



Lawful Use & LDCs: Some important judgments

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Note: the following are brief summaries of the cases and should only be used as a quick reference or *aide memoire*. It is good practice to read a full report or transcript before relying on the judgment in any particular case.

Panton and Farmer v Secretary of State for the Environment, Transport and the Regions and Vale of White Horse District Council [1999] JPL 461

Lawful use rights could only be lost by evidence of abandonment; by the formation of a new planning unit; or by being superseded by a further change of use. A use which was merely **dormant or inactive** could still be "existing", so long as it had begun more than 10 years before and had not been extinguished in one of these three ways. Qualified by *Thurrock* below.

Thurrock Borough Council v Secretary of State for the Environment, Transport and the Regions and Holding [2001] JPL 1388 and CA [2002] JPL 1278

A use could only become lawful if it continued throughout the ten year period, to the extent that the LPA could have taken enforcement action at any time. If the use ceased during that period, the time could not count towards immunity. The concept of abandonment and loss of use rights mentioned in *Panton & Farmer* only applied when lawful use rights had accrued in this way. Thus those **accrued lawful use rights** can only be lost by abandonment, a supervening material change of use, or the commencement of some other new chapter in the planning history of the site.

Sage v Secretary of State for the Environment, Transport and the Regions & Maidstone Borough Council [2003] UKHL 22

The exception to "development" in s55(2)(a) applied only to a completed building on which work was carried out for its maintenance, improvement or other alteration. It did not apply to the work involved in completing an incomplete structure which was subject to planning control. Therefore, even if the work remaining to be done on an uncompleted dwellinghouse affected only the interior of the building and did not materially affect its external appearance, that work did not come within the exception, and the building could not, on that ground, be regarded as **substantially completed** for the purposes of s171B(1). When an application was made for permission for a single operation, it was made in respect of the whole of the building operation. If a building operation was not carried out, both internally and externally, fully in accordance with the permission, the whole operation was unlawful. The EN had not been served out of time as the building had not been substantially completed.

Nicholson v Secretary of State for the Environment and Maldon District Council [1998] JPL 553

Non-compliance with **condition** must exist at the date of LDC application. If non-compliance ceases because of discontinuance of the offending activity, that



breach is at an end, any future non-compliance amounting to a new, separate, breach subject to enforcement action for 10 years.

North Devon District Council v Secretary of State for the Environment and Rottenbury [1998] 4 PLR 46

Dwellinghouse subject to an **agricultural occupancy condition** used for more than 10 years as holiday accommodation in summer only, otherwise vacant. Distinction must be drawn between use, which was continuous but seasonal, and activities amounting to a breach of the condition. Normally no breach while property vacant, unless some evidence of continuing occupation in absence of occupiers.

Basingstoke & Deane Borough Council v Secretary of State for Communities and Local Government and Stockdale [2009] EWHC 1012 Admin

It concerned a breach of an **agricultural occupancy condition** and, in particular, whether, in the circumstances of the case, the two periods when the building was not occupied by residential tenants were sufficient to stop the clock for the purposes of the 10 year rule. Collins J. in upholding the appeal decision held, on the facts, that a gap for refurbishment did not disturb the continuing breach because the works were all being carried out in furtherance of the breach which had been a longstanding one.

North Devon District Council v First Secretary of State and Stokes [2004] EWHC 578 Admin

Breach of a **seasonal occupancy condition** can become immune/lawful through the passage of time, even though the breach cannot, by definition, be continuous during the permitted season. This principle would apply equally, for instance, to a shop opening-hours condition. The case is distinguished from Nicholson and North Devon above, on which the same LPA relied, because, unlike an agricultural occupancy condition, it is only possible to breach a seasonal condition outside the relevant season, and impossible to breach it throughout the year.

St Anselm Development Co Ltd v First Secretary of State and Westminster City Council [2003] EWHC 1592 Admin

Supports a purposive interpretation of a **condition**, in line with para 8.36 of Circular 10/97 ("the matter" constituting a failure to comply"). Condition required whole of car park to be retained for use by certain occupiers. Most, but not all spaces used by others for more than 10 years. Claim that this made all spaces free of condition rejected.

M & M (Land) Ltd v Secretary of State for Communities and Local Government and Hampshire County Council [2007] EWHC 489 Admin

A use certified as lawful through an LDC can be **abandoned** subsequently. An LDC does no more than certify conclusively, at a point in time, that the use is lawful. Whether it is later abandoned is to be assessed according to the objective test of abandonment. In a sense nothing new here but a useful



confirmation and clarification that lawfulness through an LDC is not in the same species of the 'hardy beast' of lawfulness in *Pioneer Aggregates*.

***Staffordshire County Council v Challinor & Robinson* [2007] EWCA Civ 864**

EN appeal dismissed and EN upheld. Inspector aware of an LDC but it did not affect his decision. Injunction denied in the HC as an LDC in place. The CA held it is an oversimplification to contend that an EN cannot take away lawful use rights; they can in certain circumstances and that is the result of s285(1) – validity of an EN cannot be later questioned on any of the grounds upon which an appeal can be brought. **Lawful use rights can be lost** if an EN served and those rights are not then raised as a ground of appeal. An LDC is only "conclusive" on the day of the application. Whether rights derived from an LDC or other rights of use makes no difference. The necessary continuity of use after the date of the LDC has to be demonstrated in accordance with established case law.

***R v Thanet District Council ex parte Tapp* CA [2001] JPL 1436**

There is no power for LPAs or the Secretary of State/Inspector to amend the **description of a proposal** in a s192, as opposed to a s191 case - compare s191(4) with s192(2).

***James Hay Pension Trustees Ltd v First Secretary of State and South Gloucestershire Council* [2006] EWCA Civ 1387**

LDC must substantially be in the **form prescribed** by statute (Art 24 and Sch 4 to the GDPO). LPA issued 'certificate' headed 'Permission for development' which was ambiguous, had no reference to s192 or clear description of the proposal. The CA held it did not comply with s192 and therefore invalid.

***Massingham v Secretary of State for Transport, Local Government and the Regions & Havant Borough Council* [2002] EWHC 1578 Admin**

HRA Articles could not be engaged in the context of a LDC appeal, because the issue of a LDC neither created nor removed **human rights**. An LDC was merely declaratory of certain existing rights; a refusal to issue a LDC was merely a refusal to grant the declaration sought.

***Blackburn v First Secretary of State & South Holland District Council* [2003] EWHC 671 Admin**

The same applies to the legal grounds of appeal against an EN.

***Mid Suffolk District Council v First Secretary of State and Lebbon* [2005] EWCA 2634 Admin**

Confirms that the fact that **operational development** consisting in the carrying out of the building (or other operations) might have become lawful through the passage of time and the operation of sections s171B(1) and 191(2), does not necessarily mean that the use of the resulting lawful building is also lawful. While the building may be immune, its use may still be liable to enforcement



action. S75 only applies to buildings with planning permission, so it is perfectly possible to have a lawful building with no lawful use.

***R (oao Sumner) v Secretary of State for Communities and Local Government* [2010] EWHC 372 Admin**

Two ENs: one alleging MCU of a building and the other the erection of the building. Inspector found the erection of the building was lawful on the 4 year rule but the use was not in accordance with any lawful use and had commenced within the previous 10 years. The appellant's claim that the immunity of the building should carry with it immunity for the use for which it was designed and intended rejected by Collins J. The use for which the building was intended could not be ancillary to its construction. The change of use and operational development are separate concerns. **S75(3) is not relevant**, it relates to the construction to be placed on buildings which have a grant of planning permission where the use is not specified.

***Ramsey v Secretary of State for the Environment, Transport and the Regions and Suffolk Coastal District Council (No 2)* [2002] EWCA Civ 118**

Even if permanent physical changes take place on land to facilitate a temporary use, provided that they do not prevent the normal permanent use from continuing for most of the year, and it does so continue, there is no reason why the pd rights under **GPDO Sch 2, Part 4**, Class B should not be available. The critical factors for pd under Part 4 are the duration of the temporary use and the reversion to the normal use in between times.

***Waltham Forest London Borough Council v Secretary of State for Transport, Local Government and the Regions and Tully* [2002] EWCA Civ 330**

The correct comparison, to be made in determining whether a change of use was or would be material, is with the **actual present or last use** and not just with the general class of uses or some notional level of use within which the actual use might have fallen.

***Glamorgan County Council v Carter* [1963] P & CR 88**

A landowner cannot acquire use rights by virtue of **illegal** as opposed to unlawful use of land. (If there is no site licence the use is illegal by virtue of the 1968 Act.) See also article at JPL 239 [1988]. However, this principle is limited to "planning" illegality and does not extend to, for example, highway obstruction or lack of site licence.

***Vaughan v Secretary of State for the Environment & Mid Sussex District Council* [1986] JPL 840**

Applied *Glamorgan v Carter* in respect of an EUC and a use continuing in contravention of an effective EN. Held that neither the application to the local planning authority for the EUC (now LDC) nor the subsequent appeal **valid** where there was a pre-existing effective EN.

Harrods v Secretary of State for the Environment, Transport and the Regions and Royal Borough of Kensington and Chelsea [2002] EWCA Civ 412

What may reasonably be regarded as incidental or **ancillary** to a lawful use of land (other than within the curtilage of a dwellinghouse, to which the specific provisions of s55(2)(d) apply) are activities which are “ordinarily” incidental to uses of that sort. Extraordinary activities, even though subordinate to the lawful use, are excluded if their introduction amounts to a material change of use of the planning unit

Swale Borough Council v First Secretary of State and Lee [2005] EWCA Civ 1568

There is a difference between an established **dwellinghouse** when an occupier does not have to be continuously or even regularly present in order for it to remain in use as a dwellinghouse and where there is no established use; at the start of the material period the use has to be “affirmatively established” over the 4 year period. Discontinuous residential use is not continuous residential use. In this case it was not clear that the Inspector had assessed gaps in occupancy in terms of *Thurrock* and had not been influenced by the irrelevant concept of abandonment. The correct approach is to ask whether there was any period during the 4 years when the building was not physically occupied, even though available for occupation, when the LPA could not have taken enforcement action against the use. It is also necessary to make a finding as to whether the periods of non occupation were *de minimis* or not. Even though a building might be fitted out for residential use the question was whether it had been actually used as a dwelling for a continuous period, apart from *de minimis* breaks.

Moore v Secretary of State for the Environment and New Forest District Council [1998] JPL 877 (CoA)

Use of house and complex as 10 units of holiday accommodation. The distinctive characteristic of a **dwellinghouse** was the ability to afford those who used it the facilities for day-to-day private domestic existence; such a building did not cease to be a dwellinghouse because it was occupied infrequently or for only part of the year or by a series of different people. There was no requirement that a dwellinghouse had to be occupied as a permanent home; nor did the 10 units, which could otherwise be described as 10 single dwellinghouses, cease to be used as such because they were managed as a whole for commercial holiday or other temporary purposes. The units were single dwellinghouses subject to the 4 year rule.

First Secretary of State v Arun District Council and Brown [2006] EWCA Civ 1172

Whether 4 or 10-year rule applies to a condition restricting separate occupation of a **residential annex**. The CA overturned the HC decision, holding that s171B(2) and therefore the 4-year rule applied to both development without permission and breach of condition relating to a change of use to use as a single dwellinghouse. Advice in paragraph 2.4 of Circular 10/97 therefore remains correct. This judgment does not apply to occupancy conditions to which the



10 year rule applies. It applies only to conditions which seek to stop an annex or part of a building being used as a separate dwellinghouse.

Childs v First Secretary of State & Test Valley Borough Council [2005]
EWHC 2368 Admin

Site had LDC for residential **caravan site** for 4 caravans. S192 LDC refused for use as residential caravan site for 8, 15, 30 and 50 caravans. Notion that the specified number of 4 was “merely surplusage” rejected. It was important that LDCs provided precision and where appropriate an intensity of use. Subsequent change in intensification might or might not be a MCU as a matter of fact and degree. This is not comparable to the situation within a Use Class. Inspector’s conclusion that a proposed use for 8 caravans would be an MCU based on a change in the character of the use, taking into account the impact on the immediate surroundings including visual amenity and traffic, was a decision he was entitled to take. Appeal dismissed.

R (oao Colver) v Secretary of State for Communities and Local Government and Rochford District Council [2008] EWHC 2500 Admin

The site initially had a single primary use for open leisure purposes (plotland). Two ENs were served, one of which, following correction, alleged a mixed use for open leisure purposes and for the stationing of a caravan for human habitation. Whilst on the evidence it was found that this mixed use had initially commenced in the 1970s, the residential element was found to have ceased by about 1990 before resuming in 2001. The s174 appeals on grounds (a), (d) and (f) failed.

The judgment confirms that the provisions of the amended s191 and the new s171B of the 1990 Act which came into force on 27 July 1992 cannot be applied **retrospectively**. A use commencing after the end of 1963 (so as not to be immune from enforcement action) cannot attain lawfulness on the basis of being active for a 10 year period prior to 1992 if the use was not active on the ground on 27 July 1992. The unlawful use would have ceased, it would not have become dormant. Put simply, the earliest 10 year period that can count towards lawfulness, following which a use might legitimately become dormant is 27 July 1982 – 27 July 1992. (NB this is not the same for operations, conditions relating to operations, a change of use to a single dwellinghouse and conditions precluding such a change which, prior to 1992, were subject to a 4 year time limit for enforcement action).

Hillingdon London Borough Council v Secretary of State for Communities and Local Government & Autodex Ltd [2008] EWHC 198 Admin

The main finding was that under s57(4) there is a **right to revert** to the last use providing it was lawful and that lawfulness can be by way of the operation of s171B or s191(2) – that the latter section is in Pt VII and the former in Pt III is not relevant. The appropriate level of detail to be certified will vary from case to case. There is no obligation on the Inspector to define ‘ancillary purposes’. It is a well established concept. There is a full report in JPL Issue No 10 (Oct) at [2008] JPL 1486.

Beach v Secretary of State for the Environment, Transport and the Regions and Runnymede Borough Council [2001] EWHC Admin 381

If an additional component was added to a **mixed use**, there was a material change of use of the whole planning unit to a different mixed use, even though the original uses continued unchanged. The original uses were not to be regarded as distinct and unaffected by the new one. The question to be asked is, if mixed use A+B changes to mixed use A+B+C is the second mixed use materially different to the first?

Lynch v Secretary of State for the Environment and Basildon District Council [1999] JPL 354

There was a material change from a low-key, limited use to the use alleged in the EN, which had more components, was more intensive and covered a wider area. The limited use had not subsisted for 10 years before being superseded by a **mixed use** of which it was but one component; it had not become lawful and did not have to be protected under the *Mansi* principle.

Belmont Riding Centre v First Secretary of State and Barnet London Borough Council [2003] EWHC 1895 Admin

Confirms that, with the single exception specified in Article 3(4) of the UCO (mixed B1 and B2 use), sites in **mixed use** do not benefit from the provisions of s55(2)(f) and the UCO. Therefore in granting LDCs or issuing ENs a mixed use should never be described in terms of the Classes of the UCO.

Robert Fidler v Secretary of State for Communities and Local Government and Reigate and Banstead Borough Council [2010] EWHC 143 (Admin)

The central theme of Mr Fidler's appeal against an enforcement notice on ground (d) was that the new dwelling house had been substantially completed by about June 2002, whilst it was still concealed within a shield of straw bales, the top of which was covered with a tarpaulin, that he had deliberately erected in order to conceal the construction of the new dwelling and to take advantage of the 4 year rule. The new dwelling was revealed when the straw bales and tarpaulin were eventually removed in July 2006, by which time the 4 year period from substantial completion of the new dwelling had expired. The Inspector dismissed Mr Fidler's appeal on ground (d) on the basis that the overall building operations relating to the construction of the new dwelling included the erection and removal of the straw bales and tarpaulin. The Inspector took the view that, when considered as a whole, the building operations were not substantially completed until the removal of the straw bales in July 2006 and, therefore, the 4 year time limit for taking enforcement action had not expired prior to the date of issue of the EN.

Sir Thayne Forbes in the HC concluded that there can be a number of ancillary activities on a construction site that, if considered in isolation, would not be a building operation within the meaning of the 1990 Act but which could nevertheless form part of the contemplated and intended building operations when considered as a whole. In each case, it is a matter of fact and degree as to whether such an activity does form part of the overall building operations. The

Inspector was quite right to make appropriate findings of fact with regard to the totality of the building operations which Mr Fidler originally contemplated and intended to carry out. He was fully entitled to find that there was such a close and intimate connection between the erection/removal of the straw bales and the construction of the dwelling as to lead to the conclusion that the former was a necessary part of the overall building operations relating to the latter. The erection/removal of the straw bales was an integral, indeed an essential, part of the building operations that were intended to deceive the LPA and to achieve by deception lawful status for a dwelling built in breach of planning control.

Avon Estates Ltd v Welsh Ministers and Ceredigion County Council
[2011] EWCA Civ 553

This appeal raised a point of law about the status and effect of conditions attached to a planning permission granted for a limited period, once that limited period has expired. It was found that the seasonal condition (and a condition to maintain the properties) were intended to apply throughout the life of the permitted development and not beyond, pointing out that Parliament had found it necessary to make special express provision for the situation where conditions are often required to apply after the authorisation of the permitted development had expired, namely in the case of mineral extraction.

It was further found that an interpretation that the condition lived on beyond the specified date would make the permission itself internally inconsistent. The Court pointed out that where "A planning authority faced with a development which has failed to observe a time limit and restoration condition imposed under s72 has entirely adequate enforcement powers available to it. If it sits on its hands until the time limit can no longer be enforced, it has only itself to blame."

The decision was based on an unusual form of time limiting condition in that it required the permission to expire rather than the usual requirement that the use should cease. In comments which are *obiter*, Sir David Keene (who gave the only reasoned judgment) stated that "...it is very difficult to conceive of a condition on a temporary permission under s72 which could sensibly relate to a development, once that development has ceased to be authorised by the permission." He further stated that "... although I would not wish to be categorical as to the impossibility of such enduring conditions, I do regard it as very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary permission, other than the time condition itself."

R on the application of North Wiltshire District Council v Cotswold District Council and Kemble Airfield Estates Ltd and others [2009] EWHC 3702 Admin

This case emphasises the importance of precision in the definition of uses when granting an LDC. The local authority (Cotswold DC) had granted a s191 certificate for the use of Kemble Airfield, Gloucestershire, for "*general aviation purposes*". The airfield straddles both local authority areas. The authority had granted the certificate against the officer's recommendation and legal advice. The Court held that the certificate could not be impugned.



Secretary of State for Communities and Local Government and another v Welwyn Hatfield Borough Council [2011] UKSC 15

In 2001, Mr Beesley applied for and obtained planning permission to construct a hay barn for grazing and haymaking on open land which he owned in the Green Belt. In 2002, he constructed a building which was to all external appearances the permitted barn but internally was a fully fitted out dwelling house with garage, living room, study, bedrooms and gym. In August 2002, he moved in with his wife and lived there continuously for 4 years. The Council remained unaware that the building was constructed as, or was being used as, a dwelling house. In August 2006, Mr Beesley applied for an LDC for use of the building as a dwelling house contending that the 4 year time limit for taking enforcement action in s171B(2) of the 1990 Act had elapsed. The certificate was granted and subsequently upheld by the Court of Appeal which decided that there had been a "change of use" within s171B(2) such that immunity from enforcement action was established.

The Council challenged this decision on the grounds that: (1) there had not been a relevant change of use; (2) even if there had been such a change, the principle of public policy that no-one should be allowed to profit from his own wrong precluded Mr Beesley from relying on s171B(2).

The Supreme Court held that: (1) The building which Mr Beesley constructed was not the permitted barn; it was a dwelling house. There had been no change of use from the use permitted by the planning permission within s171B(2). That section is not apt to encompass the use of a newly built house as a dwelling house. In addition, the court doubted that change of use for the purposes of s171B(2) could consist of a simple departure from permitted use. The word "use" in the section is directed to real or material use, not permitted use. (2) In any event, Mr Beesley's dishonest conduct meant that he could not rely on the section. The principle of public policy that a person should not benefit from their own wrong is capable of being applied in the context of the code of the Planning Acts. It was important that there had been positive deception of the LPA. Positive and deliberately misleading false statements by an owner which prevent discovery take a case outside the rationale of the statutory provision.

The Localism Bill at Clause 112: *Time limits for enforcing concealed breaches of planning control* is seeking to deal with Mr Beesley's approach to development, along with Mr Fidler's concealed "mock tudor castle", as it is described in the *Beesley* judgment, and others, by enabling the local planning authority to apply to a magistrate's court for a planning enforcement order. This gives the authority a year to take enforcement action from the date of the order, and in turn affects the issue of lawful development certificates if deceit or fraud may have occurred, as the time for taking enforcement action may not have expired.

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