



Application for a Certificate of Lawfulness for a Proposed Use or Development

1 Triton Square, Regent's Place, London NW1 3BF

1. INTRODUCTION

- 1.1 We submit this note on behalf of our client British Land Property Management Limited ("**BL**") in support of their application for a Certificate of Lawfulness for a Proposed Use or Development under Section 192 of the Town and Country Planning Act 1990 (the "**TCPA 1990**") (the "**Application**").
- 1.2 The Application seeks to confirm that the proposed use of floorspace for life sciences and innovation uses within the recently redeveloped building at 1 Triton Square (the "**Property**") is lawful and does not require planning permission.
- 1.3 Full planning permission was granted on 21 November 2017 by Camden Council with reference 2016/6069/P ("**Planning Permission**") in relation to the Property and St Anne's Church at Laxton Place.
- 1.4 The Planning Permission authorises the following:
Erection of 3 storey extension at roof (6th floor) level of 1 Triton Square to provide additional office floorspace (Class B1) with relocated plant above, creation of roof terraces at 6th floor level, reconfiguration of ground floor including infill of Triton Square Mall including flexible retail (A1, A3 and A4), affordable workspace (B1) and reprovision of gym (D2); erection of part 6, part 9 storeys residential building to provide 22 flats (10 x 3-bed, 11 x 2-bed and 1 x 1-bed) (Class C3) following demolition of St Anne's Church (Class D1); hard and soft landscaping including garden at junction of Longford Street and Triton Square; reconfigured vehicle and pedestrian accesses; and other ancillary works.
- 1.5 Various alterations and amendments have been approved in relation to the Planning Permission via a number of non-material amendments¹ but there have been no changes to the relevant part of the Planning Permission describing the office floorspace (Class B1) use.
- 1.6 The Planning Permission has been implemented and the redeveloped building has been practically completed to shell and core and toilets and lift lobbies have been fitted out, in anticipation of further fit out prior to occupation. It was intended that the office floorspace would be fitted out and occupied by an incoming tenant, however that tenant terminated their lease of the building and further fit-out of the office floorspace has not been commenced as a result.
- 1.7 Following amendments to the Town and Country Planning (Use Classes) Order 1987 ("**UCO 1987**") which came into effect from 1 August 2021, Class B1 uses (including B1(a) offices) have been subsumed along with various other uses into Class E (Commercial, Business and Services).
- 1.8 Our client is proposing to use the Property for life sciences and innovation uses. Life sciences and innovation uses fall under Class E (Class E(g)(ii): "*for the research and development of products or processes being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit*", and so are also a use in Class E.
- 1.9 We also note for completeness that prior to the redevelopment being undertaken the Property was in use as offices.

¹ 1.1.Dec 22 2017 (2017/6573/P), Sep 7 2018 (2018/2980/P), Nov 23 2018 (2018/5705/P), Dec 9 2019 (2019/5363/P), Feb 12 2020 (2020/0120/P), Mar 9 2021 (2021/0670/P)



2. LEGAL POSITION ON CHANGE OF USE FROM OFFICE TO LIFE SCIENCES AND INNOVATION

2.1 The operation of the UCO

2.2 Planning permission is required for the carrying out on land of any development (section 57(1), the TCPA 1990). Development is defined as the "*carrying out of building, engineering, mining or other operations in, on, over or under the land or the making of any material change in the use of any buildings or other land*" (section 55(1), TCPA 1990). As such, planning permission is generally required if there is a material change in the use of any buildings or land.

2.3 However, section 55(2)(f) TCPA 1990 provides that in the case of buildings or other land used for a purpose of any class specified in the UCO 1987 the use of the buildings or other land (or any part of the buildings or the other land) for any other purpose of the same class shall not be taken to involve development of land. Therefore, planning permission is not required for such changes in the use of land.

2.4 Similarly, Article 3(1A) of the UCO 1987 provides that where a building or other land is used for a purpose specified in Schedule 2 (which includes Class E), the use of that building or other land (or part use of the building or other land) for any other purpose of the same class is not to be taken to involve the development of the land (and therefore does not require planning permission).

2.5 As such, where the existing use of the Property is as offices, planning permission will not be required to carry on life sciences and innovation uses at the Property (save for any operational development required to facilitate this use which planning permission will be required in respect of – discussed further below).

2.6 The existing use of the Property

2.7 In order to determine whether section 55(2)(f) TCPA 1990 and section 3(1A) of the UCO 1987 can be relied upon to support a change of use from office to life sciences and innovation uses without the requirement for a planning permission it is necessary to identify whether the property is in office use, which includes whether it can demonstrably be shown that the office use has been instituted having regard to the relevant legal tests for what constitutes the institution of a use.

2.8 Neither the TCPA 1990 nor the UCO define what is required to institute a use. However, there is relevant case law which has considered the point at which a use has been instituted. These cases have been in the context of changes of use, and usually in a planning enforcement context.

2.9 The decision in *Impey v Secretary of State for the Environment*² provides authority that a change of use can take place before any use for the stated purpose actually takes place if there are physical works which show an intention to use the property for a particular use.

2.10 In the *Impey* case, the owner of a kennels carried out internal and external works for the purpose of converting the building into two units of residential accommodation. Mr Impey had constructed an access road and undertaken internal alterations. Donaldson LJ considered the question of when a change of use occurs in the context of a change of use of a building to residential use where operations are undertaken to convert the premises and they are put on the market as being available for letting. In this regard Donaldson LJ stated as follows:

"Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that

² (1984) 47 P & CR 157



during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree."

- 2.11 Donaldson LJ also refers to the decision of Upjohn L.J. in *Howell v. Sunbury on-Thames Urban District Council*³, where he stated:

"... I agree that development by works and development by user are different matters and must be considered separately, but when one is considering whether there has been a material change in the use of buildings or land one must first consider the site as a whole and then, as a matter of common sense, compare the user before the critical date and after the critical date. When doing that, any changes in the physical state of the land must be taken into account as an element, for, if this is ignored, the user before and the user after cannot be properly assessed and compared. In some cases, and I think in this case, the change in the physical state of the land must be an important element; in other cases it may be entirely unimportant; but it seems to me you cannot, as an element, disregard the physical state of the land before and after."

- 2.12 Donaldson LJ went on in *Impey* to state:

"Applying that to this case, I would say that the physical state of these premises is very important, but it is not decisive. Actual use or intended use or attempted use is important but not decisive. These matters have to be looked at in the round."

- 2.13 Mr David Widdicombe QC, sitting as a deputy judge in the case of *Backer v Secretary of State for the Environment*⁴, expressed doubt about the decision in *Impey* starting that, but for it, he would have had no hesitation in accepting an argument that *"physical works of conversion, that is, say building operations, cannot by themselves give rise to a material change of use: some actual use is required"*.

- 2.14 However, the Supreme Court in *Secretary of State for Communities and Local Government and another v Welwyn Hatfield Borough Council*⁵ stated that the approach taken in *Impey* is to be preferred to the doubt expressed in *Backer*.

- 2.15 In that case the Supreme Court considered the Secretary of State's arguments that in the short period between completion of a building and its residential occupation the building had no use, so that there was a change of use from no use to use as a dwelling house. Lord Mance stated the following:

"...[21] It is not, I think, natural to talk of a house built to live in as undergoing, especially in so short a period, two different uses or non-use and then use. Second, it raises the question what would be the position if Mr Beesley had moved in as substantial completion of the building occurred. Third, should a dwelling house into which its builder-owner intends to move almost immediately be regarded as having or being of "no use" as a dwelling house?

...

[24] It is true that at one point in the Petticoat Lane case (p 1117D), Widgery LJ said of the new building that it started "with a nil use, that is to say, immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, it is a use which can be restrained by planning control". But the opinions of Lords Fraser, Scarman and Lane in Newbury and the analysis of Lord Scarman in Pioneer Aggregates show that reasoning based on change of use was not

³ (1964) 15 P & CR 26

⁴ (1984) 47 P & CR 149

⁵ [2011] UKSC 15



necessary even in the context which Widgery LJ was addressing. It was sufficient that the owner was bound by the terms of the planning permission which he had chosen to implement.

...

*[27] In the present case, the question is whether it is right to describe a dwelling house as having or being of no use as a dwelling house, when it has just been completed and its owner intends to occupy it within days. This too is not a question which can sensibly be answered on a day-by-day basis. It calls for a broader and longer-term view. Support for this is found in *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157.*

...

*[29] As a matter of law, I consider that the approach taken by Donaldson LJ was correct and is to be preferred to the doubt expressed in *Backer*. Too much stress has, I think, been placed on the need for "actual use", with its connotations of familiar domestic activities carried on daily. In dealing with a subsection which speaks of "change of use of any building to use as a single dwelling house", it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is. As I have said, I consider it artificial to say that a building has or is of no use at all, or that its use is as anything other than a dwelling house, when its owner has just built it to live in and is about to move in within a few days' time (having, one might speculate, probably also spent a good deal of that time planning the move)."*

2.16 Application of the common law principles to the Property

2.17 It is important to consider the matter in the round when applying the established common law principles to the Property and its current circumstances.

2.18 The physical state of the Property is important; it has been constructed to shell and core and toilets and lift lobbies have been fitted out in anticipation of further fit-out. The intention for the use and the attempted use of the Property is also important; the Property has been developed with the intention to be let as offices in accordance with the Planning Permission. Indeed, the Property has been directly marketed for the intended office use and was leased for use as office floorspace, and but for the tenant terminating that lease the floorspace would have been further fitted out and occupied as an office.

2.19 It is also relevant that the use of the floorspace which was existing prior to the Planning Permission being granted and the redevelopment being undertaken was in office use, and as such office use of this floorspace in the building has consistently been its lawful authorised use.

2.20 We are therefore satisfied that the principles established in *Impey* and affirmed in the Supreme Court Judgement in *Welwyn Hatfield* are applicable in the circumstances, and that when considering matters in the round and asking what use the building has or what use it is, this strongly supports the position that the floorspace at the Property is either in office use or such use has been instituted following the redevelopment of the Property in accordance with the Planning Permission.

2.21 On the basis of the above, in accordance with section 55(2)(f) TCPA 1990 and section 3(1A) of the UCO 1987 we conclude that the floorspace in the Property which is in lawful office use does not require a further planning permission to authorise the proposed life sciences and innovation use.

2.22 It follows therefore that it would be lawful for Camden Council to approve an application for a Certificate of Lawfulness for a Proposed Use or Development in respect of the proposed



life sciences and innovation use of the floorspace which is authorised for office use in the Property following its redevelopment.

2.23 **Precedent in Camden of the institution of use before actual occupation**

2.24 We are aware of a planning permission granted on 2 March 2022 by Camden Council with reference 2020/5851/P relating to land at Stephenson House 75 Hampstead Road London NW1 2PL (the "**Stephenson House Change of Use PP**").

2.25 The planning permission authorises the following:

Change of use of 11 market residential units (C3), as substantially implemented under 2018/0663/P dated 02/07/2018, to flexible temporary sleeping accommodation (Sui Generis)/residential units (C3) to be used as accommodation for the cancer patients (and their parents/carers) being treated at UCLH's Proton Beam Therapy Centre.

2.26 In terms of the status of development at Stephenson House when the planning application for the Stephenson House Change of Use PP was determined, the following statements in the Officer Committee Report provide further details:

2.26.1 Paragraph 1.2 notes that "*the permission was lawfully implemented and the development is now substantially completed.*"

2.26.2 Paragraph 2.1:

"The application site lies with a substantially completed 8 storey building (consented under 2017/3518/P dated 08/03/2018 and 2018/0663/P dated 02/07/2018), which predominately fronts Hampstead Road (eastern side) taking up the entire frontage between Drummond Street and William Road (see Figure 1 below for the building the application site lies with). As stated above, the building is consented for an office led development with other uses, including 17 residential units. The application site as part of the subject application relates specifically to the 11 market residential units only, with the remainder of the building (and uses) not forming part of the application."

2.26.3 Paragraph 9.1 of the Officer Committee Report notes that "***whilst the market units have been substantially completed and are considered established, they have not been occupied (nor sold/rented)***" (our emphasis added).

2.27 We consider that the Stephenson House Change of Use PP provides precedent for the principle that a use can be instituted prior to the actual occupation and that a change of use may then lawfully be authorised.

2.28 **Additional matters**

2.29 Planning conditions and planning obligations contained in section 106 agreements can restrict the rights to change use available under the UCO 1987. We have reviewed the conditions attached to the Planning Permission and the obligations contained in the related section 106 agreement and confirm there are no such restrictions that would prevent the Property from the benefit of Article 3(1A) of the UCO 1987.

2.30 We understand that some physical works to the building are required to facilitate the life sciences and innovation use and that a separate application for planning permission was submitted to Camden Council on 30 January 2024 in respect of these works (reference: 2024/0409/P).



3. **CONCLUSION**

- 3.1 The floorspace at the Property which is authorised by the Planning Permission for office use has been instituted for such use.
- 3.2 This is on the basis that this was the use of part of the overall floorspace before the redevelopment, and because the Property has been constructed to shell and core and toilets and lift lobbies have been fitted out in anticipation of further fit-out. The Property was also directly marketed and a lease was entered into for office use, and but for the tenant terminating that lease the floorspace would have been further fitted out as office floorspace and occupied as such.
- 3.3 The principle that the use of floorspace may be instituted before actual occupation is also supported by the Stephenson House Change of Use PP precedent discussed above.
- 3.4 On this basis a Certificate of Lawfulness for a Proposed Use or Development should be granted.
- 3.5 Please contact Martyn Jarvis (020 7466 2680 or martyn.jarvis@hsf.com) or Julia McKeown (020 7466 2321 or Julia.mckeown@hsf.com) of this firm should you wish to discuss this note further.

Herbert Smith Freehills LLP

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