

Appeal Decisions

Hearing held on 7 December 2016

Site visit made on 7 December 2016

by Katie Peerless Dip Arch RIBA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 11 January 2017

Appeal A: APP/K5600/X/16/3145624 **28 Victoria Road, London W8 5RG**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mrs A Stroyan against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref CL/15/07944, dated 15 December 2015, was refused by notice dated 9 February 2016.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is a non-material change of use from two flats to one house.
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Appeal B: APP/K5600/W/15/3141109 **28 Victoria Road, London W8 5RG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mrs A Stroyan against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref PP/15/06345 is dated 6 October 2015.
 - The development proposed is the erection of a single storey rear extension at ground floor level with roof terrace above, a glazed extension at first floor, a basement under the footprint of the building and the proposed ground floor extension, upgrading of steel windows to double glazed units and internal alterations to re-combine a ground floor flat with uppers to restore the house to a single family dwelling.
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Decisions

Appeal A: APP/K5600/X/16/3145624

1. The appeal is dismissed.

Appeal B: APP/K5600/W/15/3141109

2. The appeal is allowed and planning permission is granted for the erection of a single storey rear extension at ground floor level with roof terrace above, a glazed extension at first floor, a basement under the footprint of the building and the proposed ground floor extension, upgrading of steel windows to double glazed units and internal alterations to re-combine a ground floor flat with uppers to restore the house to a single family dwelling at 28 Victoria Road,
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London W8 5RG in accordance with the terms of the application, Ref PP/15/06345 dated 6 October 2015, and the plans submitted with it, subject to the conditions attached as Annex A to this Decision.

Procedural matters

3. The Council has described the application in Appeal A as being for internal alterations involving the amalgamation of two flats to form one house and as I consider that this more accurately describes the proposal than that on the application form, I shall use this description in my Decision.
4. On Appeal B, the Council has confirmed that, had it been in a position to issue a decision, it would have refused the application for the following reason:

The proposal would involve the loss of one residential unit which would reduce the supply and choice of housing available within the Borough and not contribute to meeting housing targets and housing needs for the Borough and London as a whole through ensuring a net increase in residential accommodation. This would be contrary to the aims of Development Plan, in particular Policies CH1 and CH3 of the Consolidated Local Plan and Policies 3.3 and 3.14 of the London Plan.

Main Issues

5. The Council has confirmed that it has no objection in principle to the operational development proposed in the scheme subject of appeal B, including the basement extension. The only reason for refusal is related to the loss of a residential unit that would be brought about by the amalgamation of the 2 dwellings. I therefore consider that the main issue in Appeal A is whether the proposed works would bring about a material change of use that would require a grant of planning permission to authorise it and, if so, in Appeal B, the impact of the proposed change of use on the supply of housing in the Borough.

Appeal site

6. The appeal property is a 4 storey mid-terrace building in a residential street within the De Vere Conservation Area. Planning permission for the development of which it is part was originally granted in 1950. At this time the development was for 5 houses but, in 1951, planning permission was granted for the subdivision of no. 28 into a ground floor flat and a maisonette on the upper floors together with a rear extension, which is the current arrangement, although the appellant states that the property has been in use as a single dwelling since 1993.
7. Each dwelling has a separate front door and they share a rear garden accessed from doors in the ground floor flat and French doors in the maisonette which give access to a flight of steps down into the garden.

Reasons

Appeal A

8. Both parties have referred to a number of appeal decisions and court judgements that consider whether, in the absence of any external change to the building, the amalgamation of 2 properties in residential use into a single dwelling amounts to a material change of use for which planning permission is required.

9. The most recent judgement from the High Court¹ has found that the loss of a unit or units of accommodation in the relevant local area may have a planning consequence in terms of the significant reduction in the number of dwellings available as housing stock. It made clear that the material effect of such conversions may not conflict with development plan policy but this should not be the sole basis upon which a decision is based. In practice, the determination of whether a material change of use would be involved may or may not be supported by a planning policy.
10. The judgement made a number of points which are set out below:
- "1) A planning purpose is one which relates to the character of the use of land;*
- (2) Whether there would be a material change in the use of land or buildings falling within the definition of "development" in section 55 of the TCPA 1990 depends upon whether there would be a change in the character of the use of the land;*
- (3) The extent to which an existing use fulfils a proper planning purpose is relevant in deciding whether a change from that use would amount to a material change of use. Thus, the need for a land use, such as housing or a type of housing in a particular area is a planning purpose which relates to the character of the use of land;*
- (4) 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;*
- (5) The issues of (2) and (4) above are issues of fact and degree for the decision maker and are only subject to challenge on public law grounds;*
- (6) 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."*
11. Accordingly, the Council's analysis of the effect of conversions upon housing supply should be considered relevant to whether the proposal fell within the scope of planning control and whether this is, in fact, the case is a matter of fact and degree for the Inspector.
12. Planning policy for the Borough includes policy CH1 of the Royal Borough of Kensington and Chelsea Consolidated Local Plan 2015 (KCCLP) that sets housing targets in the Borough and also aims to contribute to meeting the London wide housing need as set out in policy 3.3 of the London Plan (LP).
13. KCCLP policy CH2 aims to provide housing diversity and mentions both conversions and amalgamations and requires new development to take into account the current evidence in relation to housing need. CH2(f) resists the net loss of 5 or more residential units, which does not apply in this case, but makes no comment on the acceptability or otherwise of amalgamations below this threshold. The policy also supports the provision of a mix of housing that is related to the current situation on housing need.

¹ R (oao) The Royal Borough of Kensington and Chelsea v (1) Secretary of State for Communities and Local Government (2) David Reis (3) Gianna Tong [2016] EWHC 1785 (Admin) - the Kensington judgement

14. As well as the judgement referred to above, a number of appeals have recently been determined on this topic where, against the same policy background as applies here, the Inspectors concluded that a material change of use was involved in the amalgamation of 2 or more residential units based on the housing supply situation in this particular Borough. Although it is agreed that the Council can currently meet its housing targets, this is a finely balanced situation and the Council has consistently sought to ensure that amalgamations do not erode the availability of housing units, particularly of smaller dwellings.
15. I have carefully considered the findings of those Inspectors who have addressed the same issues as are now before me in relation to whether a material change of use has occurred. Whilst some of the examples are not entirely compatible with this case (for example where it was concluded that the 2 units were separate planning units²) in general, the analysis led to the conclusion that the need for housing and the impact of a reduction in the number of available units is a planning purpose which relates to the character of the use of the land and that the proposed amalgamations amounted to material changes of use when considered against this purpose.
16. It was put to me that as, to date, there has been no definitive decision made by the courts on the particularities of the Council's policies, this is a matter that might depend on the circumstances of each case. However, it was also pointed out that, if the ability of the local planning authority to meet its housing targets is the only criteria that is used to judge whether or not a material change of use has occurred, this could lead to the situation where identical proposals in properties of the same type could be judged differently if they happened to be in different administrative areas whose housing targets and land supply situation were different.
17. The appellant's representatives therefore suggest that I should look at the wider implications of the changes that would be brought about by the amalgamation in the light of the current situation on housing supply. They consider that the Council has shown that it has a 5 year supply of housing and in reaching this conclusion it has assumed, and taken account of, the possible amalgamations of units. They conclude that this situation indicates that no material change of use would occur from the development.
18. However, housing stock will vary over time and there is a danger that a conclusion in one case that an amalgamation would not constitute a material change of use would lead to an assumption that where others are not covered by policy CH2(f), they should be treated in a similar manner. There is general policy encouragement, such as found in policy 3.3 of the London Plan, for the provision of additional homes and the loss of even one unit through amalgamation would conflict with this aim.
19. If amalgamations of under 5 units came to be considered as permitted development under the present policy regime, it would not be possible for them to be assessed against the availability of housing stock at the time the development is proposed, which is the process that the adopted planning policy for the Borough makes clear should take place. There is a consequent danger that an unacceptable balance between smaller and larger units could then quickly occur.

² APP/K5600/X/16/3136227

20. Whilst amalgamations may not necessarily always be harmful to the supply of housing units in the Borough, I consider that they are nonetheless a material change of use when considered against the policy background outlined above and should be assessed in each case through an application for planning permission.
21. This seems to me to be the most equitable and consistent way of approaching the issue unless and until there is clear policy direction on whether or not amalgamations of less than 5 units are to be considered as a material change of use in this Borough. Consequently, I consider that the current proposal constitutes a material change of use and Appeal A fails.

Appeal B

22. Policy CH3 of the KCCLP seeks to protect residential uses. The Council considers that this applies to both floorspace and units and that the proposed development conflicts with this policy. This would certainly be the case in respect of social rented and intermediate affordable housing where, in CH3(b), both categories are referred to. However, in CH3(a) which specifically refers to market housing, only use and floorspace are mentioned. It seems to me that the difference in wording between these 2 parts of the policy must be intentional and that loss of less than 5 units (or, as in this case a single unit) is not therefore necessarily in conflict with policy CH3. This does not mean however that the amalgamation of 2 units does not amount to a material change of use, for the reasons outlined under the reasoning for Appeal A.
23. The Council also considers that 'residential use' covers the use as 2 separate dwellings and that amalgamation would have an impact on this use but I consider that this cannot necessarily be implied from the wording, when it is given its straightforward meaning.
24. Policy 3.14 of the London Plan seeks to prevent loss of housing unless replaced at higher density. In this case, the proposal would provide more floorspace than currently exists and I therefore find that there is no conflict with this policy. However, as noted above, there would be conflict with policy 3.3 and the proposal would reduce the number of available homes.
25. The appeal property was built as a single dwelling and the adjacent houses are still in this use. The proposal involves the extension of the dwelling through the provision of a basement and rear additions at ground and first floor levels and the amalgamation of the ground floor flat with the upper floors. I have no evidence to contradict the claim that the house has been in a single ownership since 1993 and that there has been no tenant in the ground floor flat since then. This situation has been confirmed by the Borough's Council Tax department which has agreed that there has been only one unit of occupation since that time.
26. There is no application for a lawful development certificate based on the length of the existing use and I am told this is because the appellant is unwell and hospitalised and consequently unable to collate the necessary evidence or appear in person to confirm the length of the use. However, I note that this means that, should the application for planning permission be granted, there would be no loss of a residential unit that is currently in use; the result would be the retention of a family sized house with more floorspace than previously existed.

27. There is an established need for family houses in this Borough, where many of the larger properties have already been converted into flats and the appellant has drawn my attention to strategic policy CO6 from the KCCLP which notes that the Council will seek to provide a diversity of housing type. The reasoned justification for the policy notes: *'The main identified shortfalls in terms of market housing are for three and four or more bedroom homes.'* It also notes that the identified ratios required for different house types *'underline the need for as high a proportion of large dwellings to be provided as possible, with a similar emphasis in the social rented sector'* and *'the exact mix of houses of any proposal will also take into account factors such as the characteristics of the site such as its location, size and built context, as well as the way housing need will change over time.'*
28. The most recent appeal Decision that considered the position in October 2016 concluded that there was evidence of a need for larger units. Consequently, I consider in the current circumstances, where the Council can meet its housing land supply requirements, any harm resulting from the loss of the ground floor unit would be minimal.
29. I saw at the site visit that the garden arrangement as existing is not ideal. There are presently no separate areas that 2 individual units could use and, if shared, residents of the upper floors would be able to gain views into the bedroom window of the ground floor flat whilst using the garden. To restrict the use of the garden to the ground floor occupants would leave the larger unit with no outdoor amenity space apart from a small terrace at first floor level.
30. The design of the proposed extensions are in keeping with the style and detail of the main house and would cause no harm to the character and appearance of the De Vere Conservation Area. The layout shown on the submitted plans would ensure that there would be no loss of privacy or outlook for the occupiers of the neighbouring properties.
31. Neighbouring occupiers have objected to the basement extension because of fears that it would damage their properties and have a disruptive effect whilst building work is carried out. The appellant has produced an Engineering Design and Construction Statement, a Construction Impact Mitigation Plan, a Flood Risk Assessment Report, a Geotechnical, Hydrogeological and Land Contamination Assessment, a Construction Traffic Management Plan and structural calculations for the construction of the basement from a structural engineer. The Council accepts that, if constructed in accordance with these details, it would have no concerns on any of the matters raised by the neighbours that are covered in these reports.
32. I find no reason to disagree with the Council's assessment of these documents and compliance with the construction and management methods contained within them can be secured through conditions attached to any planning permission.
33. In conclusion, I consider that the benefits weighing in favour of the proposal, namely the provision of additional residential floorspace and the upgrading of the accommodation in a family sized dwelling are sufficient to outweigh any harm caused through the loss of the ground floor unit. I therefore find that, subject to the imposition of conditions, there would be no impacts of the development that would be severe enough to indicate that planning permission should not be granted for the proposed development.

Conditions

34. In addition to the conditions discussed above that will ensure the construction process is managed and overseen in accordance with the submitted schemes, the standard commencement condition and a condition to ensure that the development complies with the submitted plans, I shall also require the proposed screen between no. 28 and 30 to be erected before the house is re-occupied after the building works, to ensure privacy between the properties.
35. I shall impose a condition to ensure that the materials used in the extensions match those of the host dwelling, to ensure a satisfactory appearance and also, as the site is within a conservation area, a condition to make sure that the existing trees on the site are protected during the construction period.

Conclusions

Appeal A

36. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of internal alterations involving the amalgamation of two flats to form one house was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal B

37. For the reasons given above I conclude that the appeal should be allowed.

Katie Peerless

Inspector

APPEARANCES

FOR THE APPELLANT:

Paul Brown QC

Charles Rose MRTPI

Will Gamble

Francis Holding

City Planning Ltd.

Francis Phillips Architects

Francis Phillips Architects

FOR THE LOCAL PLANNING AUTHORITY:

Katie Parsons

Senior Planning Officer, Royal Borough of
Kensington and Chelsea

Annex A

Conditions

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
- 2) The development shall not be carried out except in complete accordance with the details shown on submitted plans 300, 301, 302 revision A, 303, 304, 305, 310, 311, 314, 320 revision A, 321, 330, 340 revision A, Location Plan scale 1:1250
- 3) No development shall commence until a Construction Traffic Management Plan has been submitted to and approved in writing by the local planning authority. The statement should include:
 - a) routing of demolition, excavation and construction vehicles, including a response to existing or known projected major building works at other sites in the vicinity and local works in the highway;
 - b) access arrangements to the site;
 - c) the estimated number and type of vehicles per day/week;
 - d) details of any vehicle holding area;
 - e) details of the vehicle call up procedure;
 - f) estimates for the number and type of parking suspensions that will be required;
 - g) details of any diversion or other disruption to the public highway during preparation, demolition, excavation and construction work associated with the development;
 - h) work programme and/or timescale for each phase of preparation, demolition, excavation and construction work associated with the development;
 - i) details of measures to protect pedestrians and other highway users from construction activities on the highway;
 - j) a strategy for coordinating the connection of services on site with any programme work to utilities upon adjacent land; and
 - k) where works cannot be contained wholly within the site a plan should be submitted showing the site layout on the highway including extent of hoarding, position of nearby trees in the highway or adjacent gardens, pedestrian routes, parking bay suspensions and remaining road width for vehicle movements.

The development shall be carried out in accordance with the approved Construction Traffic Management Plan.
- 4) The development hereby approved shall not be occupied until the screen fence adjacent to the proposed terrace as shown on drawings 340 Revision A and 302 revision A has been provided. The screen shall be maintained as such thereafter.
- 5) No development shall commence until a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) has been appointed to supervise the construction works throughout their duration and their appointment confirmed, in writing to the Local Planning Authority. In the event that the appointed engineer ceases to perform that role for whatever reason before the construction works are completed those works will cease until a replacement chartered engineer of the afore-described qualification has been appointed to supervise their completion

and their appointment confirmed in writing to the Local Planning Authority. At no time shall any construction work take place unless an engineer is at that time currently appointed and their appointment has been notified to the Local Planning Authority in accordance with this condition.

- 6) No development shall commence until such time as the lead contractor, or the site, is signed to the Considerate Constructors Scheme (CCS) and its published Code of Considerate Practice, and the details of (i) the membership, (ii) contact details, (iii) working hours as stipulated under the Control of Pollution Act 1974, and (iv) Certificate of Compliance, are clearly displayed on the site so that they can be easily read by passing members of the public, and shall thereafter be maintained on display throughout the duration of the works forming the subject of this permission.
- 7) For the duration of works the trees existing on the site at the date of this permission shall be protected so as to prevent damage above and below ground, and no tree shall be lopped, topped, or felled, or root pruned, without the prior written approval of the local planning authority.
- 8) All work and work of making good shall be finished to match the existing exterior of the building in respect of materials, colour, texture, profile and, in the case of brickwork, facebond and pointing, and shall be so maintained.