

6-10 Cambridge Terrace Developments
2 Chester Gate
Note supporting CLEUD application
21 July 2017

1. PURPOSE OF NOTE

- 1.1 This note has been prepared by Pinsent Masons LLP and Montagu Evans to support an application for a Certificate of Lawfulness of Existing Use or Development ("**Application**") submitted by 6-10 Cambridge Terrace Developments ("**Applicant**") to the London Borough of Camden ("**Council**") in respect of land at 2 Chester Gate, NW1 4JL ("**Site**").
- 1.2 This note should be read in support of the application for a CLEUD and the Applicant's cover letter and supporting documents.
- 1.3 The Site benefits from planning permission for the change of use of 6-10 Cambridge Terrace and 1-2 Chester Gate ("**Wider Site**") from offices (Class B1) to 3 x dwellinghouses (Class C3) (ref: 2009/3041/P (as subsequently varied by 2015/1340/P)) ("**Permission**"). The change of use authorised under the Permission has not commenced at the Site.
- 1.4 The Application for a CLEUD is made in order to confirm the lawfulness of the use of the Site for office use (Class B1) ("**Existing Use**").
- 1.5 This note is intended to assist the Council in determining the Application for a CLEUD by, first, setting out the reasons in support of granting the CLEUD and, secondly, providing an overview of the legal position in relation to:
- 1.5.1 who can make an application for a CLEUD;
 - 1.5.2 what the application for a CLEUD should contain;
 - 1.5.3 how the Council should determine an application for a CLEUD – what the Council needs to take into account and the tests to be satisfied by the Applicant and/or Council;
 - 1.5.4 form of a CLEUD; and
 - 1.5.5 the effect of a CLEUD.

2. WHY A CLEUD SHOULD BE GRANTED

- 2.1 The Applicant has satisfied the legal requirements set out in sections 3 and 4 of this note and submitted a valid application for a CLEUD to the Council. The application form and supporting documents confirm that the legal requirements have been met.
- 2.2 The onus of proof rests with the Applicant to satisfy the Council that the Existing Use is lawful. The lawfulness of the Existing Use is clear from the following:
- Planning Unit*
- 2.3 It is established case law¹ that the starting point for identifying a planning unit is to assume that the unit of occupation is the appropriate planning unit.
- 2.4 The Site forms an individual unit of occupation separate to the other units within the Wider Site and is therefore a separate planning unit.

¹ *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240
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- 2.5 Prior to the Application being submitted 2 Chester Gate was an individually occupied unit used as Class B1(a) offices. The Site was accessible from its own entrance, physically separate to that of 1 Chester Gate, and the front gardens of the two units were separated by a fence. The use of the Site was not ancillary to the use of the Wider Site – it was used as a functionally separate planning unit. It is therefore clear that the Site was a separate planning unit prior to the submission of the Application.
- 2.6 The plans approved under the Permission (Drawing Nos. 639-2.002A; 639-2.003; 639-2.004; 639-2.005A; 639-2.006; 639-2.007; 639-2.008) show the Site as one unit labelled 'House 2'. It is therefore clear that the development permitted pursuant to the Permission did not envisage a change in the Site's status as a separate planning unit.
- 2.7 Notwithstanding the implementation of the Permission in respect of the remainder of the Wider Site, implementation has not occurred at the Site and it continues to be in use as Class B1(a) offices (please see paragraphs 2.9 to 2.12 below for further detail on the current use of the Site), showing that it is functionally separate from the Wider Site. The physical status of the Site remains as described in paragraph 2.5 above. It is therefore clear that the Site is and remains a separate planning unit.
- 2.8 Finally, it is useful to consider that, if a planning application had been made in respect of the Site prior to the grant of the Permission, or, if a planning application was made in respect of the Site now, there would be no reason not to consider the Site a planning unit in its own right.

Current use of Site

- 2.9 As explained above, whilst the Permission has been implemented in relation to other planning units within the Wider Site, material works have not been undertaken at 2 Chester Gate, neither in the form of a change of use from Class B1(a) offices, nor by the installation of rooflights which are the only external works permitted at the Site under the Permission. Instead, the building has continued in its use as Class B1(a) Offices accommodating, variously, employees of the Applicant and those of contractors engaged in the development of the adjacent sites.
- 2.10 2 Chester Gate comprises ancillary plant and storage areas at lower ground level, a reception area on the ground floor, with stairs leading to offices, meeting rooms, an ancillary kitchen and storage areas on the upper three floors.
- 2.11 The Site currently accommodates 12 office workers. Many of whom have occupied the building since April 2017. Prior to these occupiers, Bouygues UK Ltd occupied the Site as an 'Administrative Hub' from the end 2014 until 2017. Mainly working on computers at desks arranged in pods on all upper levels, the office workers perform administrative functions such as human resources, invoicing, project management, and client and consultant meetings.
- 2.12 An affidavit by Anthony Kooperman, Project Manager of the development of the Wider Site, will be provided confirming the use of the Site as described in this note. Photos of the existing conditions at the Site will also be provided.
- 2.13 The nature of this use falls within that of a B1(a) Office.

3. WHO CAN MAKE AN APPLICATION FOR A CLEUD

- 3.1 Section 191 of the Town and Country Planning Act 1990 ("**Act**") permits an application for a CLEUD to be made to a local planning authority and states:

"If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.”

- 3.2 The Applicant (falling within the definition of “any person”) is making the Application for a CLEUD under section 191(1)(a) of the Act in order to formally ascertain that the “existing use of buildings or other land” (ie the Existing Use) is lawful.

4. **WHAT AN APPLICATION FOR A CLEUD SHOULD CONTAIN**

Town and Country Planning (Development Management and Procedure) (England) Order 2015 (the “DMPO”)

- 4.1 Article 39 of the DMPO sets out the form and content of an application for a CLEUD and states:

- 4.1.1 an application shall be on a form published by the Secretary of State;
- 4.1.2 shall specify the land and describing use, operations or other matter in question in accordance with those sections of the form; and
- 4.1.3 include the particulars specified or referred to in the form.

- 4.2 Article 39 requires the application to be accompanied by:

- 4.2.1 a plan identifying the land to which the application relates drawn to an identified scale and showing the direction of North;
- 4.2.2 such evidence verifying the information included in the application as the applicant can provide; and
- 4.2.3 a statement setting out the applicant’s interest in the land, the name and address of any other person known to the applicant to have an interest in the land and whether any such other person has been notified of the application.

- 4.3 There are no requirements for applications to be notified to other owners or publicised. This is because the matters to be determined are solely matters of evidence and law.²

- 4.4 The Application is made in the form specified by the DMPO and is accompanied by the required supporting plans and documentation.

5. **HOW THE COUNCIL SHOULD DETERMINE AN APPLICATION FOR A CLEUD**

The Act

- 5.1 Section 191(2) of the Act sets out the test which the Council must apply when determining whether an existing use is lawful. It states:

“For the purposes of this Act 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

² Planning Encyclopaedia Commentary at P192.07

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

- 5.2 Section 191(4) of the Act sets out how the Council should determine an application for a CLEUD and states:

"If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application".

- 5.3 Therefore the Council needs to be "provided with information satisfying them" that the Existing Use is lawful.

Planning Practice Guidance ("PPG")

- 5.4 The PPG provides government guidance on "Lawfulness and the Lawful Development Certificate".

- 5.5 Paragraph 019 (ref. ID: 17c-009-20140306) of the PPG states that a local planning authority needs to consider "*whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process*".

Onus of Proof in an application

- 5.6 Paragraph 006 (ref. ID: 17c-006-20140306) of the PPG states that the applicant is "*responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land*". It states that a local planning authority is "*entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence*".

- 5.7 Paragraph 006 states that "*if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability*".

- 5.8 The court held in *Gabbitas v Secretary of State for the Environment* [1985] JPL 630 that an applicant's own evidence does not need to be corroborated by "*independent*" evidence, particularly if it is unchallenged, in order to be accepted.

- 5.9 In summary, the Applicant needs to provide the Council with the necessary evidence to satisfy the Council that the Existing Use is lawful on the balance of probability. The Council must determine the Application for a CLEUD on its facts, looking at the evidence, and asking itself whether the Existing Use would be lawful for planning purposes on the date of the Application for a CLEUD.

6. FORM OF A CERTIFICATE FOLLOWING AN APPLICATION FOR A CLEUD

The Act

- 6.1 Section 191(5) of the Act states that "A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

6.2 **The PPG**

6.3 Paragraph 010 (ref. ID: 17c-010-20140306) states that:

- *"a certificate for existing use must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a use class. But where it is within a "use class", a certificate must also specify the relevant "class". In all cases, the description needs to be more than simply a title or label, if future problems interpreting it are to be avoided. The certificate needs to therefore spell out the characteristics of the matter so as to define it unambiguously and with precision. This is particularly important for uses which do not fall within any "use class" (ie "sui generis" use); and*
- *where a certificate is granted for one use on a "planning unit" which is in mixed or composite use, that situation may need to be carefully reflected in the certificate. Failure to do so may result in a loss of control over any subsequent intensification of the certificated use."*

7. **EFFECT OF THE CLEUD**

Section 191(6) of the Act states that *"The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed"*.

8. **CONCLUSIONS**

8.1 It has been clearly demonstrated that the Existing Use is lawful for the following reasons:

8.1.1 The Site is an individual unit of occupation and therefore a separate planning unit to the remainder of the units within the Wider Site;

8.1.2 Implementation of the Permission has not occurred at the Site; and

8.1.3 The Site remains in use for Class B1(a) offices.

8.2 It follows that the Council can be satisfied that the Applicant has provided sufficient detail and evidence to enable them to determine that the Existing Use is lawful. Therefore, taking into account this note, the Applicant's cover letter and supporting documents, the Council is lawfully able to issue a Certificate of Lawfulness in respect of the Existing Use under section 191(1)(a) of the Act.

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