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Planning and Environmental Law Committee response to Department of Communities and Local Government issue paper on "How change of use is handled in the planning system"

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response is in respect of the DCLG's issues paper on "How change of use is handled in the planning system" and has been prepared by the CLLS Planning and Environmental Law Committee.

Introduction

We welcome the opportunity to respond to the Department's issue paper. We set out below our responses to the 10 questions raised by the issues paper. However, we wish to make the following general observations:

In our experience the reform of the Use Classes, undertaken between 1985 and 1987 by the then Conservative government, proved to be a resounding success and achieved in respect of the planning system the objectives which were envisaged by the 1985 Government White Paper "Lifting the Burden".

On the other hand, changes since 1987 have often been the result of single issue knee-jerk responses. For example, the use of seaside hotels during winter months for housing homeless and unemployed people was a driver in 1994 for the removal of hostel use from within Use Class C1. Equally, the reorganisation of Use Class A3 in 2005 arguably can be traced back to community opposition to one or two high profile proposals for the reuse of redundant public houses for fast food operation. As supporters of a planning system which imposes the minimum restraints necessary so as to facilitate economic growth and the proper use of land, we are cautious about changes in the planning system which do not reflect the concerns of, and appropriate demands from, the community itself. A liberal use class regime cannot prosper if the community does not support the consequences.

In addition, whilst noting the Government's commitment to localism and the localism agenda in particular, localism surely ought to be the driver for wider freedoms rather than local restrictions. If localism is merely about restrictions, it will support the critics' view that it is entirely anti-development rather than being a liberating force.

Questions and Issues

1 Should material change of use continue to be considered as "development" and handled through the planning system? If not, what alternative approach might be used?

In our opinion we see no overriding need for a material change of use to cease to be development. Material change of use comprising development has been a keystone of the planning system for over 60 years which, when combined with an appropriate Use Classes Order, has continued to work well throughout that period.

We acknowledge that in many cases where a material change of use is proposed there will be associated physical works to the buildings which will comprise "development" and which will require planning permission. However, in many such cases it would not be appropriate for a local planning authority to refuse to grant planning permission for such physical works when in fact the underlying reason for the refusal was opposition to the change of use. To do so would quickly bring the planning system into disrepute.

2 Is the Use Classes Order an effective deregulatory tool to simplify the approach to managing change of use nationally in the planning system? If not, do you have views on what an alternative deregulatory approach to managing change of use might look like?

We consider the Use Classes Order to be an effective deregulatory tool as it removes from the planning system those material changes of use which have similar impacts in planning terms.

3 The Use Classes Order and associated permitted development rights currently are a national regime for changes of use without planning applications. However, they can be extended locally to meet local needs through Local Development Orders (and, in future, through Neighbourhood Development Orders). Is this model effective and is it sufficiently flexible to meet most circumstances?

We consider that it is important that the Use Classes Order is maintained as a national standard and that the localism agenda is used to support further liberalisation so as to encourage and enable economic growth and development rather than encouraging local planning authorities or the local community bodies to impose even greater restrictions.

Not surprisingly material changes in use of properties can be the root of a considerable amount of local controversy. We believe the Use Class Orders and associated permitted development rights should operate as the minimum national regime for material changes of use without express planning permission. We would envisage flexibility being achieved by local development orders and, in future, through neighbourhood development orders with such orders establishing greater freedom and less restrictions so as to achieve local objectives rather than being used as tools to preserve current uses and inflexible planning policies.

We support an approach which provides a large degree of consistency nationally whilst encouraging local flexibility where there are specific local issues. A developer, investor or occupier choosing between various properties situated in different local planning authority areas will expect a level playing field insofar as there are constraints as to what can or cannot be achieved. If the local regime is more flexible, that flexibility can be used to attract such developer, investor or occupier to that area rather than to a competing area. If the local regime is in general terms more restrictive we believe this will be adverse to an agenda of economic growth.

4 Do you think that the current classes of use in the Use Classes Order are still appropriate?

Use Class A1 - Shops. We consider this use class is working well. Some sui generis uses might be considered unnecessary with new technological processes and environmental controls and so could be brought back into this use class, e.g. dry cleaners.

Use Class A2 – Financial and Professional Services. This was one of the more controversial changes in 1987 but again is working well as a use class, partly because of the limitation that the use class applies to services which are provided principally to visiting members of the public. This ensures that such uses are compatible within a retail zone.

However, in 1987 it was felt that the presence in high streets of a substantial number of building societies and other financial occupiers would be harmful to the vitality and attractiveness of a retail area. Today, developers, investors and users of retail properties consider the availability of financial products on the high street to be as natural as a pharmacy or a newsagent. Accordingly, there may be an argument for merging this use class with the A1 use class.

Use Classes A3, A4 and A5 – These were only introduced on the division of the original 1987 use class A3 (which was the sale of food and drink for consumption on premises or of hot food consumption off the premises) into the three separate classes and was a controversial change in 2005. From a pure planning perspective these three uses have very similar land use issues and the simplification of the use classes system by combining these uses could well be attractive although possibly controversial from the perspective of the localism agenda.

Use Class B1 – Business. The creation of the B1 Use Class was the most important reform in 1987 and reflected the increased demand over the prior decade for high tech facilities with modern offices possibly including an element of research and development as well as production. This use class has achieved the objectives and benefits sought and its continuance is essential to satisfy the objectives of balancing planning controls with entrepreneurial activity and economic growth. The key protection to the community is that any use within this use class must be one which could be carried out in a residential area without detriment to the amenity of that hypothetical residential area. (In respect of industrial activities, if that limitation cannot be met the use would automatically be a use within Use Class B2, General Industry).

In theory, if not in practice, the hypothetical residential activity limitation can be problematical in not permitting a 24/7 use. There has been confusion expressed by occupiers as to why Use Class B1 does not cover 24/7 office use but on the other hand, traffic and noise issues, for example, from air conditioning and other plant, can be very intrusive in areas where there is mixed use of B1 use and actual residential. As the leading case showed, the restriction is difficult to justify where, for example, the premises in question are situated adjoining an international airport. One reform would be for local authorities, etc. to use Local Development Orders and, in future, Neighbourhood Development Orders to identify developments where the residential limitation could be omitted, at least for "pure" office use. In Annex A of the Issues Paper it is implied by the layout that the three subsidiary uses are not composite within B1 but might be separate. Neither the statutory instrument as drafted nor as implemented over the last 24 years supports that separation. The composite use is key to the success of this use class.

Use Class B2 - General Industry. Simplification was achieved between 1992 and 1995 with the revocation of the original Use Classes B3 to B7. The result being that any industrial process other than one within Class B1 falls within B2. We believe that simplification has worked well.

Use Class B8 – Storage or Distribution. A possible reform would be to include the storage and distribution functions within a widened B1 use class. However, on balance, we feel there is a stronger argument for the retention of B8, particularly since some warehouse and distribution centres are quite substantial and planning controls would be weakened if there was an unrestricted right to change to an open B1 use. However, we would support amending the permitted development rights to increase the cap on the areas for such a change of use being permitted without express planning permission.

Use Class C1- Hotels. If simplification was being sought we would suggest consideration be given to bringing hostels back into this use class.

Use Class C2 – Residential Institutions. Again, this use class seems to work well.

Use Class C2A – Secure Residential Institution. We appreciate that Use Class C2A was introduced in June 2006 as a result of the application of the planning legislation to the Crown. However, an unnecessary consequence of this post 1987 use class is the interplay between this use class and certain uses which are within C2. In particular, we have in mind situations where an increase in the security element of an otherwise normal school or hospital raises doubt as to whether development has taken place from uses solely within Use Class C2 to mixed uses within C2 and C2A use classes. Guidance emphasising that small secure units within an otherwise predominantly C2 use should be considered as ancillary use might be helpful. On the other hand, if use classes C2 and C2A were merged, it could easily result in a fear that a residential school or college could then be converted into a secure institution such as for young offenders or low risk prisoners without the level of community involvement in that decision which the localism agenda would envisage.

On the basis that use within residential C2 would be more acceptable to the community at large than a use within C2A, there is a strong argument for permitting a one way ratchet from a C2A use to a use within C2 without express planning permission.

Use Class C3 – Dwellinghouses. The 2010 changes have clarified some of the issues which had developed since 1987 such as the growth of small residential institutional care units. However, it can still be difficult to decide in some cases whether such residents are living together as a single household.

Use Class C4 – Houses in multiple occupation. Our understanding is that the previous government wanted to use the new restrictions including the creation of the new use class C4 to prevent issues in university towns or suburbs where there is a large student population. We support the changes effective in October 2010 including the guidance that this freedom can be restrained by Article 4 direction if there was a particular issue in an area large or small. It is too early to tell whether the evolution of this policy has been correct but the whole incident emphasises the importance of the applicability of the use classes and the danger of unforeseen consequences at the heart of any reforms. However, as Circular 08/2010 explains the fact that the an increase of inhabitants above 6 may not necessarily result in a material change of use is evidence of a lack of certainty underlying these provisions which, whilst understandable to those knowledgeable in planning matters, is of concern if the objective is to make these provisions easily understandable by members of the general community.

Use Class D1 – Non Residential Institutional. We believe that this use class is working well.

Use Class D2 – Assembly and Leisure. Again, as an example of the sensitivity of the support given by the public to the use class concept was the deletion of the reference to casinos in 2006. Because of the continuing sensitivity of casino use it many communities, it remains sensible to ensure that casinos are outside these provisions.

One question is whether theatres need the protection given by being sui generis or whether theatres could be bought within D2 Assembly and Leisure. There is risk of such a change

leading to development pressure on theatres which are marginally economically viable and on balance we would suggest that in the current conditions such a change would be premature.

5 The current regime seeks to secure a balance between deregulation and protecting the citizen. Has the right balance been struck or should there be more deregulation than is currently allowed through the Use Classes Order and permitted development rights?

Broadly, the balance is correct, although the recombination of A3 to A5 into a single A3 use class might be a sensible development. With regard to the three categories of B class use, we would query whether in all circumstances 235 square metres is too small for the permitted development right to operate, although flexibility in such cap could be left to the localism agenda.

As mentioned above, we would suggest a permitted right to allow a move from C2A to C2.

6 Does the current operation of the Use Classes Order go far enough to remove inappropriate barriers to growth and allow for potential for changes of use that boost growth?

Subject to the suggestion made in response to Question 5, yes. We have not seen over the recent past any overwhelming desire for new or evolving uses which have been frustrated by the existing use class.

7 How should ancillary uses be treated within the Use Classes Order?

One of the issues throughout planning control is that ancillary use is extremely difficult to define. However, the concept of ancillary use provides the lubricant which prevents the whole planning machinery from seizing up. If the ancillary use is sufficiently small so as to be ancillary rather than creating a mixed use, this in itself implies that it is in effect de minimis or so inherently involved with the primary use it can be safely ignored from the perspective of the use classes order.

8 Are the current permitted development rights relating to the temporary use still appropriate? If not, how do you think they should be amended?

We believe that the current permitted development rights relating to temporary use avoid a level of bureaucratic interference which is widely appreciated. However, we agree that some temporary uses, such as car boot sales and motor sports, can create significant concerns. One solution might be to reduce the period of such uses from, say, 14 days to 7 days but with freedom, within the localism agenda, for relevant authorities to extend such period to 14 days or even longer.

9 Should change of use of buildings be allowed on a "temporary" basis without the need for a planning application?

We support the government's efforts to ensure that buildings are kept in use, even on a temporary basis, rather than being left vacant. However, because of the temporary nature of such uses it is unlikely that there will be associated operational development, most of these temporary uses will be within the same use class, at least insofar as they are temporary commercial uses. We appreciate community use is a more complex area but, again, this may be appropriate for localism. If the temporary use is not something which normally would be permitted in the building in question, we do believe that there may be community opposition to such a temporary use should the community believe that planning authorities will look more generously on a subsequent application to make such temporary use permanent.

10 In addition, the review team would welcome any further views or evidence on how the current Use Classes Order and associated permitted development regime is working

In the lead up to the 1987 changes there were considerable pressures for reforms including the creation of Use Class B1. We do not see at the present time an equivalent substantive pressure for change. As mentioned above, most of the recent changes have been driven by a narrower anti-development, more controlling regime. When the 1987 order was introduced it was clearly understood that categorizing those uses in four parts, A, B and C was stylistic rather than implying that it was easier to move from Use Class A2 to A1 than from A2 to B1. It is interesting that, because of the misconception that had arisen north of the border, Scotland retained the more traditional single numbering system. We have no definitive view on this. However, we see arguments favour of in adopting the Scottish approach if there was evidence to show that such misunderstanding was common in England.

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PLANNING AND ENVIRONMENTAL LAW COMMITTEE

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