TOWN AND COUNTRY PLANNING ACT 1990
SECTION 191

# Application for a Certificate of Lawfulness for an Existing Use

For the continued use of land at
Pendrethen Quarry
St Mary's
Isles of Scilly
as an inert and excavation waste transfer facility

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## Introduction

This certificate of lawful existing use application (the **Application**) is made under Section 191(1)(a) of the Town and Country Planning Act 1990 (the **1990 Act**) to establish that the continued use of land at Pendrethen Quarry, St Mary's, Isles of Scilly (the **Property**) as an inert and excavation waste transfer facility is lawful.

The purpose of this submission is to provide to the Council of the Isles of Scilly as the Local Planning Authority for the area in which the Site is situated (the **LPA**), sufficient information to satisfy them of the lawfulness at the time of the Application of the use of the Property.

## Planning History

There is no known planning history in respect of the use applied for.

## Planning Policy

None relevant, as this is a certificate application which is to be determined by the LPA on the facts, as a matter of law. Neither the identity of the applicant (except to the extent they may be able to personally confirm the accuracy of any claim being made about the history of the Property), nor the planning merits of the case, are relevant to the purely legal issues which are involved in determining this Application.

## Planning Guidance

As stated above, the determination of this Application turns on an application of law to fact. The National Planning Practice Guidance (**NPPG**) summarises the relevant standard of proof and the way the LPA should approach the evidence submitted with this Application. The NPPG states:

> *In the case of applications for existing use, if a LPA has no evidence itself, nor from any others, to contradict or otherwise make the applicant's version of events less probable there is no good reason to refuse the application providing the Applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a Certificate on the balance of probability*.[1]

The relevant standard of proof against which to assess the applicant's evidence is the balance of probability. Provided the evidence enclosed with this Application meets this standard and the LPA has no evidence itself or from others to contradict this evidence, the LPA must grant the certificate (see Section 191(4) of the 1990 Act).

**Planning Law**

The grant of a certificate of lawfulness for existing use is governed by Section 191 of the 1990 Act, which, so far as material to an existing use application made under Section 191(a) of the 1990 Act, provides that if any person wishes to ascertain whether any existing use of buildings or other land is lawful, he may make an application for this purpose to the LPA specifying the land and describing the use.

Section 191(2) explains that uses are lawful at any time if-

a) *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*
b) *they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*

Section 191(4) provides:

> *If, on an application under this 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*

[1] Paragraph: 007Reference ID: 17c-007-20140306 (as at 15 October 2015)

*modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.*

Section 191(6) provides:

*The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.*

The reference in Section 191(2)(a) to the time for taking enforcement action is a reference to the time limits imposed by Section 171B of the 1990 Act. Section 171B provides:

1) *Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.*

2) *Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling-house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.*

3) *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.*

Section 171B(1) is not relevant as this Application is in respect of a use of land rather than operational development. Section 171B(2) is also not relevant as this Application is not in respect of the change of use of a building to use as a single-dwelling house. Accordingly, the ten year time limit for any other breach of planning control in Section 171B(3) is engaged.

It is necessary, as demonstrated in *SSETR v. Thurrock BC* [2002] EWCA Civ 226, for the LPA to adopt the proper approach as a matter of law to its decision on that question of fact. The legally correct question is whether the Property has been used

for the use claimed for a continuous period of the ten years prior to the date of the Application, so that the LPA could at any time during the ten year period have taken enforcement action against that use[2].

**The Property and the wider site**

The Property and its site are described in the accompanying Planning Statement from Mulicber Limited.

**Planning Unit**

Following *Uttlesford District Council v SSE* [1991] 2 PLR 76, the identification of a separate planning unit is a question of fact to be decided on the evidence. It is always a question of fact and degree, looking at the physical layout of the land, and its functional interdependence as determined by actual use. These factors are examined in turn below.

*Functional interdependence*

In *Burdle v Secretary of State for the Environment* [1972] 3 All E.R. Bridge J. suggested three broad tests for determining the appropriate planning unit, which, whilst not intended to constitute a rigid code, have become the *locus classicus* in assessing what constitutes a planning unit:

*First, that whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered…*

*But, secondly, it may equally be apt to consider the entire unit of occupation even through the occupier carries on a variety of activities and it is not possible to say that*

[2] Whilst a breach of condition must be continuous such that any subsequent compliance with the condition restarts a fresh ten year enforcement limitation period, immunity from enforcement action against a material change of use is achieved at the end of a ten year period "beginning with the date of the breach", and the then lawful use of land is thereafter only lost by abandonment: *Panton and Farmer v. SSETR* [1999] JPL 46. The applicant in this case is attesting to over ten years of use of the Property - as a matter of fact - but as a matter of law, that breach of planning control became immune from enforcement action at the end of the ten year period beginning with the date the use in breach of planning control began.

*one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time but the different activities are not confined within separate and physically distinct areas of land.*

*Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit".*

*Burdle* thus establishes that in determining what is the appropriate planning unit, a useful working rule is to assume that it is the whole unit of occupation, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use, both physically and functionally.

Following *Brazil (Concrete) Ltd v Amersham RDC* (1967) 65 LGR 365, in assessing the functional link in land uses, what has to be looked at is the unit as a whole, and the primary purpose for which the unit is used.

*Material change of use*

A change in the actual use of the Property gives rise to an inference that reliance on the prior use is being abandoned and a new planning history begins: *Jennings Motors Ltd v SSE* [1982] QB 541.

**Evidence of actual use**

The evidence of use is detailed within the Planning Statement and the Appendices.

The LPA's attention is drawn to the commentary in the Planning Encyclopedia at P171B.09 which was endorsed by Newman J in *Thurrock BC v Secretary of State for the Environment, Transport and the Regions* [2001] JPL 1388. In that case Newman J recited the text as it then was "*Pinpointing the date of breach is often difficult. Change of use frequently is a gradual process, involving fluctuations in intensity and*

*shifts in precise location. In such cases, the only effective test is to compare the present use with the previous use, or the use in the base year (ie normally ten years prior to taking enforcement action) and assess whether there has been any material change*". Hence, whilst *Panton* provides that any continuous 10 year use is sufficient unless lost by abandonment, in this instance the Applicant primarily relies upon the 10 years immediately prior to the application and submits that there has been no material change in the use between the start of the 10 year period and the date of the application – and as such the test set out in *Thurrock BC* (in the High Court) is passed.

Further, additional guidance was given in *Thurrock Borough Council v Secretary of State for the Environment and another* [2002] EWCA Civ 226 in terms of continuous use with Schiemann LJ stating (at 28) "*I accept Mr Corner's point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on because it is the week-end or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject Mr Hockman's submission that enforcement action can be taken once the new activity which resulted from the material change in the use of land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity. These are matters of judgment for others*". As such, certain periods of non-use do not act to bring to an end a use which is a breach of planning control, the planning authority may still enforce against a use, even if at that moment the use is not being carried on.

**Planning Enforcement**

In satisfaction of Section 191(2)(b) of the 1990 Act, there is no planning enforcement in force against the Property.

## Conclusion

This is a certificate of lawfulness application, the determination of which does not turn on consideration of the planning merits of the underlying use or development, but turns instead on a legal determination based on the facts, to establish whether the stated use is lawful by period of time and therefore beyond the scope of enforcement action. The Applicant relies on the ten-year rule to establish that the use of the Property as an inert and excavation waste transfer facility is lawful. The evidence submitted with this Application demonstrates that the Property has been used for such purposes for a continuous period of 10 years.

Following *Gabbitas v SSE and Newham LBC* [1985] JPL 630:

*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 probabilities.*

Whilst independent corroboration is not necessary, appended to the Planning Statement are Statements from those who have particular knowledge of the operation of the site.

As per *Gabbitas* and the NPPG, the evidence submitted with this Application should be judged by the LPA "on the balance of probabilities" rather than against the higher, criminal standard of "beyond reasonable doubt". Accordingly, if the LPA has nothing to contradict or make less probable the Applicant's evidence that the ten year rule has been satisfied, the LPA must grant the certificate of lawfulness in respect of the Property.

**Stephens Scown LLP**
**15 October 2015**