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## Appeal Decisions

Site visit made on 11 September 2024

**by Thomas Shields DipURP MA MRTPI**

an Inspector appointed by the Secretary of State

**Decision date: 23 April 2025**

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### **Appeal A: APP/X5990/X/23/3324754**

#### **Lees Court, Lees Place, London, W1K 6LQ**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) ("the Act") against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by the Government of the United States of America against the decision of the City of Westminster Council.
  - The application ref 22/06661/CLEUD, dated 3 October 2022, was refused by notice dated 13 January 2023.
  - The application was made under section 191(1)(a) of the Act.
  - The use for which a LDC is sought is use of the building as 19 self-contained residential dwellings (Class C3)
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### **Appeal B: APP/X5990/X/23/3324755**

#### **Lees Court, Lees Place, London, W1K 6LQ**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) ("the Act") against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by the Government of the United States of America against the decision of the City of Westminster Council.
  - The application ref 22/06662/CLOPUD, dated 3 October 2022, was refused by notice dated 13 January 2023.
  - The application was made under section 192(1)(a) of the Act.
  - The use for which a LDC is sought is use of the building as 19 self-contained residential dwellings (Class C3).
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## **Decisions**

1. Appeals A and B are dismissed.

## **Background**

2. The 5 storey appeal building lies close to the former location of the Embassy of the United States (US) at Grosvenor Square, London. It was occupied by US Marines and other US staff based at the Embassy from July 1988 to February 2018. Since 2018 the building has remained unoccupied.
3. It is unnecessary for me to include the appeal building's entire history of applications and granted planning permissions. More briefly, planning permission was granted in 1983 for use of the 5 storey residential building as 24 flats. Plans showing existing layouts in 1986 show that the 1983 permission was fully implemented. One of the ground floor flats was shown as a 'porter's flat', although no such restriction on its occupation was imposed by a planning condition.
4. In 1986 planning permission was granted for the conversion of 15 of the flats on the upper floors to 10 flats (a reduction of 5 flats). Together with the 4 flats on the ground floor still benefitting from the 1983 permission this provided 19 flats in the building in total. This permission was also implemented.

5. The Government of the United States of America (USG) leased the entire building from July 1988 for a period of 30 years.
6. In 1988 the Secretary of State<sup>1</sup> used his 'call-in' powers to determine an application and grant planning permission for the construction of a "*communal dining room, lounge and kitchen on the ground floor*". This permitted the change of use of the ground floor from its former use as 4 flats. The approved proposed drawings attached to the permission show these works entailed the conversion of 3 of the ground floor flats (including the one formerly marked 'porter's flat'), leaving 1 remaining flat, now annotated as a 'porter's flat', although again no condition was imposed to limit its occupation. The permission was subject to 2 conditions as follows:
  - (i) *the permission will be personal to the Embassy of the United States of America;*
  - (ii) *the development hereby permitted shall take place not later than 30 November 1993.*
7. An LDC application for existing use of the building as 19 self-contained residential dwellings (Class C3) was refused by the Council on 13 January 2020.

### **Main Issue**

8. The main issue in both appeals is whether the Council's decisions to refuse the LDC applications were well-founded.

### **Reasons - Appeals A and B**

9. Section 191(a) of the Act provides that if any person wishes to ascertain whether any existing use of buildings or other land is lawful they may make an application for a certificate of lawfulness. A similar provision to ascertain whether a proposed use of buildings or land would be lawful is at s192(1).

Section 191(2) sets out that uses and operations 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.
10. The burden of proof in demonstrating that existing and proposed uses or operations are lawful falls to an appellant, with the standard for testing such evidence made on the balance of probabilities. Reflecting earlier Court judgments the PPG<sup>2</sup> sets out that an appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence alone is sufficiently precise and unambiguous.

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<sup>1</sup> The Right Honourable Nicholas Ridley, Secretary of State for the Environment (SoS)

<sup>2</sup> Planning Practice Guidance Reference ID: 17c-006-20140306 (MHCLG)

11. There is no enforcement notice in force relevant to Appeals A and B and hence the requirement of s191(2)(b) is met.
12. The Appellant's submitted statement of case (SOC) and historical documentary evidence related to the property is the same for both appeals. It includes the Statutory Declaration (SD) of Oliver Dunthorne, along with appended copies of documents, including an earlier SD of Thomas Reed, together with a legal opinion<sup>3</sup>. However, there is no SD or statement from anyone who states they either occupied the building, or witnessed first-hand how it was *actually* being used at the time of occupation by US Marines and other staff up to February 2018. The same applies in respect of the Council's written submissions.
13. Consequently, other than observations of the building following its vacation the Appellant's case relies on an analysis, interpretation and conclusions drawn from the various historical and other documents submitted. That of course is no different a task than is now before me. While I do not doubt the integrity or professionalism of the opinions expressed, they do not carry the evidential weight that could otherwise be attached to first-hand accounts attesting to how the building was *actually* used during its occupation.

#### *The 1988 planning permission onwards*

14. The approved proposed drawings attached to the 1988 permission, for the ground floor only, show its re-configuration. Along with a porter's flat it comprised the entrance hall, 2 ground floor toilets, lift and stairs to upper floors, a main kitchen and store room, laundry room, the main communal dining room with servery area, lounge and bar area, and with access to a rear communal courtyard. It was subject to the 2 planning conditions listed earlier. As such, there appears to be no difference in the parties' interpretation of the 1988 permission.
15. Various historical documents submitted by the main parties indicate that at that time the Council, the USG, and the SoS confirmed that the ground floor use would be ancillary to the use of the flats on the upper floors, that based on the assumption that there would be no physical changes to the upper floor flats. (Indeed, the permission permitted the change of use of the ground floor only). This ancillary level of use of the ground floor was intended to be limited to such by a personal use condition restricting use only to the "*Embassy of the United States of America*". The condition, by implication, meant that when the ground floor was no longer used by the US Embassy, it could lawfully revert to its former residential use as 4 flats.
16. The SD of Mr Reed indicates that the works to convert the ground floor were completed in 1989/1990. The Appellant argues that the permission was thus fully implemented. However, this is the point at which the parties diverge in their views.
17. Although the ground floor works were indeed carried out to provide the communal facilities, other works were also undertaken at the same time to the flats on the upper floors. Mr Reed's SD states: (My emphasis in bold)

*"The kitchen cupboards and appliances were **stripped out** of the individual units around 1989/1990, **when the communal facilities for cooking and dining were created**. However, the individual boilers remained in place in each unit and are still*

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<sup>3</sup> Legal Opinion of Charles Banner KC, 21 March 2022.

*in use. In addition, the pipe work and electrical sockets were left in place in the units to allow cupboards and kitchen appliances to be refitted”.*

18. The works to the flats are more fully described as shown in an annotated 1989 working drawing<sup>4</sup>, which notes in respect of kitchens:

*“Carefully **remove all kitchen fixtures & fittings including floor units, wall units, worktops, cooker, hob, sink, boiler, fridge & set aside off site** ...remove all floor tiling and set aside off site ...remove doors hinges and ironmongery for re-use ...remove all partitions taking care to ensure that the window & walls to remain are not damaged ...remove suspended ceiling and cornice”.*

19. With regard to the above, it seems clear to me from the evidence that the entire kitchen facilities in the flats were indeed “stripped out” as stated by Mr Reed. The works went much further than as assumed in the Appellant’s legal opinion (para.11) which refers only to ..“*partial stripping out of kitchen cupboards and appliances*”. The stripping out of the kitchens in the flats are not referred to in any of the submitted historical documents up to 1988, including those related to the called-in planning application. Hence, there is no evidence to show that at the time of the 1988 application neither the Council, the Planning Inspector, or the SoS were aware that the kitchens in the flats were to be removed.
20. The stripping out of the kitchens in the flats, as internal works, did not in isolation require planning permission. However, they resulted in some change in the way the flats were occupied. The Appellant is of the opinion that contemporary accounts and photographs<sup>5</sup> indicate food preparation facilities and storage in each flat would remain. However, the photographs referred to (post-2018) show only limited shelving in some kitchens, and much of it appears inconsistent with the design and appearance of shelving normally found for domestic kitchen use. Moreover, any subsequent provision of shelving or preparation areas are not *cooking* facilities. There is no convincing evidence (as opposed to assertion) before me of the former kitchens in the flats being used for the cooking of meals (or indeed any preparation of food) after they were stripped out in 1989/1990.
21. As a matter of fact and degree I consider that from 1989/1990 the 16 remaining residential units, absent cooking facilities, no longer had sufficient living facilities within them necessary for day to day private domestic existence in the context of *Gravesham*<sup>6</sup>. They were no longer self-contained flats in that sense. In conjunction with the provision of communal catering and other facilities on the ground floor, this inevitably changed the nature of occupation of the former flats and of the building as a whole.
22. That Council tax records (June 2023) exist for numbered individual units does not provide evidence either way in terms of how the building was actually used during occupation by the USG. I note at some point post-1989/90 one of the units (No.7) was used as a communal gymnasium, although there is no evidence before me as to its temporary or permanent duration. I also note that utilities during USG occupation were charged to and paid for by the building as a whole, rather than to the individual residential units. That feature is not typical of occupation as

<sup>4</sup> LDC Application Supporting Statement, September 2022, Document 5, appendix 2

<sup>5</sup> SD Reed, Exhibit 4 – plans and photographs

<sup>6</sup> *Gravesham BC v SSE & O'Brien* [1982] 47 P&CR 142; [1983] JPL 307

self-contained flats, but rather more typical of fully shared accommodation, although I acknowledge it is not by itself a decisive matter.

23. Taking account of all the above factors, and on the balance of the evidence before me, I consider the occupation of the 16 remaining units supported by the new kitchen, dining and other communal facilities on the ground floor was a material change of use (MCU) of the whole building from its previous use as 19 self-contained flats. While the internal works to the ground floor were not operational development with the meaning of s55 of the Act they were integral to and facilitated the MCU of the building as a whole into a single planning unit. The Council describe that change in use of the whole building to that of a hostel. I disagree with the Appellant's legal opinion that the 1988 planning permission effectively authorised that change of use of the whole building. It did not.
24. The Appellant refers to *Uratemp*<sup>7</sup>. However, whether a building or part of a building is in use as a single dwelling house has to be construed with regard to legislative purpose, which in this appeal is concerned with land use. *Uratemp* was a decision on different facts and circumstances and related to a different statute and purpose. As such, it did not establish a complete or universal definition of a single or separate dwelling house that would be applicable in all other statutes. Hence, the fact that a habitable unit may have some basic facilities does not necessarily mean that it meets the test of having the facilities for day to day private existence as set out in *Gravesham*. *Baker*<sup>8</sup>, also referred to, does not support the Appellant's argument in the context of *Gravesham*.
25. On the point of how the use might be labelled I am not convinced it would neatly fall within the Council's description of hostel use, as opposed to a mixed *sui generis* residential use, having characteristics akin to both hostel and large HMO<sup>9</sup> use. However, it is clear to me that however it may be described it was clearly a material change in the character of the use of the whole building from its former use as 19 self-contained flats, and which required planning permission.
26. Thus, the intended use of the ground floor for ancillary purposes to the remaining flats never occurred. Its use simply changed integrally along with upper floors, to a single primary hostel/mixed residential use. Without planning permission the new use was a breach of planning control, and it appears the building remained in the same mixed use without significant interruption thereafter. As such, the use would have become immune from enforcement action by 1999/2000.
27. Since the permitted change of use of the ground floor (only) from 4 flats to a porter's flat and communal facilities under the 1988 permission never occurred (because of the change of use of the whole building as described above) the permission expired in 1993. No enforcement notice was issued in respect of the unauthorised use. As such, there is no right of reversion under s57(2) or (4) of the Act to use of the building as 19 flats, or of the ground floor as 4 flats.
28. Appeal A in respect of the existing lawful use as 19 flats therefore fails.
29. Turning to whether the proposed use (Appeal B) of the building as 19 self-contained flats would be lawful therefore depends on whether such a change of use

<sup>7</sup> *Uratemp Ventures Ltd. v Collins* [2001] UKHL 43

<sup>8</sup> *Baker v Secretary of State for the Environment, Transport and the Regions* [2001] 82 P&CR 24

<sup>9</sup> House in Multiple Occupation

would be a material one from the existing lawful use of the building as a 16 unit hostel/mixed residential use.

30. Consistent with my observations during my visit to the appeal site, the submitted plans show the layout of the 19 flats including now full kitchens in each one. The occupation of the building would change from being a single planning unit comprising 16 habitable units with shared facilities to 19 separate self-contained planning units (flats). In my view the increase in the number of habitable units and the change in the nature of occupation would be a material change in the character of the use of the building as a whole. The potential for increased off-site impacts such as demand for parking, healthcare and education provision reinforces my view. The Appellant has failed to demonstrate evidentially, on the balance of probability, that there would not be such a MCU.

### **Conclusions**

31. As set out earlier the burden of providing sufficient evidence, tested on the balance of probabilities, falls to the Appellant. In this regard, the evidence in support of the Appellant's case is somewhat limited by being largely assertion based on interpretative analysis of historical documents, rather than direct evidence from anyone who observed first-hand how the building was *actually* used during the relevant period of time. Overall, the evidence does not reach the standard of being sufficiently precise and unambiguous in that regard. The appeal must therefore fail.

### **Appeal A**

32. For the reasons given above I conclude that the Council's refusal to grant a LDC in respect of use of the building as 19 self-contained residential dwellings (Class C3) was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the Act.

### **Appeal B**

33. For the reasons given above, I conclude that the Council's refusal to grant a LDC in respect of use of the building as 19 self-contained residential dwellings (Class C3) was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the Act.

*Thomas Shields*

INSPECTOR