

Section 195 Appeal relating to MDDC's refusal of application 25/01406/CLU being a section 191 application for a certificate of lawfulness for conditions 2 and 5 attached to permission 09/01587/FULL

Appellant's Legal Submissions

1 Introduction

- 1.1 Michelmores are instructed by Mr Dean Agett (the **Appellant**) on his appeal against the refusal of MDDC on 29 January 2026 to grant a certificate pursuant to section 191 for a lawful development certificate.
- 1.2 This is an appeal pursuant to section 195
- 1.3 Unless otherwise stated all references to 'sections' are to section of the Town and Country Planning Act 1990 (as amended) (the **1990 Act**).

2 Legal background

- 2.1 An application for a certificate of lawfulness may be made under section 191(1)(c) by a person wishing to ascertain that a failure to comply with a planning condition is lawful.
- 2.2 Section 191(2) confirms lawfulness of a use of a building arises if:
 - 2.2.1 no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
 - 2.2.2 they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

Immunity through the passage of time

- 2.3 The time for the enforcement action by a local planning authority is set out in section 171B.
 - 2.3.1 Section 171B(1) sets the four year time limit for breaches of planning control consisting of operational development.
 - 2.3.2 Section 171B(2) sets a four year time limit for breaches of planning control for a change of use of any building to a single dwellinghouse.
 - 2.3.3 Section 171B(3) holds "*In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach*". The 10-year rule application to cases of a breach of condition imposed on a planning permission.
- 2.4 Section 171A(2) confirms that the service of a breach of condition notice constitutes taking enforcement action for the purposes of section 171B.
- 2.5 The Court of Appeal in *Thurrock Borough Council v The Secretary of State for the Environment Transport and the Regions* [2001] EWHC Admin 128 at paragraph 18 Mr Justice Newman confirmed that:

"The combined effect of Section 171B and Section 191(2) and (3) is that after the relevant time limit has expired no enforcement action can be taken and any uses or operations become lawful. Where an enforcement notice is served, alleging a breach of planning control, its issue cannot be effective in law unless the breach alleged occurred within the prescribed time limit, because "... no enforcement action may be taken after the end of the period ..." The rationale of the immunity is, that throughout the relevant period of unlawful use the local planning authority, although having the opportunity to take enforcement proceedings, has failed to take any action, and consequently it would be unfair and/or could be regarded as unnecessary to permit enforcement."

- 2.6 Section 191(3) confirms that any matter constituting a failure to comply with any condition subject to which planning permission has been granted is lawful at any time if:
 - 2.6.1 the time for taking enforcement action in respect of the failure has then expired; and
 - 2.6.2 it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
- 2.7 For the purposes of assessing the passage of time pursuant to section 191(3)(a), the clock starts when the breach (in this case the breach of condition) first occurs. The clock would stop if the breach of condition ceased. It would restart over again if the breach resumed (as confirmed by Holdgate J in *Ocado* paragraph 132).
- 2.8 Failure by the LPA to take enforcement action within the applicable section 171B period means that the right to do so lapses and the breach of planning control is then lawful at any time provided it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
- 2.9 As a matter of law lawfulness of a breach of condition that has subsisted for longer than the duration set in section 171B(3) is not dependent upon there being a certificate *Hillingdon LBC v SSCLG* (2008) EWHC 198 (Admin). The purpose of the certificate is to allow the owner/occupier of the property to show to the world that the breach has become lawful.

Whether a breach of condition notice is 'in force'

- 2.10 An enforcement notice served against a breach of planning control after the time limits in section 171B have expired is of no effect. An enforcement notice that is of no effect cannot be said to ever be 'in force' for the purposes of section 191(3).
- 2.11 Where a breach of planning condition became lawful after 10 years by virtue of s.191(3), the right which thereby accrued is not lost if it did not continue to be exercised (*R. (on the application of Ocado Retail Ltd) v Islington LBC* applying).
- 2.12 As described in §2.3.3 pursuant to section 171B(3) it is the 10-year time limit that is to be applied where the section 191(3)(a) consideration are being made by a decision maker in respect of certificate of lawfulness application where a breach of planning control that is a breach of a planning condition (i.e. section 191(1)(c)).

Breach of condition notices

- 2.13 Section 187A provides for the service of a breach of condition notice by a local planning authority where the authority wishes to secure compliance with conditions attached to a planning permission.

- 2.13.1 The service of a breach of condition notice constitutes taking enforcement action (§2.4).
- 2.13.2 There is no right of appeal against a breach of condition notice.
- 2.13.3 A breach of condition notice may be withdrawn by the planning authority (section 171B(6)).
- 2.13.4 It is an offence not to comply with a breach of condition notice (section 171B(9)).
- 2.13.5 On prosecution of such an offence it is open to the defendant to show the enforcement notice relied on by the prosecution is invalid on the grounds that the authority's decision to issue the breach of condition notice was *ultra vires* because the authority had not complied with the requirements of the Act; namely the time limits for taking enforcement action set out in section 171B. This defence was confirmed by Lord Hoffman in *R. v Wicks (Peter Edward)* [1998] A.C. 92. It is not necessary when running this defence for the defendant to have challenged the authority's decision to issue the breach of condition notice by way of judicial review (*Dilieto v Ealing LBC* [1998] P.L.C.R. 212).

Matters relating to the determination of certificates of lawfulness

- 2.14 Section 193(4) confirms that when issuing a certificate under section 191 the LPA may issue the certificate:
 - 2.14.1 for the whole or part of the land specified in the application; and
 - 2.14.2 where the application specifies two or more uses, operations or other matters, for all of them or some one or more of them.
- 2.15 Section 193(5) requires that a certificate under section 191 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. The effect of this provision is clearly stated in *Ocado* (para 59):

"... where a CLEUD is granted because the 10-year immunity period is satisfied in relation to breaches of one of the conditions in a planning permission, it is the legitimisation of that breach which should be stated in the CLEUD. The certificate does not legitimise any breaches of other conditions in the permission which are not specified. "

and the example given at paragraph 60 explains that a condition that has been breached

"cannot be treated as expunged altogether, because that would not correspond to the continuing breach which has been demonstrated and would unjustifiably remove any limit on the number of pitches permitted".

- 2.16 Section 194 confirms that it is an offence for any person procuring a certificate to:
 - 2.16.1 knowingly or recklessly makes a statement which is false or misleading in a material particular;
 - 2.16.2 with intent to deceive, uses any document which is false or misleading in a material particular; or

- 2.16.3 with intent to deceive, withholds any material information.
- 2.17 For the purposes of a certificate application the burden of proof is on the applicant (in this instance on the appellant).
- 2.18 The standard of proof is the balance of probabilities (PPG Paragraph: 006 Reference ID: 17c-006-20140306).
- 2.19 In accordance with the findings in *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461, a decision maker considering a section 191 application is obliged to issue a certificate for any development which the evidence shows is lawful and, if necessary, to modify or substitute the description of development pursuant to section 191(4).
- 2.20 As was settled in *Gabbitts v SSE & Newham LBC* [1985] JPL 630 if the Council has no evidence of its own, or from others, to contradict or otherwise make the Appellant's version of events less than probable, there is no good reason to refuse to grant a certificate provided the Appellant's evidence alone is sufficiently precise and unambiguous.

Appealing the refusal of a certificate of lawfulness

- 2.21 Section 195(1) confirms that where an application is made to a local planning authority for a certificate under section 191 and the application is refused the applicant may by notice appeal to the Secretary of State.
- 2.22 Section 195(2) holds that on any such appeal, if and so far as the Secretary of State is satisfied that the authority's refusal is not well-founded he shall grant the appellant a certificate under section 191 (whereas 195(3) where he finds the refusal is well-founded he shall dismiss the appeal).
- 2.23 Under section 195(1B) a notice of appeal under this section must be—
- 2.23.1 served within such time and in such manner as may be prescribed by a development order;
- 2.23.2 accompanied by such information as may be prescribed by such an order.
- 2.24 There is presently no statutory time limit for the serving of a notice of appeal.

Identification of the planning unit

- 2.25 When assessing a material change of use the decision maker must first identify the planning unit.
- 2.26 The established test for the identification of the planning unit is set out in *Burdle* and does not need to be repeated here.

Identification of a residential use

- 2.27 In a case where an applicant for a certificate is relying on the time limits for a change of use to a single dwellinghouse (section 171B(2) (§2.3.2) the accepted that the test is a question of fact depending on the facilities of the building not the use to which it was in fact put and that generally little turns on any restriction as to the duration or frequency of its use (*Gravesham BC v Secretary of State for the Environment* [1983] J.P.L. 307). Gravesham confirms two pertinent points:

- 2.27.1 that the distinctive characteristic of a dwelling-house is its ability to afford to those who use it the facilities required for day-to-day private domestic existence; and
- 2.27.2 that it is correct that the decision maker take a factual approach looking at the use or uses to which a building is put (*Gravesham*).
- 2.28 There is nothing to suggest that approach when assessing the passage of time under 171B(3) for a breach of condition restricting, among all other uses, a residential use, should not assessed other than in accordance with *Gravesham*.

Planning contravention notices

- 2.29 By section 171C a local planning authority may serve a planning contravention notice requiring the person served to give such information as to the use of land and matters relating to conditions subject to which a planning permission has been granted.
- 2.30 Section 171D(5) confirms that it is an offence to:
- 2.30.1 make any statement purporting to comply with a requirement of a planning contravention notice which he knows to be false or misleading in a material particular; or
- 2.30.2 recklessly makes such a statement which is false or misleading in a material particular.
- 2.31 As confirmed in *Russnak-Johnston v Reading Magistrates' Court* [2021] EWHC 112 (Admin) an offence of this nature is subject to section 127 of the Magistrates Court Act 1980 which sets a 6-month time limitation running from the date of the offence.

Statutory declarations

- 2.32 It is customary for applications for certificates of lawfulness to be supported by statutory declarations made under the Statutory Declarations Act 1835.
- 2.33 It is an offence to knowingly or wilfully make a false statutory declaration.

Interpretation of conditions

- 2.34 The rules for the interpretation of planning conditions were set out in *DB Symmetry Ltd v Swindon BC* [2022] UKSC 33, confirming that it is a reasonable reader test (paragraph 66). This reasonable reader test is an objective exercise with regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.

Declaration of local connection

- 2.35 For the purposes of section 7C(1) of the Representation of the People Act 1983 where a person's declaration of local connection is in force when he applies for registration he shall be regarded for the purposes being entitled to be registered as a resident at the address so declared. It is used to enfranchise persons who do not reside at any address in the uses sense treating them as notionally resident at the place so declared.

Use Class Order 1987

- 2.36 Condition 2 of the 2009 Permission refers to "The Town and Country Planning (Use Classes) Order 1987 (as amended), and specifically to use classes B1 and B8.
- 2.37 The 1987 Order has been amended since the date of grant of the 2009 Permission. Uses that were described as use class B1 now fall under use class E (with part Eg(iii) covering industrial processes).
- 2.38 A storage use, including open air storage, is use class B8.
- 2.39 A residential use is use class C3 with part C3(a) covering a residential use by a single person.

Michelmores LLP

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