Development & Planning Authority

PRACTICE NOTE 13

Certificates of Lawful Use

The Land Planning and Development (Certificates of Lawful Use) Ordinance, 2019

1. Introduction

This guidance describes the process for obtaining a Certificate of Lawful Use (CLU) under the Land Planning and Development (Certificates of Lawful Use) Ordinance, 2019 ('The Ordinance').

The Ordinance and this guidance take effect from 6 May 2019.

2. What is a Certificate of Lawful Use (CLU) and what does it mean?

A CLU is a certificate as to the lawfulness of any existing use of land. In this context, land includes buildings. A CLU cannot be used to confirm the lawfulness or otherwise of physical development, i.e. the erection of buildings or structures.

Where a CLU is issued by the Development & Planning Authority ("the Authority"), it serves to certify that, on the date of the application, the use/s described in the CLU in respect of the area of land specified therein was/were lawful within the meaning of section 22(3) and (4) of the Land Planning and Development (Guernsey) Law, 2005 ('the 2005 Law'). The lawfulness of any use, at the time of the application, for which a CLU is in force is therefore conclusively presumed.

For the purposes of the 2005 Law, insofar as it relates to the control of development, an existing use is lawful at any time if no Compliance Notice may be issued under the 2005 Law in respect of the use, because either -

- the time for issuing of a Compliance Notice has expired, or
- the unlawful material change of use occurred before the date of commencement of Part V of the 2005 Law, and

the use neither constitutes a contravention of any measures required by a Compliance Notice or Interim Compliance Notice then in force, nor is the subject of any proceedings instituted under the repealed enactments which preceded the 2005 Law.

In this respect, section 48(4) of the 2005 Law, sets out that *"[...] no compliance notice may be issued after the expiry - (a) of the period of 10 years beginning with the date of the alleged breach to which it relates, or (b) of the period of 4 years beginning with the date on which the facts alleged to constitute that breach are first known by the Authority, whichever is the sooner.*"

The commencement of Part V of the 2005 Law was on 6 April 2009. The repealed enactments included the Island Development (Guernsey) Laws, 1966-1990.

3. How is a CLU obtained?

An owner of land can apply to the Authority for it to issue a CLU.

The application must be made on the application form supplied by the Authority and must include the particulars specified in that form.

An application must be accompanied by -

- Copies of a location plan which clearly and accurately identifies the location of the land to which the application relates, and
- Copies of a block layout plan which clearly and accurately identifies the land to which the application relates, and, where the application relates to two or more uses, indicates to which part of the land each use relates, and
- Such evidence verifying the information included in the application as the applicant can provide, and
- The relevant fee for the application, which is currently set at £250.

In making an application, the applicant must have regard to this guidance.

The Authority may request the applicant to supply such further information, including plans or drawings, as it may consider necessary to determine the application.

On an application being made, the Authority must issue a CLU if it is satisfied that it has been provided with information satisfying it of the lawfulness of the use applied for, at the time of the application. In any other case it must refuse the application.

4. What information must accompany an application for a CLU?

An application for a CLU must be accompanied by sufficient factual information/evidence for the Authority to decide the application. An application needs to describe precisely and unambiguously what is being applied for (not simply the use class) and the land to which the application relates.

To demonstrate immunity from enforcement and consequent lawfulness of a use, an application for a CLU will normally need to prove, on the balance of probabilities, that the use concerned:-

- commenced before 6th April, 2009, or
- where the Authority does not know about the change of use, has taken place continuously for more than ten years prior to the date of the application, or,
- where the Authority does know about the change of use, has taken place continuously for more than four years since the Authority first knew about the change.

Sufficient information and evidence to do so therefore must accompany an application. Information will also be required to show that the use has not subsequently been changed (including by reverting back to a previous lawful use) or abandoned.

It is important to note that the ten year or four year period for immunity from enforcement cannot run so that immunity accrues if there are gaps in the continuity of the use following its initial commencement so that the Authority could not have served a compliance notice throughout the period.

It will therefore normally be necessary for an applicant to prove, on the balance of probabilities, that the use has been operating continuously[1] at the level claimed for the entirety of the ten/four year period.

It is also important to have this information as there is a presumption for the purposes of section 48 of the Law that any change of use which amounted to a breach of planning control at the time occurred after the Law commenced in April, 2009.

The application needs to include such evidence verifying the information included within the application as the applicant can provide. Without sufficient and precise information, to satisfy the Authority of the lawfulness of the use at the time of the application, the Authority must refuse the application.

5. Who is responsible for providing sufficient information to support the application?

The applicant is responsible for providing sufficient information to support their application. This may include corroborative sworn statements from relevant parties providing direct evidence to support other factual documentary evidence, such as audited accounts, business records, invoices, other records, information or licences.

The Authority will use the test of the balance of probabilities in order to assess the application. If the Authority is not satisfied that it has been provided with information satisfying it of the lawfulness of the use at the time of the application, the Authority must refuse the application.

6. How is a CLU application determined?

The Authority needs to consider whether, on the facts of the case and relevant planning law, the specific use is lawful. Planning merits are not relevant at any stage in consideration of an application for a CLU.

The Authority must issue a CLU when satisfied that it has been provided with information satisfying it of the lawfulness of the use, at the time of the application, this being for the use as described in the application or that described in the application as modified or substituted by the Authority having considered the application.

The Authority may choose to issue a CLU for a different description of use from that applied for, as an alternative to refusing a CLU altogether. A refusal is not necessarily conclusive that a use is not lawful, it may mean that to date insufficient evidence has been presented.

A CLU may be issued for all or part of the land specified in the application, and where the application specifies two or more uses, may be for any one or more of the uses.

The Authority must give the applicant notification of its decision as soon as reasonably possible after the decision has been made.

[1] But does not necessarily mean every single day if a use has temporarily stopped during a weekend or short holiday.

Where a CLU is refused, in whole or part, or where a CLU is issued for a modified or substituted description of use from that described in the application, the notification of decision must state the reasons for the decision, specify the applicant's right of appeal and give brief particulars of the manner and period for appeal.

7. What must a CLU include?

A CLU must specify the land to which it relates, describe the use in question (including, where relevant, the use class of that use), give the reasons for determining that the use was lawful, specify the date of the application for the CLU and be in the form which is set out in the Schedule to the Ordinance or in a form substantially to the same effect.

It is important that any CLU issued is precise in its terms, wherever possible, so there is no room for doubt about what is lawful at a particular date. The description of the use in question must be more than a title or label, if future problems of interpretation are to be avoided. A CLU should generally spell out clearly and fully the characteristics of the use in question so as to define it with precision and without ambiguity. This will be particularly important for uses which do not fall within a use class or where there is a mixed or composite use of the land concerned.

8. Is there a right of appeal?

An appeal can be made to the independent Planning Tribunal in circumstances when the Authority refuses, or refuses in part, a CLU, or when it issues a CLU with a modified or substituted description of use from that described in the application for the CLU, on the ground that the Authority made a material error as to the facts of the case.

Such an appeal must be made within the period of three months beginning with the date on which the Authority made its decision. There is an appeal fee which is currently set at £250.

9. How do CLU's relate to other regulatory requirements?

The grant of a CLU applies only to the lawfulness of development for planning purposes and does not remove the need to comply with other legal requirements such as the Building Regulations. The term 'use' in relation to a CLU does not include a use arising from a material change of use under the Building Regulations.

10. Does the Authority need to consult on a CLU application?

There is no requirement for the Authority to publicise or consult on an application for a CLU. This is because the application will be determined on the evidence of the facts provided by the applicant and, unlike when dealing with a planning application, the planning merits of the case cannot be considered.

The Authority is not precluded from seeking evidence from third parties, if there is good reason to believe that they may possess relevant information about the content of a specific application. However, any views expressed by third parties on the planning merits of the case will be irrelevant when determining the application.

11. What information must be entered onto the public register of applications?

The Authority is required to keep the following information on the register of applications in relation to an application for a CLU:

- The applicant's name and address
- The date of the application
- The address or location of the land to which the application relates
- The description of the use included in the application
- Brief particulars of the decision made on the application by the Authority, the Planning Tribunal in the event of an appeal and the Royal Court in relation to a legal challenge to a decision of the Planning Tribunal.

The register may contain other information and documents as the Authority considers appropriate.

12. Can a CLU be revoked?

The Authority can revoke a CLU in whole or part if a statement was made or document used which was false in a material particular, or if any material information was withheld.

Before revoking a CLU, the Authority must give notification of its intention to revoke to the owner of the land, the occupier of the land and any other person who in the Authority's opinion will be affected by the revocation. Representations can be made by those persons within 14 days from the date of service of the notification and the Authority cannot revoke the CLU until expiry of that period. The Authority must also notify all those persons if the CLU is then revoked.