



The Planning
Inspectorate

Lawful Development Certificates

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- Applies to Ops, MCU, BoC and other matters not involving development.
- No planning merits – awful may be lawful
- Very useful guidance at Annex 8 to Circ 10/97
- S191: existing use, existing ops and existing BoC
- S192: proposed use or operations
- Snapshot in time
- Cannot attach conditions
- Application must be specific and not general



Definitions of lawfulness

- Found in s191(2) and (3)
- To be determined for LDCs at the date the application is made:
 - s191 circumstances as exist at that date
 - s192 if the use instituted or ops begun on that date
- Lawful if:
 - No enforcement action could be taken at that date
 - Not in contravention of any requirement of an EN then in force (includes ENs issued but not yet in effect) or BCN



- Not within the definition of development – s55, or *de minimis* operation, use or activity
- Specifically excluded from the definition of development, e.g. agriculture
- Involves development but is exempted by s57
- Benefits from an extant grant of planning permission, PDRs, or from a s173(11) PP
- Took place before the Appointed Day – 1 July 1948
- Time for taking enforcement action has expired



The effect of a LDC

- S191(6) The lawfulness of any use, operations or other matter ... shall be conclusively presumed.
- S192(4) as above + unless there is a material change in relevant circumstances before the use is instituted or ops begun.
- S191(7) shall have effect as if it were a PP for purposes of CSCDA, CPA and EPA



A few general points

- HRA Articles not engaged in LDCs
 - *Massingham v SSTLR* [2002] J.1093
- Certificate must be substantially in the form prescribed by GDPO
 - *James Hay Pension Trustees v FSS & S Gloucs* [2006] EWCA Civ 1387, J.1161
- The terms of a s191 application can be modified by LPA/Inspector – s191(4)
- ... but not unilaterally in a s192 application
 - *R v Thanet (ex parte Tapp)* [2001] EWCA Civ 559, J1074



A few general points

- But LDC can be issued for all or part of the site and for one or more of the uses or operations in the application
 - Whether s191 or s192 – see s193(4)
- In s191 the use does not have to be active on the ground at the date of the application but:
 - It must have become lawful before becoming dormant and must not have been abandoned or put to an inconsistent use.
 - But continuing effect condition: breach must be continuing at date of the application



Specifying the level of use

- Certified uses should be described in detail to set a benchmark for the future
 - Numbers of vehicles parked, types of material stored, areas of storage, height of storage, number and type of caravans, etc
 - But this is not a legal requirement – *Autodex*
- Where a use is within a Use Class it should be referenced to the Class.
 - There may be cases where more detail would be helpful as a benchmark in case use moves out of a Class to test if there has been a MCU.



Specifying the level of use

- Set right level where level of use has increased significantly over the 10 year period, albeit not to a point where there was a MCU within that period.
- A matter for the decision maker based on the evidence.
- Unlikely to be the present level of use where it has increased significantly.
- Start with the level 10 years ago and assess fluctuations to determine lawfulness of that level – whether it characterises the use.
- Answer could be start level, average level, lowest level



Specifying the level of use

- Where the application is in respect of part of a mixed use or for part of a PU any certificate issued should be explicit in that respect and explain the context.
 - If later one element of a mixed use ceases and is supplanted by an increased level of the certified use there might be a MCU
 - Need the benchmark to assess that.



Breach of condition

- Continuing requirement, e.g. occupancy limited to agricultural occupant:
 - The breach should not have ceased at the date of the application.
 - Certify **the** breach of the condition.
 - Where condition is not separately discharged it will apply if that breach ends
- Whether or not the LPA agree to discharge the condition on a future application is up to the LPA. On appeal it is not within Inspector's powers under s191.



- S193(5) failure to comply relates only to the matter certified.
 - Open plan condition applying to estate as a whole
 - Be clear that it is only one particular wall or fence that is certified so as not to circumvent the condition as a whole.



Creeping lawfulness

- S192 attempt to ratchet up from a low lawful base level on back of next lowest number
 - use of dwellinghouse by 6, 7 or 8 people
 - use of caravan site for 8, 10 or 15 caravans
- *Waltham Forest* to the rescue!
 - Can only compare the proposed use with the actual existing use and not some notional use.
 - If site has LDC for 6 caravans that is the base against which to compare 8, 10 and 15.
 - See also *Childs*



- More value than EUC
- Allows for right of reversion following service of enforcement notice
- Equivalent of planning permission for issuing of licences
- But lawful uses are not in themselves 'hardy beasts'
- If certificated use ends then lawful use can be considered abandoned (*M&M Land v Secretary of State*)
- Lawful use can be lost by an event of planning significance (*Staffs CC v Challinor*)



- See *Beach*
 - Where mixed use A+B is joined by use C the correct comparison is between A+B and A+B+C.
 - Original uses A+B are not to be regarded as distinct and unaffected by the new one.
 - Where A+B has not existed for 10 years before it is joined by C, it cannot continue to accrue time - *Lynch*
- Note: UCO not relevant to description of mixed uses



Recent judgments

- *Kemble Airfield*
 - Need for precision in drafting LDC
- *Avon Estates*
 - Conditions die with cessation of permission
- *Robert Fidler*
 - Deception of the LPA by concealment
- *Alan Beesley*
 - Deception of the LPA by concealment



- The Localism Bill
 - Clause 112: *Time limits for enforcing concealed breaches of planning control*
 - Planning enforcement order gives the LPA a year to take enforcement action
 - Affects LDCs as the time for taking enforcement action may not have expired (ie the time for applying for an order has not expired, or it has not been decided, or the year has not begun)



- Any questions?