted:

(1) the development must be within the curtilage of the existing school (sub-para (a) of the Part 32);

(2) the development shall only be used as part of, or for a purpose incidental to, the use of the school (sub-para (b) of the Part 32);

(3) if the development falls within "article 1(5) land" (i.e. National Parks, AONBs, conservation areas, areas designated under Section 41(3) Wildlife and Countryside Act 1981, the Broads and a World Heritage Site) then the extension or alteration must be constructed using materials which have a similar external appearance to those used for the existing building (sub-para (d) of the Part 32).

12. Given the various references to "curtilage" it should be noted that the actual delineation of a "curtilage" has given rise to some difficulty as a result of a series of cases. The leading case of <u>*Sinclair-Lockhart Trustees v Central Land Board*</u> [1950] 1 P&CR 195 is undisputed authority for the proposition that a "*curtilage*" is:

"... the ground which is used for the comfortable enjoyment of a house or other building ... and thereby an integral part of the same although it has not been marked

off or enclosed in any way. It is enough that it serve the purpose of the house or building in some necessary or reasonably useful way".

13. The emphasis on this latter aspect is that it is enough that it serves the purpose. It is not a requirement that it must serve (see *Wheeler v First Secretary of State* [2002] EWHC 1194 (Admin) (Harrison J) where a workshop replaced a former agricultural building.

14. However, there is no definitive legal test as to the extent of a "curtilage". Both the leading cases, *Dyer v Dorset County Council* [1989] 1 QB 346 and *Secretary of State v Skerritts of Nottingham Ltd* [2000] 80 P&CR 516 ("*Skerritts (No.1)"*), only advise that it is a matter of fact and degree. As one of the Court of Appeal judges remarks in his judgment in *Skerritts (No.1)*:

> *"I also respectfully doubt whether the expression 'curtilage' can usefully be called a term of art. That phrase describes an expression which is used by persons skilled in some particular profession, art or science, and which the practitioners clearly understand even if the uninitiated do not. This case demonstrates that not even lawyers can have a precise idea what 'curtilage' means. It is, as this court said in Dyer's case, a question of fact and degree."*[2]

15. In *Dyer* the Court of Appeal was concerned with whether a lecturer at an agricultural college was precluded under "right to buy" provisions of a house let to him within but on the edge of the college grounds. In that case it did not. In *Skerritts (No.1)* the issue concerned whether an unlisted stable-block fell within the curtilage of a listed hotel in the context of the scope of a listed building enforcement notice alleging the insertion of unauthorised windows. It did.

SPECIFIC CONSIDERATIONS AFFECTING PART 32

16. **Is it development requiring planning permission?** The first consideration is whether the Proposals fall within the definition of "building". As explained in Paragraph 6 above, the word "*building*" includes *"any structure or erection, and any*

[2] Robert Walker LJ @ 522

part of a building, as so defined". This is an energy generation system intended to be treated as a long-term facility. It is not plant or machinery Here, for flat roofs, each PV panel requires a structure on which to be mounted, whether it be of a frame variety or an L-shaped tray. For pitched roofs, the mounting of the system is intended to provide a raised layer of PV panels above the existing covering.

17. The second consideration is the degree of attachment to the existing building. For both flat and pitched roofs my understanding is that the PV panels will be physically attached to the structure. This will be to the existing roof by clip fastenings. For flat roofs it will through the use of ballasted structures (which can be anchored). Furthermore, in both instances, cable work will connect the PV panels to the school building's existing electrical housing. As such, there will be a sufficient degree of attachment for the Proposals to be treated as a permanent installation on the building. Again, this underlines a distinction between this type of facility and plant or machinery within the building.

18. Furthermore, building operations, in the practical sense, will be required for each installation.

19. In overall terms, therefore, the size of the array, its permanence and degree of physical attachment sufficiently meet the *Barvis* tests mentioned in Paragraph 7 above.

20. **Is it an alteration?** By its very nature an "alteration", in this context, connotes an adjustment, change, or modification to the external appearance of the building in question. Neither the TCPA nor the GDPO define the word "alteration". However, the use of the word "alteration" within section 55(1A) is more restricted as it is preceded by the adjective "structural". In contrast, the word "alteration" in Part 32 is without qualification. This is significant; for in my view this distinction embraces a wider ambit of alterations than simply new buildings or extensions. For example, it would include the introduction of new windows or doors; and as mentioned in

Paragraph 5 above, works which materially affect the external appearance of a building are treated as "development" so will require planning permission unless treated as permitted development. I would add that the change in external appearance also requires a degree of visibility, too. With the Proposals, this will be self-evident on a pitched roof but even when located on a flat roof due to the angle, orientation and size of the PV panel array.

21. I also do not consider that the exemption criteria in Class A.1 concerning building heights and dimensions[3] limit the ambit of Part 32 rights to only structural alterations in this regard. Rather, these are focused on spatial separation, protection of the amenities of adjoining residents and other relevant factors which are considered, in the public interest, to require more detailed consideration through a specific planning application.

22. Furthermore, as a matter of general approach, the Part 32 use of the word "alteration" is also intentionally generous in the scope of the permitted rights allowed under that heading; for it needs to be borne in mind that permitted development rights are a form of deregulation, the purpose of which is to reduce the administrative burden in respect of both routine and small-scale changes. This degree of latitude, save in the case of buildings that are listed or within such curtilage, within a conservation area or other article 1(5) land, is considered to be greater in the public interest for schools, colleges, universities and hospitals than, for example, operational Crown Buildings. There, the equivalent rights under Part 34, paragraph B.1(e), of the GPDO specifically excludes extension or alterations if "the external appearance of the building would be materially affected"[4].

23. By way of further support for the correctness of this approach, I also draw attention to the contrasting approach taken in Part 40 of the GPDO. There, one of the

[3] See Paragraph 10 above.

[4] It should also be noted that Part 34, which provides the same range of permitted development rights as for local authorities under Part 12 (see Paragraph s 28 & 29 below) is more restricted with regard to external appearance

conditions for the use of permitted development rights for the installation of domestic microgeneration equipment is the siting of the solar PV or solar thermal equipment so as to minimize its effect on the external appearance of the dwellinghouse (see paragraph A.2(a) of Part 40). Incidentally, the same reservation is found in respect of the exercise of permitted development rights for CCTV cameras under Part 33 of the GPDO. However, the fact that Part 40 is only restricted to domestic microgeneration does not mean that it restricts such permitted development rights on a generic basis. Again, as a matter of public interest and public policy, I take the view that the Department for Communities and Local Government have only wanted to provide specific guidance for householders, leaving the issue for institutional buildings to be to be addressed on a more flexible basis by local authorities. This also accords with my understanding, recorded in Paragraph 22 above, that a greater degree of latitude is to be given to properties falling within Part 32 of the GPDO where, in effect, a public service is being performed.

24. **Can the other applicable Class A requirements be met?** I highlight three particular considerations arising out of Paragraph A.2 of Part 32. First, is whether the Proposals will fall within the curtilage of the existing school, as required by Paragraph A.2(a). As it is intended that they will be placed on the roofs of buildings this requirement is met. It also needs to be borne in mind that, in any event, the curtilage of the school will be greater than the buildings themselves. Indeed, from the facts of *Dyer* and *Skerritts (No.1)* it is apparent that substantial area of land can be included within a "curtilage". Accordingly, in practice, it seems highly unlikely that the restriction in Paragraph A.1(b) (if any part of the development would be within 5 metres of the boundary of the curtilage of the premises) will preclude the erection of the Proposals on school buildings save, perhaps, in a constrained urban context.

25. Secondly, as the intention of the Proposals is to provide an electricity source for the school buildings the next requirement will be met, namely, that the alteration be

used as part of, or for a purpose incidental to, the use of the school. Accordingly, the requirement of Paragraph A.2(b) will also be met.

26. The third consideration is whether the buildings upon which the Proposals are to be located fall within the definition of article 1(5) land, in which event the materials for the alteration must match those of the existing buildings. As a matter of approach the external appearance of the Proposals cannot meet this requirement, which means that permitted development rights will not apply in such circumstances. This is by reason of the restriction in Paragraph A.2(d). Nor will they apply where the existing school building is listed or where it falls within the curtilage of some other listed building[5]. This arises from the other preclusive provision in Paragraph A.1(f).

27. Finally, I would remind that the other height and distance restrictions set out in Paragraphs A.1(a), (d) and (e) of Part 32 are also location specific.

PART 12 OF THE GPDO

28. Class A of Part 12 permits:

"The erection or construction and the maintenance, improvement or other alteration by a local authority or by an urban development corporation of—

(a) any small ancillary building, works or equipment on land belonging to or maintained by them required for the purposes of any function exercised by them on that land otherwise than as statutory undertakers;

(b) lamp standards, information kiosks, passenger shelters, public shelters and seats, telephone boxes, fire alarms, public drinking fountains, horse troughs, refuse bins or baskets, barriers for the control of people waiting to enter public service

[5] See *Skerritts No.1* again

vehicles, and similar structures or works required in connection with the operation of any public service administered by them ."

29. Class A.2 further defines the reference in Class A to any small ancillary building, works or equipment as reference to "*any ancillary building, works or equipment not exceeding 4 metres in height or 200 cubic metres in capacity*".

SPECIFIC CONSIDERATIONS AFFECTING PART 12

30. The scope of Class A of Part 12 is much wider than Class A of Part 32 as the words . "small ancillary building, works or equipment" clearly embrace the principle of the Proposals being treated as permitted development. However, it is the size restrictions under Class A.2 where a specific solar PV scheme may well fall outwith Part 12.

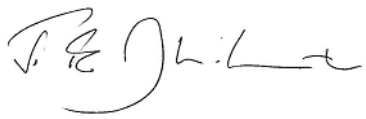
THE RELATIONSHIP BETWEEN PART 12 AND PART 32

31. It is my understanding that a dual consideration of Part 12 and Part 32 would only apply where the school in question is owned and run by a local authority. Arguably, for Part 12 to apply it would also require the development is to be carried out by that local authority rather than under a separate arrangement by a licensee/lessee.

32. As the GPDO grants planning permission, in article 3(1) for the classes of development set out in Schedule 2 it is permissible for more than one class to apply. Thus, for example, a householder has permitted development rights under not just Part 1 (development within the curtilage of a dwelling-house) but also under Part 2 (minor operations) and Part 40 (domestic microgeneration). Accordingly, I see no legal impediment for a local planning authority to review a specific proposal, here, under both Part 12 and Part 32 of the GPDO.

CONCLUSIONS

33. As a matter of general approach, I am of the opinion that the Proposals are capable of being treated as permitted development under the GPDO. Whilst site specific considerations will need to be carefully applied a local planning authority should be able to proceed with confidence as to the starting point for its determination.



JOHN PUGH-SMITH

October 5th , 2011

Thirty-Nine Essex Street Chambers
39 Essex Street
London
WC2R 3AT