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Planning Information sheet 3

(Lawful development certificates)

Annex 8: lawfulness and the lawful development certificate (LDC)

Lawfulness And The Lawful Development Certificate

Introduction

8.1 In this Annex "the 1990 Act" (except where it is qualified by "as originally enacted") means the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ("the 1991 Act").

8.2 Sections 191 and 192 of the 1990 Act provide for anyone (not just a person with a legal interest in the land) to apply to the local planning authority (LPA) for a lawful development certificate (LDC). A certificate is a statutory document certifying:

- (1)** in the case of an application under section 191, the lawfulness, for planning purposes, of existing operations on, or use of land, or some activity being carried out in breach of a planning condition; or
- (2)** in the case of an application under section 192, the lawfulness of proposed operations on, or use of land.

A LDC has no function in determining whether consent may be required under other legislation such as the Planning (Listed Buildings and Conservation Areas) Act 1990.

Lawfulness for planning purposes

8.3 By virtue of section 191 (2), *uses and operations* are "lawful" if no enforcement action may be taken against them **and** they are not in contravention of any enforcement notice which is in force. And, by virtue of section 191(3), *a failure to comply with any condition or limitation subject to which planning permission has been granted* is "lawful" if the time for taking enforcement action in respect of the failure has expired and it does not constitute a contravention of any enforcement notice or breach of condition notice which is in force. Development or other activity on land is lawful for planning purposes if it is within one of the following categories and does not involve a failure to comply with a condition or limitation subject to which planning permission has been granted:

- (1)** it is not within the definition of "development" in section 55(1) and (1A) of the 1990 Act. (This might be because it is so insignificant that it can be disregarded (a "de minimis" operation, use or activity); or because it involves a change of use which is not, as a matter of fact and degree, materially different, for planning purposes, from a previous lawful use of land.); or
- (2)** it is specifically excluded from the definition of development by section 55(2) (for example, a use of land for the purpose of "agriculture"); or

- (3)** it is within the definition of "development" in section 55, but is exempted from the need for planning permission by the provisions of section 57; or
- (4)** it benefits from an extant grant of planning permission under Part III of the 1990 Act (or the equivalent Parts of preceding Acts); or
- (5)** it benefits from a general planning permission granted by the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418), or by a simplified planning zone or enterprise zone scheme; or
- (6)** it benefits from deemed planning permission, whether under section 90 or by virtue of compliance with the requirements of an effective enforcement notice; or
- (7)** it took place before 1 July 1948 (the "appointed day" Country Planning Act 1947); or
- (8)** it is development by or on behalf of the Crown; or
- (9)** the time for taking enforcement action has expired.

'Taking enforcement action' is defined in section 171A of the 1990 Act. It is the issue of an enforcement notice or the service of a breach of condition notice. The section also defines a "breach of planning control" (against which it is possible to take enforcement action) as the carrying out of development without the required planning permission, or failing to comply with any condition or limitation subject to which planning permission has been granted.

8.4 A breach of planning control becomes "immune" from planning enforcement action if no such action has been taken within certain time-limits. By virtue of section 191 (2) and (3) of the 1990 Act, a breach of planning control which has obtained immunity by the passage of time also becomes "lawful" for planning purposes, as explained in paragraph 8.3 above.

8.5 As explained in paragraphs 2.4 and 2.5 of Annex 2 to this Circular, section 171B of the 1990 Act specifies the time-limits for taking enforcement action.

8.6 Guidance on interpretation of the terms "substantially completed" and "use as a single dwellinghouse", where they are used in relation to the time-limits, is given in paragraphs 2.80 and 2.81 of Annex 2 to this Circular.

8.7 The combined effect of these provisions is that if the development or activity was, on or after 27 July 1992, immune from enforcement action it also became lawful for planning purposes. This applies whether or not a LDC has been issued under sections 191 or 192 of the 1990 Act. There is no compulsion to apply for a LDC, though obtaining a LDC or grant of planning permission is a prerequisite to an application for any of the licences referred to in paragraph 8.24 below.

Application for a LDC

8.8 Article 24(1) to (4) of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) ("the GDPO"), specifies the contents of an application and how it should be made. Applications must be submitted to the LPA in writing. Although no application form is prescribed in the GDPO, model application forms, which LPAs may like to use, are appended to this Annex.

8.9 There are two kinds of application:

- (1)** subsection (1) of section 191 provides for an application to determine whether a specified existing use, operation, or failure to comply with a planning condition or limitation, which has already been carried out on land. is lawful for planning purposes; and
- (2)** subsection (1) of section 192 provides for an application to determine whether any proposed use or operations would be lawful for planning purposes.

The application fee

8.10 A statutorily prescribed fee is payable to the LPA in respect of most LDC applications. The enabling primary legislation is section 303 of the 1990 Act. The fee level is set by the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989 (SI 1989/193), as amended by SI 1992/1817, SI 1993/3170 and SI 1997/37. There is no discretion on the amount charged, although there are some concessions. Further information is in Appendix 2 of the Annex to DOE Circular 31/92. An interim concession (one-half of the relevant fee) for an application in respect of an existing use supported by an "established use certificate" has now been withdrawn.

Determination of applications - general

8.11 It is important to keep in mind the purpose of the provisions. They enable owners and others to ascertain whether specific uses, operations or other activities are or would be lawful. But they do not enable anyone to ask the general question, "what is or would be lawful?" For this reason, the applicant must precisely describe what is being applied for - as required by section 191(1) or 192(1) of the 1990 Act and Article 24(1) of the GDPO. It is insufficient for the applicant merely to specify one of the "use classes" in the Schedule to the Town and Country Planning (Use Classes) Order 1987 ("the UCO"). Occasionally a vendor of property may make a section 192 application and seek to describe the proposed activity in this way. For example, a building may be used as offices (other than Class A2) and the application describes the proposal as "use as offices within Class B1". Invariably the real reason for the application proves, on initial examination by the LPA, to be the need to establish whether the existing use is lawful: and it becomes clear that the application should have been made under section 191. If the application was nevertheless accompanied by the information required by Article 24(1) in respect of a section 191 application, it can be determined as such, although the applicant should of course be first informed that the LPA are proposing to treat the application in this way. Once satisfied that the application is valid, what the LPA must address when reaching their determination is whether, on the facts of the case and relevant Planning Law, the specified matter is or would be lawful.

The onus of proof in an application

8.12 The onus of proof in a LDC application is firmly on the applicant. While the LPA should always co-operate with an applicant seeking information they may hold about the planning status of land, by making records readily available, they need not go to great lengths to show that the use, operations, or failure to comply with a condition, specified in the application, is, or is not, lawful. While LPAs are statutorily required to maintain the planning register, this is not a complete record of the planning status of all land in their area. In many cases, the applicant for a certificate will be best placed to produce information about the present, and any previous, activities taking place on the land, including a copy of any planning permission he may hold. Some information, especially about the history of any unauthorised activity on the land, will be peculiarly within the applicant's knowledge. The fact that a LDC may be refused because the onus of proof is not discharged by the applicant does not preclude the submission of a further application if better evidence is subsequently available. A refusal to issue a LDC is therefore not necessarily conclusive that something is not lawful: it may merely mean that, so far, insufficient evidence has been presented to satisfy the LPA that the use, operation or activity is lawful. For this reason, it is pointless for third parties to pursue objections to activities by making LDC applications.

Application for a LDC in respect of existing operations, uses or activities (section 191)

8.13 Section 191(1) of the 1990 Act enables anyone to apply to the LPA for a decision whether a specified existing use, operation, or failure to comply with a planning condition or limitation, which has already been carried out on land, is lawful for planning purposes.

8.14 Subsection (4) of section 191 provides that if, on an application under the section, the LPA are provided with information satisfying them of the lawfulness, at the time of the application, of the use, operations or other matter described in the application, or that description as modified by the LPA or a description substituted by them (see paragraph 8.35 below), they shall issue a certificate to that effect; and, in any other case, they shall refuse the application.

The relevant test of the submitted evidence

8.15 In appeals to the Secretary of State which raise "legal issues" (for example, enforcement appeals on grounds (b) to (e) in section 174(2)), where the burden of proof is on the appellant, the Courts have held that the relevant test of the evidence on such matters is "the balance of probability". As this test will accordingly be applied by the Secretary of State in any appeal against their decision, a LPA should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely "beyond reasonable doubt". Moreover, the Court has held (see *F W Gabbittas v SSE and Newham LBC* [1985] JPL 630) that the applicant's own evidence does not need to be corroborated by "independent" evidence in order to be accepted. If the LPA have no evidence of their own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate "on the balance of probability". The LPA should proceed on the basis that neither the identity of the applicant (except to the extent that he or she mayor may not be able personally to confirm the accuracy of any claim being made about the history of a parcel of land), nor the planning merits of the operation, use or activity, are relevant to the consideration of the purely legal issues which are involved in determining an application.

The content of a LDC under section 191

- 8.16** Subsection (5) of section 191 provides for certain matters a LDC must contain. The LDC is particularly valuable because its effect is similar to a grant of planning permission. It is therefore vital that the certificate indicates precisely the area of land to which it relates (normally by means of an attached, scaled site-plan); precise details of what use, operations or failure to comply with a condition are found to be lawful, why, and when. For example, if a certificate is for a use of land -unless the use falls within one of the "use classes" specified in the UCO current at the time, or the certificate is granted on the basis that a specific grant of planning permission confers, lawfulness on the use it is important for it to state the limits of the use at a particular date. These details will not be legally equivalent to a planning condition or limitation. They will be a point of reference, specifying what was lawful at a particular date, against which any subsequent change may be assessed. If the use subsequently intensifies, or changes in some way to the point where a "material" change of use takes place, the LPA may then take enforcement action against that subsequent breach of planning control (which a less precise certificate might well preclude). A LDC must therefore be precisely drafted in all respects. (See also 8.11 about the need for applications to be specific.)
- 8.17** By virtue of section 191(S)(b), a LDC must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a "use class" of the UCO. But where within a "use class", a LDC must also specify the relevant "class". In all cases the description must be more than simply a title or label, if future interpretational problems are to be avoided. The LDC should therefore state the characteristics of the matter so as to define it unambiguously. This is particularly important for uses which do not fall within any "use class" (that is, a "sui generis" use). So for example a LDC for a caravan site might typically include the number and type or size of caravan found to be lawful at the application date and, where the use is seasonal, the calendar dates on which the use then took place.
- 8.18** Paragraph 8.16 above explains, in principle, why so much detail may need to be provided, first by the applicant when applying for the LDC, and then in the certificate itself. Some further illustration may be helpful to LPAs and prospective applicants.
- 8.19** One obvious example requiring such detail would be the case of an unauthorised building substantially completed more than four years ago and in respect of which a LDC is sought. The application, and any LDC, should identify the location and form of that building (which may be on a site with a number of similar buildings) with sufficient precision to ensure that it cannot be confused with any other building on the site, either at the application date or in future. This minimises the possibility of its being confused with any new building which might subsequently replace it in the same position on the site. Identification will usually best be in the form of a scaled plan or plans and whatever additional descriptive material is necessary to describe the building's siting, design and appearance, including accurate drawings of the building's elevations.
- 8.20** Equally, a LDC for a vehicle park, used in the past only for parking motor cars, should specify that limitation (assuming the LDC derives from ten years' unauthorised use rather than from a planning permission). Then, if the land is subsequently used for parking articulated lorries or coaches, which might have such an impact on amenity of the surrounding area, in planning terms, that a "material" change in the character of the use occurs, the LPA would be able to control it.

8.21 It is generally accepted that any "sui generis" use which is not in a "use class" in the UCO, such as a builder's yard or many haulage depots, can be "materially" different in planning terms from another use which nevertheless falls within the same general description. In other words, there can be a "material" change of use requiring planning permission between, for example, one builder's yard use, or a particular use as a haulage depot, and another. A change of ownership or occupation of land does not, in itself, constitute a material change of use. However, where a builder's yard has only in the past been used by a small jobbing builder for his office, and as a base for one or two vehicles and storing building materials, unless that detail and level of use are specified in the certificate (or by condition or limitation in a permission on which the LDC is based), the LPA will lack effective control in future over any significant intensification of the use (perhaps by a building contractor who introduces the storage of heavy plant and machinery, the mixing of concrete and the manufacture of joinery items on to the land). Such an intensification, though arguably constituting a "material" change of use from the former use, could not be controlled if the site benefited from a LDC which stated that it was lawfully "a builder's yard", without further qualification.

8.22 Where a LDC is granted for one use on a "planning unit" which is in mixed or composite use, that situation may need to be carefully reflected in the certificate. Failure to do so may result in a loss of control over any subsequent intensification of the certificated use if it extends to the whole of the land comprising the planning unit, to the exclusion of the other uses formerly taking place on some of the land (see *Wipperman v Barking LBC* [1965] 17 P&CR 225).

The effect of a LDC under section 191

8.23 Subsection (6) of section 191 provides that the lawfulness of any matter for which a certificate is in force under this section shall be conclusively presumed because, once a LDC is issued, it is important that nobody should be able to "look behind" it to question whether what appears on its face is valid. The statement in a LDC of what is lawful relates only to the state of affairs on the land at the date of the certificate application. As explained above, if, after a certificate has been issued, development is carried out on the land in breach of planning control, the LPA should be able to take whatever enforcement action may be expedient.

8.24 Section 191(7) provides that, in certain cases, the grant of a LDC is equivalent to a grant of planning permission for obtaining a licence required by licensing regimes enacted in other legislation. Currently these cases are an application for:

- (1) a caravan site licence under section 3 of the Caravan Sites and Control of Development Act 1960; and
- (2) a waste management licence issued by The Environment Agency under section 36 of the Environmental Protection Act 1990.

Application for a LDC in respect of proposed operations, uses or activities (section 192)

8.25 The purpose of subsection (1) of section 192 is to enable any person who wishes to find out whether any proposed use or operations would be lawful to apply to the LPA for that purpose.

8.26 Subsection (2) of section 192 is the counterpart, for proposals, to section 191(4) described in paragraph 8.14 above. It provides that, if the LPA are supplied with information satisfying them that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect; and, in any other case, they shall refuse the application. The burden of proof is firmly on the applicant. He will have to describe the proposal with sufficient clarity and precision to enable the LPA to understand (from a written description and plans) exactly what is involved in the proposal; and to submit whatever supporting information or legal submission he wishes to make to satisfy the LPA that a LDC should be granted for the proposal. Where a proposed change of use is involved, it will be necessary to describe the present, or last, use of the land; and, where the lawfulness of that use is being relied upon to pave the way to implementing the proposed use, provide sufficient information to satisfy the LPA of the lawfulness of the existing use (having regard to the criteria in paragraph 8.16 above for deciding what is lawful).

8.27 In making their decision on an application under section 192, the LPA will ask themselves the hypothetical question - "If this proposed change of use had occurred, or if this proposed operation had commenced, on the application date, would it have been lawful for planning purposes?" In doing so, they will not only consider whether the proposal would involve "development" requiring an application for planning permission, but whether it would involve a breach of any existing condition or limitation imposed on a grant of planning permission which has been acted upon, and which therefore constrains what can be done on the land.

A LDC granted under section 192

8.28 Subsection (3) of section 192 is the counterpart, for proposed uses or operations, of section 191 (5). It provides that a LDC granted under section 192 shall specify the land to which it relates; describe the use or operations in question (where appropriate, identifying a use by reference to the relevant "use class"); give the reason why carrying out the proposal would be lawful; and specify the date of the application. Although this certificate would not be the equivalent, in law, of a grant of planning permission for proposed development, it will indicate that, unless any relevant factor has changed since the application date specified in the certificate, it would be lawful to proceed with the proposal. It is therefore vital to ensure that the terms of the certificate are precise and there is no room for doubt about what is lawful at a particular date.

The effect of a LDC granted under section 192

8.29 Subsection (4) of section 192 provides that the lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.

8.30 Obvious examples of such a change would be a direction under Article 4 of the GPDO taking away the particular "permitted development" right, in Schedule 2 to the GPDO, on which the proposal would have relied for its lawfulness; or revocation of the planning permission on which the proposal relies; or a statutory amendment to the "permitted development" rights in the GPDO itself. However, provided the circumstances and the statutory provisions remain unchanged between the application date specified in the LDC and the date the proposed use is instituted or the operations are begun, the change of use remains lawful, or the operations are lawful, and may lawfully be completed, as the case may be.

The effect of an existing "established use" certificate, issued under section 194 or 195 of the Act as originally enacted, and conversion to a LDC

- 8.31** There is no compulsion to convert an existing "established use" certificate (EUC) into a LDC. An EUC is a potentially less valuable document than a LDC. Nevertheless, it retains its former value, as described in section 192(4) of the 1990 Act as originally enacted. In brief, it is conclusive as respects any matters stated in it for the purpose of an appeal against any enforcement notice which is issued after the date specified in the certificate. It is not conclusive of anything which may have occurred on the land since the date specified in the certificate. Thus, where there has been a further material change of use, or abandonment of the "established use", since that date, the use described in the EUC may no longer be "immune" from enforcement action, or now lawful. For this reason, while they do not need to "look behind" any EUC submitted in support of an application to "convert" an EUC into a LDC (and in most cases this should considerably reduce the LPA's administrative costs in considering such applications), the LPA will need to satisfy themselves that the "established use" cited in the certificate has continued to subsist on the land without any "material" change before issuing a LDC for the same use. Moreover, as with any LDC application, it may be necessary, and perfectly proper, for the LPA to describe the use more precisely in the LDC than in the EUC which preceded it.
- 8.32** For these reasons, while the effect and value of an existing EUC remain unchanged, EUCs have no effect "for the purposes of section 191" of the 1990 Act, as amended. An application to "convert" an EUC to a LDC must be made like any other LDC application.

Supplementary provisions: applications under sections 191 and 192

- 8.33** As indicated in the preceding paragraphs, Article 24 of the GDPO, provides for the way in which LD applications are to be made and dealt with, and the matters to be contained in applications and certificates. Section 193 of the 1990 Act specifies these arrangements and contains supplementary provisions, as well as the enabling power for the GDPO.
- 8.34** The GDPO provides for the LPA to be able to direct the applicant to provide information necessary to process and determine the application. There is no requirement for a LDC application, under either section 191 or section 192, to be accompanied by a certificate under sections 66 or 67 of the 1990 Act. This is because the matters to be determined in both cases are solely matters of evidential fact and Planning Law, with the burden of proof on the applicant. Anyone, other than the applicant, with an interest in the land, or the neighbours of a site, may have evidence which is relevant to the application. If that evidence supports the application, it is up to the applicant to produce it, if he or she is able to do so, in support of the case. If it might tend to disprove the case, the applicant risks prosecution, and revocation of any LDC granted, if he or she withholds it (see paragraphs 8.38 and 8.40 below). Nevertheless, if the LPA consider that a person with a legal interest in the land or a neighbour may be able to disprove a claim made in an application, it is open to them to canvass that evidence, if they wish, before determining the application. To minimise bureaucratic procedure in deciding a LDC application, there is no statutory requirement to consult parish or community councils.

Although it may be reasonable for the LPA to seek evidence from these sources if there is good reason to believe they possess relevant information about a specific LDC application, they should not be routinely consulted in other cases. However, any views on the planning merits of the case, or on whether the applicant has any private rights to carry out the operation, use or activity in question, are irrelevant. (As explained in paragraphs 8.15 and 8.45, planning merits are not considered at any stage in the LDC application or appeal process: there is no "deemed application for planning permission" if a LDC is not granted on appeal.)

8.35 Subsection (4) of section 193 provides for a LDC to be issued in respect of all or part of the land specified in the application and, where the application specifies two or more matters, in respect of all, or some one, or more of them; and to be in such form as may be prescribed by a development order. This is intended, along with the LPA's power under section 191(4) to issue a certificate of a different description from that applied for, to give the LPA a reasonable degree of flexibility in cases where it would be helpful to the applicant to receive a certificate in terms which may differ slightly from the terms of his application, as an alternative to refusing a certificate altogether. For example, a lesser area of land may be included. The GDPO contains a prescribed form of LDC for use under both sections 191 and 192. The prescribed form explains its effect. Where necessary, the LPA should include on the form, for each type of certificate, the degree of descriptive detail mentioned in paragraph 8.17 above. Where appropriate, this could be supplemented by including a cross-reference to the terms of the application and accompanying plans or drawings, for example by issuing a certificate in respect of a use of land "as more particularly described in" or "in accordance with" the terms of the submitted application. Alternatively, the description in the LDC might be more detailed than in the application.

8.36 Subsection (5) of section 193 provides that a LDC granted under section 191 or 192 shall not affect any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, unless that matter is described in the certificate. This means that, in any case where a LDC is granted on the basis that there is an extant planning permission for the development, the fact that the LDC certifies that development to be lawful, does not mean that it can lawfully take place without complying in future with any conditions or limitations imposed on that grant of permission, except to any extent specifically described in the LDC. Unspecified existing or future breaches will not be covered by the LDC. For example, if the planning permission was subject to a number of conditions, a LDC granted in respect of a breach of one of them could not be regarded as legitimising breaches of any of the others. Moreover, it is possible to breach some individual conditions in different ways. It is the matter constituting the failure to comply with the condition, rather than the condition itself, which the LDC should, where appropriate, describe. If a condition prohibiting open storage on a site has been breached for more than ten years, for example by storing materials in the open on a particular part of the site, the LDC should describe the extent of the breach which has become lawful. Such a certificate would not then cover a future breach of the condition involving open storage on a different part of the site from that described in the LDC.

Entry in the planning register

8.37 By virtue of subsection (6) of section 193, provision has been made in Article 25 of the GDPO for LDC applications and decisions to be entered in the planning register, in accordance with section 69 of the 1990 Act.

Revocation of certificates

8.38 Subsections (7) and (8) of section 193 provide that a LPA may revoke a LDC granted under section 191 or 192 if, on the application, a statement was made, or document used, which was false in a material particular; or any material information was withheld; and that the development order may provide for regulating the manner in which a LDC may be revoked and the notice to be given of such revocation.

8.39 These powers are available for use where it becomes clear that a LDC has been erroneously based on a false statement, or that relevant information was withheld from the LPA when they considered the application. As it is clearly a serious matter for the applicant to have a LDC revoked, Article 24(12) to (14) of the GDPO provides a statutory procedure which LPAs should follow in giving notice of revocation and carrying out the revocation. No compensation is payable in the event of revocation. The decision whether to revoke a LDC is entirely for the LPA, even when the LDC has been granted by the Secretary of State. If they propose to revoke a certificate, they must give notice of their proposal, thus providing an opportunity for the recipients to make representations before the LPA make their decision. Although the circumstances in which a LDC may be revoked are statutorily limited, by section 193(7), to those explained in paragraph 8.38 above, revocation does not necessarily depend on the commission of an offence, as described in paragraph 8.40 below, because the offence provisions also require evidence that somebody has acted knowingly, recklessly or with intent to deceive. Although there is no right of appeal to the Secretary of State against the LPA's decision to revoke a LDC, the validity of the decision may be challenged by application to the High Court for judicial review in accordance with the provisions of Order 53 of the Rules of the Supreme Court. Moreover, there is nothing to prevent a further LDC application being made, following revocation of an earlier LDC. If a LPA behave "unreasonably" in revoking a certificate and refusing to grant a fresh LDC upon re-application, they may well be at risk of a successful application for costs against them in the event of a subsequent LDC appeal to the Secretary of State, under section 195 (see paragraphs 8.42 to 8.48 below).

Offences

8.40 Section 194 provides that if any person, for the purpose of procuring a particular decision on an application (whether by the applicant or another) for a LDC under section 191 or 192, knowingly or recklessly makes a statement which is false or misleading in a material particular; or, with intent to deceive, uses any document which is false or misleading in a material particular, or withholds any material information, that person is guilty of an offence which is "triable either way". On summary conviction in the Magistrates' Court, the penalty is a fine not exceeding the statutory maximum (currently £5,000). On conviction on indictment in the Crown Court, the convicted person is liable to imprisonment for a term not exceeding two years, or to an unlimited fine, or both.

Cautioning alleged offenders

8.41 When investigating the facts prior to initiating any proceedings, LPAs should have regard to the provisions of sections 66 and 67(9) of the Police and Criminal Evidence Act 1984 in relation to cautioning alleged offenders.

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Right of appeal to Secretary of State

8.42 Sections 195 and 196 of the 1990 Act provide a right of appeal to the Secretary of State, following an unsuccessful application under section 191 or 192. Only the applicant may appeal.

8.43 An appeal may be made against the LPA's refusal, partial refusal or deemed refusal to issue a LDC. By virtue of substituted section 195(4), a partial refusal of an application includes a modification or substitution of the description in the application (see section 191(4) described in paragraph 8.14 above).

8.44 Appeal forms are available, on request, from the Planning Inspectorate at the address given in the DOE booklet entitled "Lawful Development Certificates - a user's guide" which contains specific guidance on making applications to the LPA and appeals to the Secretary of State. The booklet is available from LPA offices.

8.45 The LDC appeal provisions contain no "deemed application" for planning permission or power for the Secretary of State to grant planning permission in respect of any matter for which a LDC is not granted. This means that the LDC procedures involve no consideration of the planning merits of the matter in question. It is nevertheless open to applicants to apply for planning permission in the normal way, without prejudice to their application for a LDC, and to appeal to the Secretary of State against any adverse decision, or failure to give a decision within the time-limit, at the same time as they submit any LDC appeal under amended section 195. In the event that the LPA consider, on receiving an application, that planning permission is not required, they should return the planning application fee (though not any LDC application fee), explaining to the applicant that no fee was properly payable. However, although a refund of fees paid for an application found to be invalid may be made at any stage, the Fees Regulations do not provide for the refund of correct fees paid for valid applications for planning permission once these are accepted (and an application for planning permission would not be invalidated by the issue of a LDC).

8.46 LDC appeals received after 24 March 1997 are included among the classes of appeal for determination by persons appointed by the Secretary of State, instead of by the Secretary of State himself (SI 1997/420).

8.47 In any LDC appeal where evidence as to the facts is at issue or in dispute, the Secretary of State will normally direct that a local inquiry be held. This is so that evidence can be taken on oath, if necessary, and witnesses cross-examined about the precise nature and extent of the previous, existing or proposed uses of land, and, where relevant, its planning history. However, where the appeal simply involves the interpretation of agreed facts and Planning Law or relevant judicial authority, the written representations procedure will normally suffice. And, since planning merits are not at issue unless a contemporaneous planning appeal for the same matter is being considered simultaneously, it is often unnecessary to arrange for an officer of the Department to inspect the site before the Secretary of State determines the appeal.

8.48 The Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1992 apply to local inquiries into LDC appeals.

The expense involved in making a LDC appeal

8.49 The parties to a LDC appeal are normally expected to meet their own expenses. Unlike litigation, costs do not normally "follow the event" of the appeal and are only awarded, on an application, against a party who behaved "unreasonably" in the appeal process. DOE Circular 8/93 gives comprehensive guidance on the policy and procedures for awarding costs to parties in an appeal. As with enforcement notice appeals, by virtue of section 196(8) of the 1990 Act (inserted by paragraph 4 of Schedule 4 to the Planning (Consequential Provisions) Act 1990), an award of costs may be made in a LDC appeal whether the appeal has proceeded by written representations or by local inquiry.

Appeal to the High Court

8.50 The Secretary of State's decision on a LDC appeal may be challenged under section 288 of the 1990 Act, by way of a further appeal, on a point of law, to the High Court.

Secretary of State's power under section 177(1)(c) to issue a LDC under section 191

8.51 Section 177(1) of the 1990 Act gives the Secretary of State certain discretionary powers on the determination of an enforcement notice appeal under section 174. Section 177(1)(c), enables him to determine whether, on the date the appeal was made, any existing use of the land was lawful, any operations which had been carried out were lawful, or any matter constituting a failure to comply with a condition or limitation subject to which planning permission was granted was lawful; and, if so, to issue a certificate under section 191. This discretionary power can be exercised where the enforcement notice appeal succeeds on grounds (c) or (d) in section 174(2) of the 1990 Act, as amended. However, a fee is payable to the LPA for a LDC application, and regulation 10(12) of the 1989 Fees Regulations, as amended by the 1992 Amendment regulations, provides that the "deemed application" fee shall not be refunded where a LDC is granted under section 177(1)(c).

8.52 Nevertheless, this power is discretionary and is only exercised in exceptional circumstances. It will not be exercised where appellants specifically requests that their "deemed application" fee be refunded in the event of the appeal succeeding on any of grounds (b) to (e) in section 174(2). Appellants who have paid the "deemed application fee" both to the Secretary of State and to the LPA, in respect of such an application arising on an appeal against an enforcement notice, may prefer to have both fees refunded in these circumstances, and then pay a single fee to the LPA for a subsequent LDC application. Or, they may decide that, once their enforcement appeal has succeeded, they do not need a LDC. Neither will the power be exercised in respect of an existing use which is outside the scope of the matters stated in the enforcement notice to be in breach of planning control.

8.53 Thus a LDC will not be issued, under section 177(1)(c), unless the appellant has specifically so requested, in the event of his appeal succeeding on grounds (c) or (d) in section 174(2), before the date on which the appeal is determined. Even then, the Secretary of State or Planning Inspector may still decline to exercise this discretionary power. The LDC procedure is intended to be administered primarily by LPAs. They are usually best placed to identify all the relevant details about a use, operation or activity which may need to be specified in a LDC, as explained in paragraphs 8.16 to 8.22 above. These details, including suitable plans to attach to the certificate, may not be readily available to the Secretary of State or a Planning Inspector, even at the decision stage of an enforcement notice appeal. In most circumstances where an enforcement appeal succeeds on grounds (c) or (d) in section 174(2), the notice will be quashed, the "deemed application fee" refunded by the Secretary of State (and, where applicable, by the LPA) and the appellant advised that it is open to him or her to apply to the LPA for a LDC under section 191.

The form of a LDC and model application forms

8.54 The form in which a LDC, under section 191 or 192, should be granted is prescribed in Schedule 6 to the GDPO. LDC applications must be made in writing,

Application For A Certificate Of Lawfulness For An Existing Use Or Operation Or Activity In Breach Of A Planning Condition.

1. Applicant (in block capitals)

Name.....

Address.....

.....

.....

Post Code:

Tel.No:.....

2. Agent (if any)

Name

Address.....

.....

.....

Post Code:

Tel.No:.....

3.

(1) Nature of applicant's interest in the land, eg owner, lessee, occupier.

(2) If you do not have an interest:

(a) give name(s) and address(es) of anyone you know who has an interest in the land;

(b) state the nature of their interest (if known);

(c) state whether they have been informed about this application. - Yes/No

4. Address or exact location of the land to which this application relates:

Describe here and enclose [] copies of an OS-based plan showing the boundary of the land edged in red.

5. This application is for:

[] an existing use;

[] an existing operation;

[] an existing use, operation or activity in breach of a condition;

being a use, operation or activity subsisting on the date of this application.

(Tick whichever box is applicable)

6. Full description of the existing use, operation or activity to which the application relates:

7. If there is more than one subsisting use of, or operation or activity on, the land at the date of this application, describe fully each of them and, where appropriate, show to which part of the land each use, operation or activity relates.

8. If the application relates to an existing use which you consider to be within one of the "Use Classes" in the Schedule to the current Town and Country Planning (Use Classes) Order, state which one:

9. When was the use or activity begun, or the operation substantially completed?

10. Under what grounds is the certificate sought?

(Delete those which are not applicable)

(1) The use began more than ten years before the date of this application; or

(2) The use, operation or activity in breach of condition began more than ten years before the date of this application; or

(3) The use began within the last ten years, as a result of a change of use not requiring planning permission, and there has not been a change of use requiring planning permission in the last ten years; or

(4) The operations were substantially completed more than four years before the date of this application; or

(5) The use as a single dwellinghouse began more than four years before the date of this application.

(6) Other - specify (this might include claims that the change of use or operation was not development, or that it benefited from planning permission granted under the Act or by the General Permitted Development Order).

11. If the certificate is sought for a use, operation or activity in breach of a condition or limitation, specify the condition or limitation which has not been complied with, and attach a copy of the relevant planning permission:

12. Give any additional information you consider necessary to substantiate your claim.

(Continue on a separate sheet if necessary)

13. List here all the documents, drawings or plans which accompany this application.

I/We hereby apply for a lawful use or development certificate under section 191 of the 1990 Act in respect of the existing use, operations or activity described in this application and the documents, drawings and plans which accompany it. I/We enclose the appropriate fee of £.....

Signed:..... Date:.....

On behalf of.....

(insert name of applicant if signed by an agent)

Warning: Section 194 of the 1990 Act provides that it is an offence to furnish false or misleading information or to withhold material information with intent to deceive. Section 193(7) enables the Council to revoke, at any time, a certificate they may have issued as a result of such false or misleading information