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Planning News: Certificates of Lawful Use

Property partner and Advocate Martyn Baudains considers the impact of a recent change to Guernsey's planning laws.

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Those taking a close interest in property and construction in Guernsey will not have missed a recent change to our planning laws following the States' agreement to introduce so-called "Certificates of Lawful Use".

The word "use" in this context refers to how a property is used under the Use Classes provisions of our planning law.

The catalyst for this recent change was the use of the Stan Brouard Group site at its Garden, Leisure and Furniture Store at Landes du Marche for retail purposes. The Stan Brouard Group wanted to open a café at its premises but because the use of the site for retail was unlawful, and because of existing policies, there was no 'gateway' to allow the planners to approve development of a café on the site.

It may be helpful to say here that where a site is approved for a particular use, a part of that property can, in some circumstances, have another use provided that any other use is only "ancillary" or "ordinarily incidental" to the use of the main part of the property. In this case, because the use of the property for retail use was not lawful, the use of a part of the property as a café could not be said to be ancillary to the use of the site for retail. The owner of the site submitted a planning application for a café at the site and it was refused, and a subsequent appeal against that decision was dismissed.

The fact that a situation existed where a site was being used unlawfully and yet there was no way of regularising the situation was the subject of comment by the inspectors at the Planning Inquiry for the Island Development Plan in 2015. The Inspectors said the "existing situation ... brings no credit to the business, which has made the change of use without the necessary planning permission and has not applied for retrospective planning permission [nor to] the former Island Development Committee which failed or was unable to take enforcement action at the appropriate time, nor to the Island planning system...". These were harsh words which must have struck a chord with certain States members, because the States asked the Development & Planning Authority (DPA) to give thought as to how the situation could be regularised and to report back.

The DPA did so by way of a policy letter placed before the States in June 2017. That policy letter made it clear that the use of the site was unlawful, but because of the time that had passed (and partly because of a change in law) the Department was powerless to act. The DPA said they had considered two ways of dealing with the situation. The first was to change planning policy, but that would require changes to the Strategic Land Use Policy (SLUP) and the Island Development Plan (IDP) and it was clear that the time and cost involved in that exercise made that idea very unattractive. The second idea was to use a provision in The Land Planning & Development (Guernsey) Law 2005 which could possibly allow the DPA to issue Certificates of Lawful Use. The States would have to agree to pass an Ordinance to allow the change, but that was a far simpler process than reviewing the SLUP and IDP.

A Certificate of Lawful Use, if issued, would have the effect of making the use of the Stan Brouard premises lawful, which would be the 'gateway' needed for use of a part of the site as a café.

The policy letter asked the States to approve a change in the law to allow the DPA to move forward with the idea of being able to issue Certificates of Lawful Use. The policy letter was not debated for too long, though there were some comments that such a change in the law could be exploited by land owners who could "flout the planning law" and "if they can get away with it long enough" they will be able to apply for a Certificate of Lawful Use and make their unlawful development lawful. Reassurances were given that the changes brought about by the 2005 law make it highly unlikely that a similar situation could arise again – though there was one other case known about which might also benefit from the change in the law.

The States decided to approve the change in the law and has since approved The Land Planning and Development (Certificates of Lawful Use) Ordinance, 2019 which comes into force on 6 May 2019.

There will not be many land owners who will be able to benefit from this change. To apply for a Certificate of Lawful Use it must be shown that, albeit the use of the property was unlawful, it is deemed to be lawful because, in brief, no enforcement proceedings can be issued because of passage of time (either 4 years from the date that the planning department first knew about the breach or 10 years from the date of a breach in a case where the department did not know about it), or where the change of use occurred before 6 April, 2009.

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