
Appeal Decisions

Site visit made on 1 November 2019

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA

an Inspector appointed by the Secretary of State

Decision date: 10 February 2020

Appeal A: APP/K5600/C/17/3170675

Appeal B: APP/K5600/C/17/3170676

3 Observatory Gardens and Flat 1, 2 Observatory Gardens, London W8 7HY

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr William Clark Kennish and Appeal B by Mrs Kristen Kennish, against an enforcement notice issued by The Council of The Royal Borough of Kensington & Chelsea.
 - The enforcement notice was issued on 21 February 2017.
 - The breach of planning control as alleged in the notice is the amalgamation of two separate self-contained residential units on the ground and lower ground floor levels of No 3 Observatory Gardens, London W8 7HY and at lower ground floor level of No 2 Observatory Gardens, London W8 7HY.
 - The requirements of the notice are to restore the land to its former condition by reinstating the section of wall which was removed between both residential units at lower ground floor level (identified on submitted drawing No 1 rev A) and reinstating the previously existing internal layout of both residential units such that the two properties are arranged as two self-contained dwellings once again.
 - The period for compliance with the requirements is three calendar months.
 - The appeals are proceeding on the grounds set out in section 174(2)(a), (c) and (g) of the Town and Country Planning Act 1990 as amended.
 - This decision supersedes that issued on 13 April 2018. That decision on the appeal was remitted for re-hearing and determination by consent order of the High Court.
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Appeal C: APP/K5600/W/17/3170674

3 Observatory Gardens and Flat 1, 2 Observatory Gardens, London W8 7HY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr and Mrs Kennish against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref PP/16/08526, dated 16 February 2016, was refused by notice dated 10 February 2017.
 - The development proposed is the amalgamation of No 3 Observatory Gardens with Flat 1 of No 2 Observatory Gardens.
 - This decision supersedes that issued on 13 April 2018. That decision on the appeal was quashed by consent order of the High Court.
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Procedural Matters

1. The enforcement notice has a typographical error, repeating the phrase 'without planning permission' which will be corrected.

2. The proposal in the planning application is essentially the same as the deemed planning application that is part of the ground (a) appeals and I shall consider the planning aspect of the appeals together.

Decisions

Appeals A and B

3. It is directed that the enforcement notice be corrected by deleting one of the repeated phrases 'without planning permission' in the notice.
4. Subject to that correction, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal C

5. The appeal is dismissed.

Reasons

Ground (c)

6. This ground of appeal is essentially that matters alleged in the enforcement notice do not constitute a breach of planning control. The appellant argues that the amalgamation of the two units is not development for the purposes of Section 55 of the Town and Country Planning Act 1990.
7. The operational aspect of the development, the formation of the opening and doorway between the units, is internal and does not have a material effect on the external appearance of the building and therefore is not development for the purposes of Section 55.
8. The appellants indicate that the amalgamation is within the exclusion of Section 55(2) specifically that where a building is used for a purpose specified in an Order made by the Secretary of State, the use of the building or any part of the building for any other purpose in the same use class does not constitute development. The appellants say the two units were in residential use (which is not a matter of dispute) falling with Use Class C3 before the amalgamation and remained so after the amalgamation took place, so no development has taken place.
9. However, the judgement of *Richmond upon Thames v The Secretary of State for the Environment, Transport and Regions* and *Richmond upon Thames Churches Housing Trust* and an earlier case of *Mitchell v Secretary of State for the Environment* confirmed that the need for housing in a particular area can be a material consideration and that amalgamation of similar units can be a material change of use and is referred to as the 'policy factor'. The appellant has referred to three appeal decisions, but each case will turn on its own facts and the circumstances in the area. One of those decisions was challenged and the Courts held 'policy factor' was relevant and not reliant upon being encapsulated in planning policy as suggested by the inspector in that case.
10. Questions to be considered in determining whether a material change of use has taken place are the extent to which an existing use fulfils a proper planning purpose and whether the loss of an existing use would have significant planning consequences even where there are no amenity or environmental

- impacts. Whether or not a planning policy addresses a planning consequence of the loss of an existing use is relevant to, but not determinative of, whether a change from an existing use would represent a material change of use.
11. London Plan Policy 3.14 supports the maintenance and enhancement of the condition and quality of London's existing homes. It notes that the loss of housing, including affordable housing, should be resisted unless the housing is replaced at existing or higher densities with at least equivalent floor space.
 12. The Kensington and Chelsea Local Plan 2019 [KCLP] Policy CH1 aims to resist the loss of residential units through amalgamations of existing or new homes unless amalgamations will result in the net loss of one unit only and the total floorspace of the new dwelling created will be less than or equal to 170m² gross internal floor area. While there would only be the loss of one unit, it is not disputed that the resulting gross internal floor area would exceed 170m².
 13. Quite clearly the supply and maintenance of appropriate housing provision is a proper planning purpose. The provision of these properties for two self-contained units fulfils a proper planning purpose in providing a variety of residential accommodation and each makes a contribution to meeting the housing need of the borough.
 14. These policies indicate that the control of housing stock in the area is important to the Council and London as a whole. The loss of a unit of accommodation has planning consequences in terms of the Council's aim to maintain and increase its supply of housing. Therefore, while there are no amenity issues or environmental impact associated with the change of use that has occurred, there are important planning consequences, and I conclude that there has been a material change of use that is a breach of planning control as alleged in the enforcement notice and that planning permission is required.
 15. The appellant now argues that the unit has been returned to separate independent use with the door fixed shut. While that may be the case, what was alleged by the Council had occurred at the time of the notice and required planning permission. While part of the requirements may have been complied with in terms of the use of the unit, it remains reasonable for the wall to be reinstated to ensure that the use of the flat does not return to integrated use, which could readily occur if the door were to remain in place.
 16. The appeal on ground (c) fails.

Ground (a) and Section 78 Appeal

17. The main issue is the effect of the amalgamation of the two units on housing stock in the Borough.
18. The development includes the London Plan [LP] and the local plan has been recently updated to the Local Plan 2019 [KCLP]. This document has been produced to include all the main modifications recommended by the Local Plan Partial Review planning inspector as well as the Council's Minor and Additional modifications as adopted. It incorporates all the extant policies and their supporting text from the Consolidated Local Plan 2015.
19. LP Policy 3.14 resists loss of housing. It allows replacement, providing it is replaced at the existing density, with the equivalent floorspace. If the measure of density were based on floorspace there would have been no need to refer to

- both. While the development that has occurred has the same floorspace, the result is the loss of one unit and a reduced density, which is normally expressed in terms of number of dwellings over a particular area of land. Therefore, the development that has occurred does not accord with LP Policy 3.14 and in accordance with the policy should be resisted.
20. KCLP Policy CH1 resists the loss of residential units through amalgamations of existing or new homes unless the amalgamation will result in the net loss of one unit only and the total floorspace of the new dwelling created will be less than or equal to 170sq m gross internal area. It is not disputed that the resulting gross internal floor area would exceed 170m² and so the development does not accord with ELP Policy CH1. The Policy also notes that the Council will seek to meet and exceed the London Plan target for new homes in the borough.
 21. The Mayor's Housing SPG of 2016 noted that in some neighbourhoods, especially in parts of central London, de-conversions of a number of smaller units into larger dwellings can reduce capacity to meet the requirements of small households. Where this is occurring, it is recommended that amalgamations should be resisted in line with LP Policy 3.14.
 22. I accept that at the time of preparation (around 2010) for the previous development plan (recently superseded) the estimation was of a need for 80% 3 and 4 bedroom homes. However, the need is now assessed as being for about a 50/50% split between smaller (1/2 bed) units and larger (3/4+ bed) units.
 23. The appellant notes the Council is meeting its five year housing supply targets and the Council does not dispute this. However, the Council explains that this has not always been the case and as some have been missed it is subjected to the imposition of an additional buffer, making the target harder to meet. There are clearly supply constraints because of the density of development generally, and the loss of units to amalgamations is an important factor. The Council estimate that the reduction in supply through amalgamations could be up to 50 units per year, which would have a considerable impact on housing supply targets.
 24. This is only the loss of a single unit, which by itself would have little impact. However, it must be considered in relation to the area as a whole, and the obvious demand for such changes, if each were to be allowed on the basis that one is not 'material'. It is clear that amalgamations as a whole have an adverse effect on housing stock, hence the need for a controlling policy. The Council also notes the significant cost difference between a studio flat and even a two bedroom flat, which is likely to make it very difficult for people to afford the larger premises if there is a shortage of smaller units. I consider the loss of this small independent unit would have a material effect on the mix of housing available.
 25. I conclude that the development here does not accord with LP Policy 3.14 or CKLP Policy CH1 and it has an adverse impact on the Council's policies provided to control housing supply in the area.
 26. The appeals on ground (a) fail, the deemed planning application and the Section 78 appeal will be dismissed.

Ground (g)

27. I have taken into account the need to obtain quotes for the work, but what is required is a simple building operation that can readily be completed in a short time. I consider that 3 months is more than enough time to obtain quotes and to complete the works required. The appeal on ground (g) fails.

Graham Dudley

Planning Inspector