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Planning insight: Certificates of Lawful Use - the benefits and risks to Guernsey property

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The introduction of Certificates of Lawful Use ("CLU")

Prior to May 2019 it was possible for unauthorised uses of land or buildings in Guernsey to become immune from planning enforcement action due to the passage of time. However, they could not be recognised as lawful other than by way of a retrospective planning application. For various reasons (including policy and case law), such applications were frequently unsuccessful.

The island's Land Planning and Development (Certificates of Lawful Use) Ordinance, 2019 introduced a route for property owners to formally regularise any historic, unauthorised change of use of land or buildings without needing to apply for planning permission.

Associated amendments to The Land Planning and Development (Guernsey) Law, 2005 ("the Law") provide that an existing use is lawful at any time if no Compliance Notice may be issued under the 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 06 April 2009

The time limits for issuing of a Compliance Notice are a period of 10 years beginning with the date of the alleged breach to which it relates, or a period of four years beginning with the date on which the facts alleged to constitute that breach are first known by the Development and Planning Authority ("the DPA").

CLU applications to date

Of the 38 CLUs listed on the DPA's online register, 19 relate to the regularisation of land used as domestic garden and of previously unauthorised dwellings. Of those, 14 applications were granted (in whole or in part) and CLUs issued.

However, the register also shows that CLUs have been sought for a much wider range of uses, including retail, office, storage, industrial, and community uses amongst others.

Of the 19 applications for non-residential/domestic uses, 16 have been granted and CLUs issued - a marginally higher success rate than for residential/domestic uses.

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The benefits of obtaining a CLU

The benefits are outlined here:

- provides legal certainty;
- removes the risk of planning enforcement action being taken;
- can expand the potential for development under the Island Development Plan and Exemptions Ordinance;
- can increase the value of land or buildings; and
- can make it easier to sell or purchase a property or business.

However, property owners should be aware that once an unauthorised use has been regularised by way of a CLU, planning permission would almost certainly be required to revert back to the previous lawful use. That may be undesirable in certain circumstances.

The burden of proof when submitting a CLU application

The onus rests on the applicant to submit sufficient evidence to demonstrate that, on the balance of probability, the specified use is lawful.

The applicant's own evidence does not have to be corroborated by independent evidence, but it is open to the DPA to take account of any other information available to it, for instance records held in its archives. The DPA may also seek evidence from third parties, if it believes that they may possess relevant information. But regardless of whether the DPA undertakes its own research or consults with any other party, if that does not uncover information that contradicts or challenges an applicant's own precise and unambiguous evidence, then a CLU will normally be issued.

Complications can arise if enforcement action has been taken previously, if there have been any materially significant gaps in the continuity of the use during the relevant 4 or 10 year period or if the use has subsequently been 'abandoned', if the nature or intensity of the use has changed over time, or if there has been any subsequent and different use amounting to a separate breach of planning controls in its own right.

In such circumstances the DPA might refuse a CLU application, or grant a CLU for a lesser area or for a different description to that applied for.

Whether a CLU is required or not

In practical terms, amendments to the Law referred to above mean that lawfulness of any unauthorised use is automatic as soon as immunity from enforcement is achieved, and this is not dependent on a CLU being granted.

Where the DPA has confirmed that a particular use is immune from enforcement action, it may also be prepared to provide a degree of informal comfort and confirm that the use is lawful in accordance with the

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provisions of the Law, thereby enabling a property owner to sidestep the formality of applying for a CLU.

Alternatively, where property owners are certain of the facts in their particular case, and confident that lawfulness has been achieved, they may choose to submit planning applications that depend on or undertake works provided for by the Exemptions Ordinance as it relates to the new, lawful use.

A note of caution must be sounded, however, as it is unlikely that an informal undertaking would prevent the DPA from pursuing future enforcement action. And unilateral action by a property owner also carries with it a risk that the DPA might subsequently disagree with their conclusion, which could lead to planning permission being refused or enforcement action being pursued.

The advantages of seeking professional planning advice

CLUs are still in their infancy in Guernsey, and the nuance and complexity outlined above means that property owners should consider seeking professional planning advice from the outset in order to fully understand any benefits or risks involved, and to increase the likelihood of a CLU being granted. Consultants who are members of the Royal Town Planning Institute are trusted worldwide as abiding by the highest professional and ethical standards.

If you require advice on any aspect of planning please contact Chris Crew, Senior Planning Consultant.

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