

LDC Report	
Officer	Application Number
Kristina Smith	2017/1917/P
Application Address	Recommendation
Flat 4 Great Russell Mansions 59-61 Great Russell Street LONDON WC1B 3BE	Approve
1st Signature	2nd Signature (if refusal)
Proposal	
Use of unit at lower ground floor level as self-contained flat (Class C3)	
Assessment	
<p>The application site refers to a vacant unit on the lower ground floor of Great Russell Mansions, a 7-storey late 19th century mansion block on the south side of Great Russell Street between Museum Street and Bury Place. The block comprises self-contained residential units on all floors including lower ground floor level. The building is not listed but is located in the Bloomsbury Conservation Area.</p> <p>The application seeks to demonstrate that the residential use is lawful such that the continued use would not require planning permission. In this situation, the key consideration when granting a certificate of lawfulness of existing use of development under section 191 of the Town and Country Planning Act 1990 (the 'Act') is whether on the evidence provided the use of the Unit can be said to have been lawful and remains lawful or whether it can be said that the lawful use has been abandoned.</p> <p>It should be noted that the 4 year time frame under s171B of the Act does not apply in the present case as there is no record of change of use or any non-compliance with the use which could give rise to enforcement action.</p>	
Planning History	
<p>2016/0344/P Flat 4, Great Russell Mansions 59-61 Great Russell Street London WC1B 3BE Change of use of Flat 3 (basement) from storage area (Class B8) to create 1 no. self-contained 2-bed flat (Class C3); erection of privacy fencing in rear lightwell; alterations to openings; and associated works. Pending Decision</p>	

Applicant's Evidence

The applicant has submitted the following information in support of the application:

- Site Location Plan (1:1250)
- Planning statement prepared by James T Sharp dated 29th March 2017
- Signed Affidavit from LB Camden Estate Services Manager
- Existing floor plans, elevations and section drawings (dated 2015)
- Floor plans dated November 1979 and February 1983
- Electoral roll records from 1947 and 1982 showing Flat 4 listed with name of tenant

Council's Evidence

There is no relevant planning history or enforcement action on the subject site which demonstrates the residential use of the property. There is a current application which is still pending decision (ref. 2016/0344/P) which has stalled due to uncertainty regarding the Unit's lawful use, which this application seeks to resolve. Although the application refers to the use as storage (B8), there is no evidence to suggest this is its lawful use and the applicant has informed the case officer that the application will be withdrawn in the event a Certificate of Lawfulness (existing) is granted.

A site visit to the property was undertaken on the 28th March 2017. On the site visit, the officer had seen that the property is in a poor state of disrepair; however, evidence including electrical fittings, fireplaces and domestic wallpaper, suggests it has been used as a residential dwelling.

Assessment

The Secretary of State has advised local planning authorities that the burden of proof in applications for a Certificate of Lawfulness is firmly with the applicant (DOE Circular 10/97, Enforcing Planning Control: Legislative Provisions and Procedural Requirements, Annex 8, para 8.12). The relevant test is the "balance of probability", and authorities are advised that if they have no evidence of their own to contradict or undermine the applicant's version of events, there is no good reason to refuse the application provided the applicant's evidence is sufficiently precise and unambiguous to justify the grant of a certificate. The planning merits of the use are not relevant to the consideration of an application for a certificate of lawfulness; purely legal issues are involved in determining an application.

Lawfulness of use

Under section 191(2) of the Act, a land use is lawful if no enforcement action may be taken in respect of that use and the use does not contravene any enforcement notice already in force.

The Unit has been created for residential purposes and has not been used for any other purposes. In his affidavit, the Estate Services Manager refers to the current storage activity; however, this is sufficiently minor as to be considered ancillary use only. It is unlikely that there has been any unlawful use which may give rise to an enforcement action and there is no enforcement action currently in force. While there have been cases where a person's conduct has been enough to hold that the use has been unlawful, but the case would have to be an extreme one, for example where the fraudulent behaviour to dishonestly conceal a dwelling for which a CLEUD was sought was of a "truly egregious" nature (*R. (on the application of Welwyn Hatfield BC) v Secretary of State for Communities and Local Government Secretary of State for*

Communities and Local Government v Welwyn Hatfield BC [2011] J.P.L. 1183). In the present case, there is no suggestion of any concealment and there appears to be no fraudulent behaviour in relation to the Unit.

Accordingly, from the facts and the evidence supplied to the Council, the use of the Unit is unlikely to have been unlawful.

Abandonment

It is commonly established in case law that once a use is lawful, it can be lost only by a material change of use or in an extreme situation, such as abandonment or “a new chapter in the planning history” arising from, for example, the demolition of the building in which the use takes place (*Swale BC v First Secretary of State* [2005] EWCA Civ 1568; [2006] J.P.L. 886 (CA (Civ Div)); *Fairstate Ltd v First Secretary of State* [2004] EWHC 1807; [2005] J.P.L. 369). The Court of Appeal decision in *Swale* suggests that lawful use may remain without any activity taking place on the site for decades. In light of these case law principles, as there appears to not have been any material change of use of the Unit, the only other way the lawful residential use could have been lost is by abandonment, which should be shown to be more than merely leaving the use dormant.

Abandonment is generally assessed having regard to the following matters (*Hughes v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P. & C.R. 397):

- the physical condition of the dwelling;
- the period the dwelling has not been in use;
- whether there has been any intervening use; and
- evidence of the owner’s intentions.

In *Hughes*, it was held that residential use of a cottage which had been uninhabited for nearly 30 years and had fallen into a ruinous state had in all the circumstances been abandoned, despite the owner's subjective intention to resume residential use. If the approach in *Hughes* case is followed, the residential use of the Unit could be considered to have been abandoned. But while *Hughes* is considered one of the leading cases on abandonment, it should not necessarily be used as strict guidance. It was noted in later case law that it would be difficult to think in such a case of any other use which the cottage could be said to have continued to have and caution could be necessary in describing a ruinous cottage or waste land as having or being of no use at all (*Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 (SC)).

Welwyn (SC) decision confirms that cases on abandonment show that use as a dwelling house should not be judged on a day-by-day basis, but on a broader and longer-term basis and each case should be viewed against the background of previous active use. Dwelling houses are frequently left empty for long periods without any question of abandonment or of their not being in or of use. An example considered in *Welwyn* was a holiday home visited only yearly which remains of and in residential use.

In the present case the Unit has (on evidence provided) never been used for any other dominant use (intervening with the residential use) and forms part of the property (Great Russell Mansions) used for residential purposes. Additionally, the Unit is not in a dilapidated state and the owner’s intentions are clearly to continue the residential use. Accordingly, if the sensible day by day basis from *Welwyn* decision is applied, the Unit should qualify for a CLEUD. In practical sense, stating that the residential use has been abandoned would be problematic as it would be

difficult to think of any other use that the Unit could be said to have continued to have if the residential use has been abandoned.

Conclusion

While the applicant's evidence in relation to the Unit is not particularly extensive, the Council does not have any evidence to contradict or undermine the applicant's version of events.

As there does not appear to have been any material change in the use of the Unit and the residential use is not and has not been unlawful, it would not be practical to state that the residential use of the Unit has been abandoned. Therefore, on the balance of probability, a Certificate of Lawfulness (Existing) should be granted.

Recommendation: Approve