PROPERTY MANAGEMENT

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REFERENCE
GN18-21

TEMPORARY STRUCTURES INCLUDING MARQUEES FOR EVENTS – PLANNING AND HERITAGE ISSUES

(This guidance note replaces GN23-17 which should be deleted from your files)

A. PREFACE AND TEMPORARY NOTE

Marquees and other temporary structures can be useful or essential in generating income to fund the maintenance of heritage.

The purpose of this Guidance Note is to provide guidance on whether they need planning permission and/or heritage consents, and if so on how you can maximise the chances of getting consent(s) in practice. The issues can be complex (there is a Summary in section D below). This Guidance Note particularly focuses on heritage cases.

TEMPORARY NOTE:
To mitigate the economic impacts of Covid, Government has made some **temporary permitted development relaxations** in 2020-21. In particular, the usual permitted development 28-day limit (see section D below) has been extended to 56 days; and 'moveable structures' are permitted within the curtilage of some buildings, including listed buildings if they qualify as a 'historic visitor attraction'. There are also Government suggestions that local planning authorities should not take enforcement action unless there is a good reason to do so. **These are set to expire at the end of 2021**. The rest of this Guidance Note has not been amended to reflect this. For the detail, see the CLA planning Guidance Notes on the Advice page of the CLA website, especially GN15-21 and GN19-20, which have links to the legislation.

B. INTRODUCTION

Local authorities traditionally were deeply reluctant to grant planning permissions for temporary structures, especially near heritage. They saw them as "dangerous", somehow more "dangerous" than permanent planning permissions, and as "inappropriate" by definition anywhere near heritage. The reasons for these views were somewhat opaque, perhaps reflecting a reluctance to concede that the need to fund the maintenance costs of heritage is a material consideration in planning decisions, and/or a lack of experience with temporary permissions, and/or the lack in the past of substantive national planning guidance on the subject. The result was that to a great extent those needing temporary structures felt forced to operate outside the planning system, and were vulnerable to enforcement action, a particular problem when bookings (for example for weddings) were taken well in advance.

Guidance issued by Historic England (then English Heritage) in 2010, after years of CLA lobbying, significantly increased the probability of getting consent in these cases (see sections C and D below), but it is important to be aware of the issues and to make a good case.

This Guidance Note should be used with the CLA Guidance Note *Heritage: Getting heritage and heritage-relevant planning consents*. All CLA heritage Guidance Notes are available from the Advice page on the CLA website www.cla.org.uk, by filtering for "heritage".

There is a separate CLA planning Guidance note *Permitted development rights for temporary buildings and uses of land* (and other planning Guidance Notes which may be relevant).

This Guidance Note is directly applicable to **England**, but the principles are similar in **Wales**. There is no Welsh guidance specifically on temporary structures near heritage, but for that reason it should be possible to refer, tactfully, to the Historic England advice as above.

C. DO I NEED PLANNING PERMISSION FOR A TEMPORARY STRUCTURE

Introduction

This section ignores heritage issues, which are covered in section D. In summary, the key issue – in **s55 of the Town and Country Planning Act 1990** ('the 1990 Act') – is to decide whether the temporary structure constitutes '**development**', in which case planning permission is required. 'Development' can be either a '**building or engineering operation**' – see (a) below, or a '**material change in the use of land**' – see (b) below.

However, in some cases in which planning permission is required, it is deemed already to have been granted, under the **Town and Country Planning (General Permitted Development) (England) Order 2015** ('**GPDO**'). In these '**permitted development**' cases no actual planning application is needed – see (c) below.

For cases of doubt, see (d) below, and the 'Summary' and 'Strategy' sections at the end.

(a) 'Building and engineering operations'

Each case will turn on its individual facts, but courts in judging whether something amounts to a 'building operation' have consistently looked at three main factors: (i) size, (ii) 'permanence', and (iii) physical attachment.

This approach was endorsed by the Court of Appeal in *Skerrits of Nottingham v Secretary of State for the Environment, Transport and the Regions* (2000), which concerned the erection of an extremely large marquee, 40m x 17m, in the grounds of a hotel. The Court of Appeal held that the marquee, which was erected on the lawn "every year for a period of eight months was, due to its ample dimensions, its permanent rather than fleeting character and the secure nature of its anchorage, to be regarded as a building operation. The annual removal of the marquee did not deprive it of the quality of permanence. Permanence did not necessarily connote that the state of affairs was to continue forever or indefinitely."

The same tests were applied in a later High Court decision *Hall Hunter v First Secretary of State and others* (2006). It was held that polytunnels with a length of 50-100m, covering a total area of 30-40ha, in place for 3 to 7 months of the year, and attached to the ground with metal hoops, did involve a 'building operation'.

It seems clear that the erection of a large marquee, or any such substantial structure, for several months of the year is likely to be a 'building operation', and thus 'development' requiring planning permission.

However, a structure which is smaller, less permanent, and/or not substantially attached may not constitute a 'building operation'. It will depend on the individual facts of each case (see (d) below). In Hall Hunter three months could be enough to create 'permanence', but (as in Skerrits) the structures there were very large. A small or medium-sized structure, in place for say one or two (or perhaps more) months, and held in place by weight rather than fixings, may not amount to a 'building operation'. In particular, a marquee erected for a few days for a private party or wedding reception almost certainly will not.

Any significant **ground preparation works** for a temporary structure could in themselves constitute a 'building or engineering operation' requiring planning permission. (Note however that, "within the curtilage of a dwellinghouse", the **General Permitted Development Order, Schedule 2, Part 1, Class F** deems planning permission already to exist for "the provision…of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such", so that where this applies a planning application may not be needed, though some conditions apply. For more about curtilage, see (c) below).

(b) 'Material changes of use'

As above, 'development' can also consist of a '**material change in the use** of the land'. Even where a temporary structure is not a 'building operation', planning permission would be needed if its use amounted to a 'material change of use'.

A marquee for one or two private parties in the garden of a private house should not be a change of use, because such parties are 'incidental to the enjoyment of' houses and their gardens. That would probably remain the case if the marquee was also used for a charitable event, or (perhaps) hired out briefly. But a marquee regularly hired out commercially for a number of parties, or used for retail purposes, probably would amount to a material change of

use, because these are essentially business, rather than residential, uses, and planning permission would be required[1]. Conversely, a hotel using a marquee for parties would probably not involve a 'material change of use'.

(c) Is permission already deemed to have been granted under the General Permitted Development Order?

Where planning permission is required, it may be deemed already to exist by the General Permitted Development Order (GPDO). Although consolidated and tidied up in 2015, this is a complex document. Two sections of the GPDO are potentially relevant:

(i) The **GPDO**, in **Schedule 2, Part 4, Class B**, grants planning permission for "the use of any land for any purpose for not more than 28 days in total in any calendar year…and the provision on the land of any moveable structure for the purposes of the permitted use". This is widely used. It however does not apply if "the land in question is a building or is within the **curtilage** of a building" (there are some other restrictions, eg in SSSIs, and on markets). If you are not 'within the curtilage of a building', and do not exceed the 28-day limit, therefore, you should not need to make a planning application for a temporary structure.

Secondly, in interpreting this it is important to note firstly that the 28 days is a total number of days: it does not mean that you can hold 28 weddings and erect a marquee for 4 days for each. And if you have already had say 7 days of some other use permitted only because of the GPDO, that reduces the 28 day total commensurately. It is also vital to remove the structure entirely after use, and all other features like boundary ropes or dustbins.

Thirdly, the extent of 'curtilage' may sometimes be unclear. 'Curtilage' is not defined in statute, but is often considered in case law. Essentially it depends on past and present ownership, use and function, and physical layout. Before 2000 courts tended to define 'curtilage' as necessarily small, but Skerrits appears to have widened this. In practice, the 'curtilage' of a house and small garden is likely to include the whole area owned, but where a larger area is owned this may well not be the case, especially where there are areas whose use relates less directly to the dwelling, and/or physical boundaries. A front lawn, back yard and parking area probably are within the 'curtilage'; outlying areas of garden or wood might be, depending on their use and relationship with the building; agricultural land and agricultural outbuildings probably are not.

Fourthly, some or all permitted development rights under the GPDO can be specifically removed by the local planning authority (LPA) using an '**Article 4 Direction**' under the GPDO. This can happen anywhere, but Article 4 Directions are relatively unusual, though somewhat more likely to be used in National Parks, AONBs, World Heritage Sites, and Conservation Areas. (LPAs sometimes tell you that being in such areas "automatically removes all permitted development rights", but this is not the case).

(ii) In addition, the **GPDO Schedule 2, Part 4, Class A** says that a planning application is not needed for the provision of buildings etc "required temporarily in connection with and for the duration of operations being or to be carried on, in, under or over…land…". This

[1] There may also be other implications, like business rates.

refers to 'operations' rather than 'uses', and it is not wholly clear that it covers temporary structures associated with an already-legitimate use, like a marquee for events on a site where that events use is already established, but there are cases in which LPAs have agreed that temporary structures in such circumstances are covered by Class A.

(d) Planning permission – cases of doubt

It will be clear from all the above that the planning position can sometimes be unclear. You can of course seek professional advice. The conventional recommendation is to ask the LPA whether the proposed structure requires planning permission. The problems with this in practice are that LPAs are short of the skilled staff needed to give accurate answers to such questions, and that they often do not take a positive view of temporary structures. Except perhaps for a one-off domestic event, the LPA may well say that planning permission is required, even if it is not. Even if it did say that consent is unnecessary, this does not necessarily protect the owner against later enforcement action.

A more formal alternative (provided the activity has not already commenced) is to seek from the LPA a **Certificate of Lawfulness of Proposed Use or Development** (CLOPUD) under s192 of the Town and Country Planning Act 1990. The cost of this may be almost as high as for a planning application, but it does allow the applicant to argue that the structure is not 'development', or is permitted under the GPDO, or is covered by an existing planning permission, which may increase the chance that the LPA will agree. If so, it must grant the CLOPUD, even if it thinks the proposal undesirable, and it cannot apply conditions as it would on a planning consent.

If the owner does make a planning application, it is certainly possible – except perhaps in minor straightforward cases – that it will be refused, often on 'visual amenity' or Green Belt grounds, and a refusal might be upheld at appeal (see 'Summary' and 'Potential strategy' below).

Normal planning considerations like access, traffic generation, and noise, are of course all potentially material. A planning application should address these issues, and show that they are not relevant, or will be managed so as to minimise their impact. It may be helpful to have local support, rather than objections, though in practice local support is often of limited value.

A possible option is to proceed without planning permission. If planning permission is not required, going ahead is obviously lawful in planning terms, but the LPA might try to take action if it disagrees that planning permission is not needed, or dislikes the proposal. If planning permission is required, proceeding without it is not a criminal offence, but the LPA can take **enforcement** action (though it must be 'expedient' for it to do this; see s172 of the 1990 Act) requiring the owner to abandon the use and/or reinstate the land to its former condition. Failure to comply can become a criminal offence. An obvious problem is that you may have to remove the structure before you intended to, and may not be able to re-erect it later, which may be a problem if you have (say) taken bookings for future events. You might also prejudice the LPA against you.

If you have already been erecting temporary structures without planning permission, you can seek a **Certificate of Lawfulness of Existing Use or Development** (CLUED) under s191 of the 1990 Act. After four years (for 'operational development') and 10 years (for 'material changes of use') a CLEUD must be granted automatically, even if the activity was not lawful. In some cases this may be a better starting-point than a planning application, which the LPA of course has discretion to refuse. The application of this rule to temporary structures can be

uncertain, but the CLA is aware of cases in which a CLEUDs has confirmed the legitimacy of temporary structures and uses over a wide area of land.

There is a CLA planning Guidance Note on CLOPUDs and CLEUDs.

(e) Temporary and permanent consents, the use of conditions in planning permissions, and guidance on the use of planning conditions

A planning consent is made temporary by imposing a condition requiring the later removal or cessation of the development. Guidance on the use of conditions is set out in the national **Planning Practice Guidance** (PPG). The main aim, including in the section Use of Planning Conditions, is to limit conditions to those which are sensible and appropriate. Paragraph 014 of this section concerns temporary development. It says "Circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of the development on the area or where it is expected that the planning circumstances will change in a particular way at the end of that period. A temporary planning permission may also be appropriate to enable the temporary use of vacant land or buildings prior to any longer-term proposals coming forward (a 'meanwhile use'). It will rarely be justifiable to grant a second temporary permission (except in cases where changing circumstances provide a clear rationale, such as temporary classrooms and other school facilities). Further permissions can normally be granted permanently or refused if there is clear justification for doing so. There is no presumption that a temporary grant of planning of planning permission [sic] should be granted permanently."

The implication is that you, and the local authority, should consider whether a temporary or permanent permission is most appropriate. If you want a summer marquee to generate income your requirement may actually be permanent even if the structure is removed each year. Although many local authorities seem in practice to be more alarmed by a temporary consent than a permanent one, in some cases it may be appropriate to seek a temporary consent for a trial period only. If you get this, you can then seek a permanent consent before the trial period is over, basing your case on the benefits, this PPG paragraph, and the absence of problems during the trial period. The local authority may resist a trial consent, but of course if the trial causes problems it would then have reasons to refuse a permanent consent, and if there were no problems it would then seem reasonable to grant the permanent consent.

D. HERITAGE CASES

(a) Listed buildings and their settings

There are two separate issues here. Firstly, under Section 7 of the **Planning (Listed Buildings and Conservation Areas) Act 1990**, any "works of demolition, alteration, or extension to a listed building which would affect its character as a building of special architectural or historic interest" will require Listed Building Consent (LBC). This requires an application to the LPA, and it is a criminal offence to carry out such works without consent. But **if there is no physical work to the listed building, LBC is not needed**. (It should be noted that other pre-1948 historic structures within the planning curtilage of the listed building, and ancillary to its use, may well be covered by the listing ('curtilage structures'), so that (say) cutting a doorway through a garden wall may require LBC, even if the wall is not itself mentioned in the list description). For further advice on whether LBC is needed, or on what is (and is not) covered by listing, see the CLA Guidance Notes *Listed buildings - when do I need consent?* and *What listing includes*.

Secondly, where **planning permission** is required (irrespective of the need for LBC), the effect of the development on any listed building(s) or other heritage assets, not necessarily in the same ownership, and more especially on their **settings**, is a '**material consideration**' which can be taken into account, and could in some cases justify the refusal of planning permission, or its grant subject to additional conditions. At least up to the publication of the 2010 Historic England guidance (see (d) below), LPAs were usually looking to find that temporary structures would have an unacceptable effect on listed buildings and their settings.

Note that where listed buildings are involved and planning permission is required (irrespective of the need for LBC), **permitted development rights** under the GPDO are to some extent reduced, but this does not affect those referred to above (permitted development rights are not withdrawn in full for listed buildings, though LPAs sometimes claim otherwise).

(b) Scheduled Monuments and their settings

Similarly, there are two main issues here. Firstly, under the **Ancient Monuments and Archaeological Areas Act 1979**, any physical works to a Scheduled Monument, above ground or below, require Scheduled Monument Consent (SMC). Merely placing a structure on a Scheduled Monument would probably not require SMC, unless its weight or the ground conditions could lead to damage, but any excavation or (say) driving angle irons into the ground may well be work requiring SMC. Guidance on this is set out in *Scheduled Monuments: identifying, protecting, conserving and investigating nationally important archaeological sites under the Ancient Monuments and Archaeological Areas Act 1979* (DCMS, 2013), see www.gov.uk/government/publications/scheduled-monuments-policy-statement. There is also a CLA Guidance Note *Archaeological features including scheduled monuments on your land*.

Secondly, where **planning permission** is required, the effect of the development on any monument, scheduled or not, and/or its **setting**, could be a 'material consideration' which can be taken into account and could in some cases justify the refusal of planning permission, or its grant subject to appropriate conditions.

(c) Other designated heritage assets and their settings – Conservation Areas, Registered Parks and Gardens, Registered Battlefields, and non-designated heritage including locally-listed heritage

Where planning permission is required, any impacts on these kinds of heritage and their settings are 'material considerations'.

(d) Heritage policy and guidance

General national heritage planning policy is set out in the **National Planning Policy Framework** (NPPF), especially the chapter on the historic environment, the **Planning Practice Guidance** (PPG), and in advice from Historic England including its **Good Practice Notes** (especially GPA3 on **setting**). These are discussed in more detail in the CLA Guidance Note *Getting heritage consents* mentioned in section B above.

The key starting point for temporary structures is the Historic England (then English Heritage) advice ***Temporary Structures in Historic Places*** (2010), which sets out the key principles and will itself be a material consideration where heritage is involved.

This *Temporary Structures* guidance was the product and object of years of CLA lobbying, partly because its draft versions were negative, reinforcing the view that temporary structures are "inappropriate". The final version however is definitely helpful to those seeking planning permissions because it takes a much more balanced approach.

It stresses the **benefits** of temporary structures: the opening sentence on page 1 says that "Events in historic places make a vital contribution to the economic sustainability of our heritage". Sections 1.2, 2.1-2.2, 4.1-4.2, and 6.12 reinforce this.

Even more importantly, it says in 6.7 that "**there should not be a presumption against temporary structures simply because they are visible in the historic environment**", a crucial statement because it is a reversal of the assumption previously made in LPAs and in Historic England's regional offices. It also stresses **proportionality** throughout: 6.4 says that "each case will need to be considered on its merits, and a proportionate response taken, according to the circumstances", and 8.2 adds that "the amount of information required should be proportionate…this is of particular relevance to temporary structures as the cost of preparing the application…may be high in relation to the income derived…".

It is essential to quote this document when seeking planning permissions, because LPAs and Historic England regional offices may not be aware of it, or may ignore it.

E. SUMMARY

1. Larger temporary **structures** in place for months rather than weeks are likely to constitute 'development' and therefore to require **planning permission**. Smaller structures in place for shorter periods may well not be 'development', in which case they would not need planning permission. Where the tipping point at which planning permission is required comes is not clear: it is a matter of fact and degree in each case, and depends primarily on size, 'permanence', and the degree of physical attachment to the ground (see Section C above).

2. Even if a structure does not amount to 'development', 'development' needing planning permission also happens if there is a '**material change of use**' (see Section C (b) above).

3. Where structures are in place for less than 28 days a year in total, planning permission may be deemed to have been granted by the **GPDO**, but this does not apply 'within the curtilage of a building' (see Section C (c) above).

4. The planning position is complex, and there are grey areas in which the need for permission is debateable, though LPAs are likely to say, if asked, that it is required (see C (d) above).

5. You should also consider whether to seek a permanent rather than temporary consent (see Section C (e) above).

6. For **listed buildings** and/or **scheduled monuments** (see Section D above), **LBC** or **SMC** will only be required where there is work physically affecting the building or monument itself. But where **planning permission** is needed its effect upon a listed building or any monument, or its **setting**, will be a '**material consideration**'.

7. Perhaps partly because of the lack of national planning guidance in this area, a strong culture of opposition to temporary structures grew up in most LPAs, and was carried into appeal decisions. There was usually a view, not set out in formal policy, that they must result in "unacceptable visual intrusion", especially where heritage or Green Belt are involved, and also that temporary planning permissions will "inevitably" become permanent.

8. The counter-argument is that temporary permissions are only temporary: they cease to be valid when they expire, and there is no obligation on the LPA to grant any further consent at that point. They can be used to test whether the benefits claimed by the applicant are realised in practice; and if the development does cause harm, that would be good grounds not to grant another planning permission. But these arguments, where they are put forward, are not always taken into account, and LPAs may ignore the many potential benefits of temporary structures, including their ability to generate tourism revenue and fund the maintenance of heritage.

9. Where planning permission is required, therefore, the chances of obtaining it was (and may still be) be lower than you might expect, even in cases where there is no adverse impact on traffic, heritage, or local inhabitants, and no objections.

10. However, in all cases which involve **heritage**, very broadly defined, the 2010 **Historic England advice *Temporary Structures in Historic Places*** (see section D above) has proved helpful in reversing traditional assumptions that temporary structures are inappropriate and dangerous, but it is essential to quote this guidance if you want it taken into account. This should be done in a planning/heritage analysis.

F. POTENTIAL STRATEGY

1. Members might first consider whether they can limit themselves to proposals which do not need a planning application, either because they are not 'development', or because they are deemed to have permission under the GPDO, and should also avoid the need for LBC or SMC. Where you want certainty that planning permission is not required, applying for a CLOPUD can provide this.

2. In most cases where the aim of the temporary structure is to generate significant income you are likely to need planning permission. If you were to go ahead without planning permission, you would be vulnerable to enforcement action, a major problem if you book events in advance, and also effectively beholden to any neighbour(s) whose complaints about noise or traffic might prompt the LPA to take enforcement action. See the CLA heritage Guidance Note *Heritage enforcement and prosecution*.

3. If you do apply for planning permission, you should not assume that this will be easy to obtain. It is essential to include a planning/heritage analysis, which should explain why the proposals are desirable, why they are not harmful (or what measures will be taken to avoid or mitigate any problems), and why the specific location has been chosen, and refer to any relevant local plan policies (and, where heritage is affected, to the NPPF and the Historic England guidance). In simple cases this statement may be brief, but in more complex cases it may need to be detailed and you may need help from a planning (or where relevant heritage planning) consultant. You need to weigh up the costs of preparing proposals against the likely benefits and the risks of refusal.

4. You should also consider whether to seek a permanent or a temporary consent (see section C (e) above).

5. Where **heritage** is involved, the 2010 Historic England advice (see section D above) has changed the previously very discouraging picture, because it sets out a much more balanced approach, but it is essential to quote the advice in the Planning/Heritage Statement accompanying your application.

6. **Important note: this area of planning law is complex, this guidance is simplified in some areas, and it obviously takes no account of the circumstances of individual cases. Site-specific expert advice should be sought.**

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