THE TOWN AND COUNTRY PLANNING ACT 1990

AMALGAMATION OF RESIDENTIAL UNITS

OPINION

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1. The Royal Borough of Kensington and Chelsea, on whose behalf I am instructed, is an Inner London Borough Council which (putting the matter generally) is seeking to maintain or enhance its residential base. Accordingly, the loss of residential accommodation is a concern to the Royal Borough both as planning authority and in its other capacities.

2. Furthermore, there is a particular policy in the Unitary Development Plan, namely H17, which seeks to resist the loss of existing, small, self-contained flats of one or two habitable rooms. At paragraph 5.5.1 it is said that a large stock of small residential units is also important in order to maintain the level of population by allowing a more intensive use of residential properties, maintain the number of adult households which support ancillary services and meet the overall housing provision envisaged by Regional Planning Guidance Note 3.

3. It has been well stated that the hinge on which the law of town and country planning turns is the concept of development. This is widely defined and the rule is that planning permission is required for development. Consequently,

whether the amalgamation of residential units constitutes an exercise requiring planning permission will depend on both a consideration of the meaning of development and the question whether any particular types of development are excused from the requirement whereby planning permission has to be expressly sought.

4. Development means, in consequence of Section 55 of the Town and Country Planning Act 1990, except where the context otherwise requires, the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings on other land. A division can be noted within this definition between operational development on the one hand and change of use on the other.

5. By Section 55(2)(a) the carrying out for the maintenance, improvement or other alteration of any building of works which affect only the interior of the building or do not materially affect its external appearance shall not be taken to involve development of the land. It should here be noted that (by Section 336) land means any corporeal hereditament, including a building and building includes any structure or erection, and any part of a building as so defined.

6. An interesting question might be thought to arise as to whether a flat could be said to be the building under consideration within Section 55(2)(a) and, if so, what constitutes the exterior of the flat. However, my present focus will be on the question whether the amalgamation of residential units within one building

constitutes a material change of use. Indeed I suspect the Court would take the view that, in the conventional situation, the building under consideration for the purpose of section 55(2)(a) was the building containing the flats rather than the individual flats.

7. In respect of material change of use it needs to be noted that (Section 55(2)(f)) in the case of buildings or other land used for a purpose of any class specified in the Town and Country Planning (Use Classes) Order 1987 (as amended) the use of the buildings or other land or, subject to the order, of any part of the buildings or other land, for any other purpose of the same class shall not be taken to involve development of the land. Consequently, even if such an event would otherwise be regarded as a material change of use, it is not taken to be development and so does not require planning permission.

8. The Use Classes Order provides that where a building (which will bear the meaning given by Section 336 of the 1990 Act) or other land is used for a purpose of class C3, the use of that building or that other land for any other purpose within C3 shall not be taken to involve development of the land. C3 comprehends use of a dwelling house by a single person or family or by not more than six people living together as a single household.

9. It appears to me that this provision cannot be of relevance to the situation under consideration. That situation contemplates amalgamation of units. The Use Classes Order contemplates not an amalgamation but a consideration of a particular building (which (in this instance) might be a part of a building) with

the same building in a different circumstance (e.g. now occupied by six people not constituting a family). In other words, it is concerned with (say) a comparison between an individual flat and two (former) individual flats which happen to have been combined. That comparison is not the one sought by the Order. Indeed it could, in the old phrase, be categorised as comparing apples and pears.

10. Accordingly, I return to Section 55 with a view to considering whether the amalgamation of residential units can be or is a material change of use. In this context it can be observed that Parliament has expressly provided by Section 55(3)(a), for the avoidance of doubt, that the use as two or more separate dwelling houses of any building previously used as a single dwelling house involves a material change in the use of the building and of each part of it which is so used. Thus, subdivision is recognised as having planning consequences; in other words even though the use throughout a building remains residential, the fact that the number of residential occupiers has changed (by virtue of the subdivision) is regarded as having a planning consequence.

11. The preceding point is not surprising given that the number of residential occupiers within a given building or area has definite consequences, recognised in the field of town and country planning. Section 5.5 in the UDP reveals such is the case. It is headed providing and maintaining a wide range of housing.

12. The point is equally unsurprising when one considers that the expression material change of use is not defined by the Act. Another phrase left undefined by the Act is material considerations. Planning applications have to be determined having regard to the development plan and other material considerations. Judicially, it has been indicated that this phrase can embrace anything which bears on planning. In other words, it is exceptionally wide.

13. It appears to me, if one contemplates a mansion block of flats in an urban area being used to provide flats for 48 separate households, that to use it for accommodation for one household must, on an ordinary use of language, mean that one is using the block in a materially different way. This is even though the works to achieve that result do not materially affect the external appearance of the block but affect only its interior.

14. The answer to the preceding question must, at least, inform the view to be taken as to whether the amalgamation of a lower number of units into one residential unit constitutes a material change of use. It should be noted at this stage that the question of materiality is plainly capable of being affected over time and place. In some contexts a particular activity or development may be highly material when, in other circumstances, it is entirely insignificant.

15. The consideration so far leads to these conclusions. First, the question as to what is or is not material is not defined by the legislation. Second, in principle what is material can be affected by an almost limitless range of factors. Third, the number and character of residential occupancy is capable of having

material planning consequences. Fourth, an amalgamation of residential units both situated within one building is unlikely to amount to operational development.

16. I consider this further conclusion also follows. It is that the amalgamation of residential units is capable of amounting to a material change of use. So far I have considered the matter by reference to the statutory provisions alone. It is now appropriate to see whether the view expressed is supported by legal commentators and decided cases.

17. The Planning Encyclopaedia at P55.33 discusses the concept of material change of use. Attention is drawn to the lack of a statutory definition and, how, the application of the formula to individual cases will often involve a significant element of subjective judgment, being regarded by the Courts as primarily a matter of fact and degree for the local planning authority. It further records how the Courts have insisted that a material change can occur even though both former and new use falls within the general category of residential.

18. Further, it should here be noted that even though individual flats may be situated within a large building they could constitute individual planning units for the purpose of assessing change of use. This is clear from a decision of the late Mr R M K Gray QC involving the Metro Centre, Gateshead: *Church Commissioners v. Secretary of State for the Environment* [1995] 71 P&CR 73.

19. The Planning Encyclopaedia draws attention to the fact that assessing what constitutes a material change in sue is not entirely straightforward. A change is not material if minimal and thereby insignificant: *de minimis non curat lex*. Intensification of use can be a material change; the intensification has to be of such a degree as to amount to a material change in the character of the use. If that is so it is difficult to see why the reverse should not also be the case. If, for this purpose I may construct a nonce word, why should disintensification leading to a change in the character of the use not amount to a material change of use?

20. Accordingly, the general proposition I put forward that amalgamation of residential units could amount to a material change of use is supported by the analysis I undertook together with the approach given in the Planning Encyclopaedia.

21. In a case called *Richmond Upon Thames v. The Secretary of State for the Environment, Transport and the Regions*, 28 March 2000, Mr Christopher Lockhart-Mummery QC sitting as a Deputy High Court Judge of the Queen's Bench Division had to consider the approach of an Inspector for the proposition that use of a semi-detached residential property in Richmond as a simple family dwelling house instead of seven small self-contained flats did not amount to a material change of use.

22. The learned deputy judge held that the Inspector was wrong in holding that such a change would not be a material change in use. The judge was of the

view that the Inspector should have considered the materiality of the nature of the use before and after within the internal envelope of the building irrespective of external impact. Further, the judge accepted a proposition to this effect: the extent to which a particular use fulfils a legitimate planning purpose is relevant in deciding whether a change from that use is a material change of use.

23. Further, Mr Lockhart-Mummery QC cited a decision by Kennedy J (*Panayi v. Secretary of State for the Environment* (1980) 50 P&CR 109) in which Kennedy J (as he then was) said a change from four self-contained flats without structural alterations to a hostel for homeless persons could amount to a material change of use. The change could give rise to important planning considerations and effect, for example, the residential character of the area, strain the Welfare Services, reduce the stock of private accommodation available for renting and so forth.

24. These authorities support the view, I earlier expressed, that the amalgamation of residential units can amount to a material change in use and hence require, if it is to occur, an application for planning permission. It is interesting to note that the Secretary of State was granted leave to appeal against Mr Lockhart-Mummery QC's decision but did not pursue such leave. Further, the decision has not, as far as I am aware, been questioned in subsequent proceedings.

25. It is apparent from what I have said that what is material is capable of being affected by time and place. Further, it is clear that what is material is affected

by the existence or otherwise of planning policies. However, these matters do not exhaust or substantively reveal what may render something material or immaterial. If one supposes an absence of a development plan but a factual circumstance of an inner urban area with a numerically declining population with consequential effect on local services, the reduction of the number of residential units would be highly material.

26. Accordingly, the materiality of a particular matter is driven by the underlying facts which may have also influenced the creation of various policies which, in their turn, then provide part of the basis which make such a change material. Thus, whether a particular proposal produces a material change of use will depend on a view being reached as to the planning circumstances which obtain at that time.

27. I wholly agree with the proposition expressed in a note dated 9 August 2000 that, as a rule of thumb, an application for planning permission should be sought if a proposal to create a larger residential unit results in the loss of one or more small self-contained flats of one or two habitable rooms. I suggest the matter can be taken further to the effect that if amalgamation of residential units produces material planning consequences then such amalgamation constitutes a material change of use and requires a planning application.

28. In the context of Kensington and Chelsea it is likely that a reduction in the number of residential units will have planning consequences so as to render amalgamation a material change of use. It is clear that as a matter of planning

control a single step which might otherwise be thought as of little consequence can be regarded by itself or in combination as having consequence, An illustration, in a different context, is a mobile home in the green belt.

29. The materiality of the change is affected by the underlying facts which will, of course, be informed by research data and government policy. Further, the extent that policy guidance supports the retention of residential units (rather than simply resisting the loss of a particular type) will also support the materiality of the change. Furthermore such material could aid the Council on any appeal in which it would be necessary to detail the cumulative consequences of the loss of accommodation and any particular problems generated by the loss of the individual units in question.

30. I now switch track to a question which arose in the course of my meeting with my Instructing Solicitor and Planning Officers, namely, whether the same reasoning applies to offices. The point here is that small office suites have been found better to support local employment than large offices which might attract (say) an international company and produce more commuting than is associated with a combination of small office suites.

31. As a matter of principle the approach in connection with amalgamation of distinct office suites ought to be the same. One can readily imagine an old fashioned shopping parade with offices over ground floor shops. The offices may provide local professional services and facilitate local employment. The amalgamation of such offices would have appreciable planning consequences.

32. However, it seems to me that the outcome is significantly affected by section 55(2)(f) and the terms of the Use Classes Order. First, section 55(2)(f) makes plain that the rights conferred by the Classes Order should, subject to the terms of the order, extend not only to the whole but also to part of the buildings to which applicable. This allows subdivision overruling the effect of *Winton v. Secretary of State* [1984] JPL 188. This position does not apply to dwelling houses: section 55(3)(a) of the 1990 Act and Article 4 of the Order.

33. Second, Class B1 embraces use for certain purposes including use as an office other than a use within Class A2 (financial and professional services). This can be contrasted with use as a dwelling house. The language in B1 is use for purposes namely as an office. C3 simply says use as a dwelling house. It does not say, by way of contrast, for the purposes of dwelling or for the purposes of a dwelling house. When amalgamation occurs use for a purpose namely as an office is occurring whereas amalgamation of residential units means that the former units are not being used as a dwelling house but as part of a dwelling house.

34. The significance of financial and professional services to which I referred in my example is recognised because they are not in the same use class. Thus, it appears amalgamation of B1 office uses can occur. Furthermore, a case involving Kensington and Chelsea (but in a retail context) would appear to support that approach: *R v. Kensington and Chelsea ex p. Europa* [1996] EGCS 5.

35. On the same basis it would appear that professional services could be combined under A2.

CONCLUSION

36. On the important question of amalgamation of residential units, the answer is that amalgamation can constitute a material change of uses and, in many instances, it is likely to do so.

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