REFLECTIONS ON THE RICHMOND CASE

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01 When I was sitting as a Deputy High Court Judge, I decided in London Borough of Richmond upon Thames v Secretary of State for the Environment that: The extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether a change from that use is a material change of use.

02 At the time, this judgment was widely regarded as eccentric, out of line with established principles, and – by some – as plain wrong. It was widely thought that the question whether development by a material change of use had occurred depended on conventional planning factors – sometimes called external impacts – such as a change in the physical appearance of the building or the site, the level of activity created, noise,traffic, pedestrian flows, impact on car parking and so forth. All these factors went to the determining principle: whether there was a change in the character of the use of the land: East Barnet UDC v British Transport Commission (1962).

03 How did the issue arise? Section 55(3)(a) of the Town and Country Planning Act 1990 (and its predecessors) provides that the use as two or more separate dwellinghouses of a building previously used as a single dwellinghouse constitutes a material change of use. Parliament did not legislate for the converse position, i.e. the amalgamation of dwellinghouses. It is therefore a question of fact and degree whether an amalgamation constitutes a material change of use, and hence development.

04 The case concerned a terraced house, originally a single dwelling which had been converted in the past into seven flats. The current proposal was to revert the house to a single dwelling (by way of amalgamation). The Inspector (on a planning appeal relating to a CLOPUD) found that there would be no external impacts, and thus no material change of use. Richmond applied to the court, and argued the principle described in paragraph 1 above. It was said that the planning purpose involved was the policy-supported wish to resist the loss of housing units in the borough. This aspect had been left out of account by the Inspector.

05 In that case, there was the loss of six dwellings. But there have been innumerable cases where the loss of just one unit has been held to constitute a material change of use, despite the facts that no external impacts were involved, and that in the context of the housing supply in the area of the local planning authority, it could be said that the loss was a drop in the ocean. These – to my mind – bizarre decisions have been immune to judicial challenge, on the basis of the mantra that such decisions are the exercise of "planning judgment".

06 Did Richmond make new law? The simple answer is: No. I based my judgment on a series of well-established authorities. In Panayi (1980) the court stated: The change could give rise to important planning considerations and could affect, for example, the residential character of the area, strain the welfare services, reduce the stock of private accommodation available for renting and so forth.

In Mitchell (1994) it was held that: The need for housing in a particular area is a material consideration [for the purposes of a planning application]...the same considerations apply to the question whether there would be a material change of use of any buildings so as to make any such change a development within the meaning of section 55...

07 There has been comment that I have "regrets" about the Richmond judgment. The only regret I had was that it made my day job, as an advocate promoting amalgamations, harder; I had and have no regrets as to the correctness of the judgment.

08 In modern judicial decisions, the Richmond judgment has been upheld and applied. The two most recent and relevant decisions are the Royal Borough of Kensington and Chelsea decision and the Lambeth decision. In RBKC Holgate J. (as he then was) held:

- Whether the loss of an existing use would have a significant planning consequence(s), even where there would be no amenity or environmental impact, is relevant to an assessment of whether a change from that use would represent a material change of use;

- Whether or not a planning policy addresses a planning consequence of the loss of an existing use is relevant to, but not determinative of, an issue under (4) above.

09 In the very recent case of London Borough of Lambeth [2024] EWHC 1391 Mrs Justice Lang considered the grant of a CLOPUD to the effect that the amalgamation of two flats (i.e. involving the loss of one residential unit from the building) did not amount to a material change of use. The Inspector (in a refreshingly robust and common-sense decision) had concluded:

- The loss of a single unit, in the context of current housing delivery in the Borough, would not be a planning consequence of significance.

- The proposed deconversion of the two flats to a single dwelling would not result in any significant difference in the character of the activities, as a matter of fact and degree, nor would there be any planning consequences of significance as a result of the change.

As a consequence, he did not accept Lambeth's contentions as to breaches of development plan policy in the London Plan and the Lambeth Local Plan concerning housing supply.

10 The court held that, applying the above authorities (including Richmond): The Inspector's conclusion that the loss of a single unit, in the context of current housing delivery in the borough, would not be a planning consequence of significance, was a planning judgment which he was entitled to make, for the reasons he gave. Lambeth plainly disagreed with the Inspector's assessment but it is not entitled to challenge the merits of the Inspector's decision under section 288 TCPA 1990.

11 Further: Each planning appeal has to be considered individually and on its own merits, not by reference to hypothetical applications which might be made in regard to other sites. Future decisions on other applications will also be decided on their individual merits, in the context of the circumstances which exist at the relevant time, which may or may not be different to those found by this Inspector.

12 Postscript: it might be thought that, in any residential amalgamation case, the use of the (say) two flats pre-amalgamation was a use as Class C3 dwellings, and the use of the amalgamated flat would likewise be C3, so the change could not constitute development as a result of the Use Classes Order.

13 I decided in Richmond that that could not be the case. The point is technical, but essentially Class C3 relates to "use as a dwellinghouse by a single person" etc. The "before" situation (where there is more than one dwellinghouse) does not fall within C3. So the Use Classes Order did not apply. This finding has not been disturbed by any subsequent judgment.