**THE TOWN AND COUNTRY PLANNING ACT 1990**

**AMALGAMATION OF RESIDENTIAL UNITS**

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**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) seeks 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. The essential question is whether or not the amalgamation of residential units without affecting the exterior of a building containing those units, into, typically, one unit constitutes development and thereby requires, if amalgamation is to occur, planning permission. There are variants of this question so that the same considerations would, in all likelihood, arise if, for example, 7 units within the same building were converted into three units.

3. The hinge on which the law of town and country planning turns is the concept of development. The rule is that planning permission is required for development. Consequently, whether amalgamation of residential units requires planning permission depends on the meaning of development.

4. A particular set of circumstances may generate a number of issues. For instance the question might arise whether the need for an express grant of planning permission is avoided by permitted development rights. Alternatively, the question might arise whether planning permission should be given for amalgamation of units. Whether one asks that question depends on the prior question whether or not planning permission is required. This serves to emphasise that the question whether planning permission is required is different from the question whether planning permission should be given.

5. By section 55 of the Town and Country Planning Act 1990 ‘development’ means, save 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. The principal division in this definition is between operational development and the making of a material change of use.

6. 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. By section 336 of the 1990 Act land means any corporeal hereditament, including a building and building includes any structure or erection, and any part of a building as so defined.

7. It is section 55(2)(a) which reveals that our focus has to be on the question whether the amalgamation of residential units within one building constitutes a material change of use.

8. In considering this matter, i.e. amalgamation of residential units, one does not need to devote time to section 55(2)(f) of the 1990 Act or the Town and Country Planning (Use Classes) Order 1987 (as amended).

9. 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, i.e. use of a dwelling house by a single person or family or no more than 6 people living together, 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.

10. This provision is of no relevance to the situation under consideration. We are concerned with amalgamation of units. However, the Use Classes Order contemplates not an amalgamation but a comparison of a particular building with the same building but in a different circumstance. The circumstance with which I am concerned is one that involves two or more buildings, i.e. the individual flats. It will be remembered that the meaning of building includes part of a building.

11. 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. It can

be noted 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.

12. Thus, subdivision is recognised as having planning consequences; in other words even though the use throughout a building remains residential, the fact that one housing unit has become two (by virtue of the subdivision) is regarded as having planning consequences.

13. The preceding point is not surprising. The number of residential occupiers within a given building or area has definite consequences, recognised in the field of town and country planning. I am concerned with an inner London borough. Housing is a vital issue in London. It is notorious that there is a shortage of housing and that the character of housing in parts of London has become, by virtue of its size or price, out of reach for innumerable people.

14. A multitude of consequences flow from the character of housing provision in London. It would be neither practicable nor possible to specify them all. An example can be given. A diminution in the number of units and an increase in the size of units makes it more difficult for young people seeking to live and work in London to do one or other or both. In turn this contributes to unsustainable commuting or possible overcrowding.

15. It can be noted that section 13 of the Planning and Compulsory Purchase Act 2004 requires local planning authorities, such as Kensington and Chelsea, to keep under review matters that may be expected to affect the development of

its area or the planning of its development. These matters include social characteristics, size composition and distribution of population and any consideration that may be expected to affect those and other matters.

16. Two matters can be taken from section 13 of the 2004 Act. First, Parliament reveals the width of matters that bear upon and are material to planning. Second, Parliament imposes the obligation on the local planning authority to keep matters under review. Thus, the planning authority is expected by Parliament to have the information about matters that bear on planning.

17. The expression 'material change of use' is not defined by the Act. The word material is not defined and simply bears its ordinary, English, contextual meaning. It suggests something of consequence or relevant. It follows that in considering whether or not there may be a material change of use one is simply looking for a change which has some-it does not matter what- planning consequence. It also follows that the local planning authority, being required to keep matters under review, is in the best possible position to gauge whether a change of use is material.

18. The word 'material' is used elsewhere in the 1990 Act. Thus by section 70, planning applications have to be determined having regard to the development plan and other material considerations. Judicially, it has been indicated that this phrase, i.e. material considerations can embrace anything which bears on planning. In other words, the phrase is exceptionally wide.

19. If one contemplates a mansion block of flats in an urban area being used to provide flats for, say, 12 separate households, 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 whether or not the necessary works do not materially affect the external appearance of the block but affect only its interior.

20. The preceding point informs the view to be taken as to whether the amalgamation of a smaller number of units into one residential unit constitutes a material change of use. It should be noted 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.

21. 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 situated within one building is unlikely to amount to operational development.

22. This further conclusion also follows. It is that 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.

23. 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, at P55.36, 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.

24. The reference to the courts regarding the question of material change of use, being one of fact and degree, for the planning authority is in harmony with the planning authority having to keep under review matters that may affect the planning of its area. It follows that a planning authority's views on whether losing housing stock by its amalgamation constitutes a material change of use is likely, ordinarily, to be determinative of the matter. It also follows that this is what is expected by Parliament.

25. Further, it be noted that even though individual flats may be situated within a large building they will generally 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.

26. The Planning Encyclopaedia draws attention to the fact that assessing what constitutes a material change 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. Why should dis-intensification, leading to a change in the character of the use, not amount to a material change of use?

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

28. 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 to the proposition that use of a semi-detached residential property in Richmond as a single family dwelling house instead of seven small self-contained flats did not amount to a material change of use.

29. The learned deputy judge held 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.

30. 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.

31. 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.

32. 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.

33. Accordingly, the materiality of a particular matter is driven by the underlying facts which may also have 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.

34. As a rule of thumb in Kensington and Chelsea 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 say this as I understand the local planning authority to consider that such a loss has planning consequences. Such is not to say that such might not be permitted but it is a mistake to confuse the question whether planning permission is required with the question whether planning permission should be granted. Both questions will involve the consideration of planning matters but they remain, none the less, different questions.

35. Further, the question whether planning permission should be granted is determined in a particular way given by section 70 of the 1990 Act. There is no such particular way given to resolve the question whether there is a material change of use.

36. 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.

37. 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.

38. The question of amalgamation of residential units naturally arises from time to time. The substance of this opinion was conveyed in 2003. I consider the relevant law has stayed the same during that time.

39. Inspectors have sometimes expressed views or reached decisions contrary to the views of the planning authority but such views do not undermine the reasoning here expressed. I have noted a recent decision dated 24 February 2016 in respect of 14 St Charles Street, W10 (Ref APP/K5600/X/15/3006157. This appears an example of the correct approach.

40. Another inspector's view is presently before the High Court so it may be that the High Court will again be called on to declare the law as to material change of use. However, it seems clear that the High Court, on the present state of the law, would be bound to say that whether or not there was a material change of use was a matter of fact and degree with which the local planning authority was well placed to deal.

## CONCLUSION

41. 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. It seems unlikely it would not do so in Kensington and Chelsea.

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**11th March 2016**

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