



Appeal Decision

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 24 August 2020

Appeal Ref: APP/K5600/X/20/3245201

78 Blenheim Crescent, London W11 1NZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) 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 Mr Charles Wijeratna and Mrs Edna Wijeratna against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref CL/19/06943, dated 9 October 2019 was refused by notice dated 17 December 2019.
 - The application was made under section 191(1)(a) of the 1990 Act as amended.
 - The use for which a certificate of lawful use or development is sought is a single family dwelling.
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Preliminary Matters

1. I consider that this appeal can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available.
2. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
3. Uses are lawful at any time if 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)¹. For the avoidance of doubt, the appellants' case is that the use of the premises is lawful because it did not involve development.
4. Statutory Declarations submitted by both appellants, another family member and the occupant(s) of the lower ground floor have been duly signed and witnessed. These statements carry due weight as sworn evidence.

¹ Section 191(2)(a) of the 1990 Act as amended.

Main Issue

5. What must be considered is whether the appellants have shown, on the balance of probability, that there has not been a material change of use of the property from a single dwellinghouse to two separate dwellinghouses. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded.

Reasons

Evidence

6. The appeal relates to a relatively large, terraced property comprising lower ground and upper ground floors with three upper floors. The main entrance serves the upper floors and there is a separate entrance at lower ground floor level. The appellants explain that the lower ground floor includes a living area with a kitchenette, a bathroom and a bedroom, and it has access to the rear garden. I understand that there is an internal stair from the lower ground floor to the upper ground floor. The rear of the lower ground floor can be accessed via an external stair to the ground floor. The layout of the property is not in dispute, neither are the floorplans or photographs submitted by the appellants.
7. The appellants describe the way the property has been used since 1986. It is explained that between 1986 and 1998 the property was occupied by the appellant and her sons. Sometime in 1998, a bathroom and kitchenette were installed in the lower ground floor. The lower ground floor was then occupied at different times, up to 2007, by one or other of the appellant's sons. They did not pay rent, had free access to the upper floors and regularly enjoyed shared meals.
8. It is stated that since 2008 the lower ground floor has been occupied by lodgers, who have paid rent. The internal staircase connecting the lower and upper ground floors remained in place, and a door at the top of the stairs was rarely, if ever, locked. The occupiers of the premises continued to move freely between floors and make use of the shared rear garden. There are no separate meters. Utility bills are settled by the appellant but the lodger(s) have paid a contribution. The lower ground floor is registered separately for Council Tax purposes. There are no tenancy agreements as the appellant explains it was never her intention to grant exclusive use of the lower ground floor to any person. However, there was a licence to occupy (dated 20 July 2019), which afforded certain obligations and responsibilities to the parties. A new licence is currently in place. In addition to the free access, the more recent lodger(s) have checked on the appellant's well-being twice daily and carried out grocery shopping on a weekly basis.

Analysis

9. Section 55(1) of the 1990 Act as amended defines the two limbs of development, namely operational development, which means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change of use. Section 55(3)(a) specifically provides that the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change of use of the building as a whole and each part so used.

10. There is no dispute that the lower ground floor has the ability to afford to those who used it the facilities required for day-to-day private domestic existence. This, in itself, does not show it is a separate dwellinghouse for the purposes of s55(3)(a). It is a question of fact and degree as to whether a single residential use has become two separate residential uses and two planning units. The leading case on the subject is *Burdle*². The planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct and occupied for different and unrelated purposes. The concept of physical and functional separation is key.
11. The lower ground floor forms part of the appeal building and is connected for access purposes by internal and external staircases. In addition, there is a shared garden and there are no separate utility meters. Nonetheless, there is a significant degree of physical separation. The lower ground floor contains washing, cooking and toilet facilities and it has its own entrance door. The basic facilities required for residential occupation are not shared, which allows the lower ground floor to be used as a separate unit of residential accommodation.
12. Since the premises has been let to paying lodgers, there has also been a functional separation. The licence to occupy is indicative of this. The occupiers essentially form a separate household as they live independently from the appellant. I appreciate that there is, and have been, good relationships between the appellant and the people who live or have lived on the lower ground floor. This is described as shopping, checking on well-being or generally passing the time of day. In my view, this amounts to an element of good neighbourliness. It is not the same as sharing living activity with the family in the upper floors of the dwelling. Nor is it the same sort of functional relationship that would be provided by a live-in carer.
13. In reaching this view, I have had regard to *Uttlesford*³, in which the judge considered that, even if the accommodation provided facilities for independent day-to-day living, it would not necessarily become a separate planning unit from the main dwelling. In that case, permission had been granted for the garage for incidental use. The accommodation subsequently gave the occupant the facilities of a self-contained unit, but it was intended to function as an annexe only, with the occupant sharing her living activity in company with the family in the main dwelling. There was no reason in law why such accommodation should consequently become a separate planning unit from the main dwelling. A fact and degree judgment has to be made on the specific circumstance of the case.
14. The appellants cite *Ealing Corporation*⁴, with particular reference to the definition of development. A supporting Counsel's opinion is supplied which concludes "there are good reasons for granting the certificate as sought". In that case, it was acknowledged that a house can be occupied by two or more persons, living separately, without the house being used as two separate dwellings. 'Multiple occupation' is not enough by itself to make a definitive finding that separate dwellings had been created. Nonetheless, it is matter of fact and degree, as previously stated, and each case falls to be determined on its own merits.

² *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207101.

³ *Uttlesford DC v SSE & White* [1992].

⁴ *Ealing Corporation v Ryan and Another* [1965] 2 QB 486.

15. In the case before me, the appeal premises is not within single family occupation and does not function as a single household. The lower ground floor operates as a separate unit of occupation with both physical and functional separation. Therefore, it has become a separate planning unit.
16. I am also referred to an appeal decision at Nos 20 and 20A Ennerdale Avenue⁵ relating to the use of a side and rear extension (No 20A). In that case, the Inspector concluded that internal doors at first and second floor level undermined the claim that No 20A formed a physically separate dwelling. A further appeal decision Poplars Farm⁶, in which the appeal sought to confirm the use of a building as a separate dwelling, has also been provided. Clearly, these are different properties with very specific site circumstances that informed the decision makers. Overall, I am satisfied that I have applied relevant law and judicial authority in a consistent manner.
17. I find that, as a matter of fact and degree, the lower ground floor of the property has become a separate planning unit hence a material change of use is involved. I have not made an assessment of the character of the previous and current uses of the lower ground floor, since s55(3)(a) makes it clear that separation amounts to a material change of use.

Conclusion

18. The appellants have not shown on the balance of probability that there has not been a material change of use of the property from a single dwellinghouse to two separate dwellinghouses.
19. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a single family dwelling 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.

Decision

20. The appeal is dismissed.

Debbie Moore

Inspector

⁵ Ref APP/X/17/3192079 dated 27 July 2018.

⁶ Ref APP/P1045/X/18/3202007 dated 4 March 2019.