Appeal Decision

Site visit made on 3 August 2022

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 15 August 2022

APP/N5090/X/21/3288781
15 Parkhurst Road, London N11 3EN

- 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 by the London Borough of Barnet Council to grant a certificate of lawful use or development.
- The appeal was made by Questmarc Limited.
- The application, reference 21/4488/191, was registered on 13 August 2021. It was refused by a notice dated 8 October 2021.
- The development for which a certificate of lawfulness or development was sought was for the use of existing dwelling as 2no. self-contained flats.
- The Application was made under section 191(1)(a) of the Act for a certificate of lawfulness for use of the existing dwelling as 2no. self-contained flats at No. 15 Parkhurst Road, London N11 3EN.

Summary of decision: A certificate of lawfulness is issued.

Costs application

1. The Appellants, Questmarc Limited, made an application for a full award of costs against the London Borough of Barnet Council. That is the subject of a separate decision.

Appeal property

2. The appeal property, No. 15 Parkhurst Road, is a 2 storey mid-terrace house. It has been divided into 2 self-contained flats, a one bedroom flat on the ground floor and a 2 bedroom flat on the first floor and above in the roof.

Appellants' case

3. No. 15 Parkhurst Road had been in use as 2 self-contained residential units continuously for a period of more than 4 years before the application for a lawful development certificate, (LDC), was made to the Council. The division of the house had taken place more than 10 years ago.

4. A Statutory Declaration by Ali Khani, (of Austin Chambers & Co), confirmed that: "*the property was at all times subdivided into two self-contained flats with separate access and facilities for each flat*". That covered "*the entire period*" of Austin Chambers & Co's role as managing agents of the property – covering 15/07/10 – 15/07/12 and from 18/02/18 to date. The

declaration was supported by copies of tenancy agreements relating to both flats during both of Austin Chambers & Co's tenures as managing agents.

5. A further Statutory Declaration from April Farr, (of Lets Property Management), confirmed that "*the property was at all times subdivided into two self-contained flats with separate access and facilities for each flat*" during the period in which Lets Property Management were managing agents of the property - 09/03/13 – 12/10/17.

6. It was noted that the Council Officer's report on the LDC application said, in relation to the first floor flat that: "*The information provided is sufficient to determine that the first floor flat has been in continuous use as a self-contained flat since 13.09.2017*". However, The Officer's report went on to state that whilst the Council did not contest the continual occupation of the first floor flat as a self-contained residential unit, (for a period of at least 4 years), the LDC application relates to both flats collectively. They concluded that: "*the Council must be satisfied that the evidence provided is sufficient to show that both flats have been in continuous use for the full four year period*". It seemed the application was refused on the basis that the Council did not consider sufficient evidence had been submitted to prove that the ground floor flat had been in continuous use for the full four-year period.

7. It was accepted there was no Statutory Declaration or tenancy agreement to confirm that the ground floor flat was occupied during the 5 month period between 13 September 2017 and 18 February 2018. But it should be noted that the existing tenancy agreement was valid until 25 January 2022. The deadline for the appeal representations was 23 February 2022. As that date was over 4 years on from 18 February 2018, the date the Council confirmed it was satisfied that the continuous, self-contained use of the ground floor flat had been shown. No. 15 remained in use as 2 self-contained flats. That indicated any application submitted now would likely be granted.

8. With the Statutory Declaration provided by Austin Chambers & Co confirming that the property was occupied from 18 February 2018, it was not unreasonable to consider there to be a strong likelihood that any application seeking an LDC for the four-year period up to 18 February 2022 would be granted, given the fact that the Applicant could reasonably provide evidence to prove continuous occupation of the ground floor flat as a self-contained flat for the entirety of that period.

Council's case

9. The Council said the information submitted was insufficient to demonstrate that, on the balance of probability, No. 15 Parkhurst Road had been in use as 2 self-contained residential units continuously for a period of more than 4 years as required by s.171B and s.191 of Act. However, they said the evidence for what they described as the first and second floor flat was sufficient to accept it had been converted and used for up to 4 years prior to the date of submission of the certificate. They said that flat may be lawful. But, pointing to what they saw as a gap in the evidence of continuity of the occupation of the ground floor flat, the Council said an LDC could not be issued as the application was specifically for the use of No. 15 as 2 self-contained flats.

10. It was accepted that the Appellants' evidence dated from 15/07/2010 to up to 12/10/2017 may suggest the conversion had taken place during this time period. But that time period fell before the point at which this 4 year period was relevant by law. Therefore, that evidence had not been given any weight in the determination of the certificate.

11. There was a lack of robustness regarding the statutory declaration (April Farr, para. 5 above), signed but without reference to the witness's name, nor the name of this unknown persons' company. The declaration confirmed only that the property was let, or marketed to rent, or occupied by a family member between 09.03.2013 and 12.10.2017. It did not prove the continuous occupancy of the ground floor flat for the dates stated.

12. The Council tax bill addressed to the 'Ground Floor Flat' provided a strong probability that the flats were physically sub-divided to have made up a 4 year period 17/10/2017 to 31/03/18. But there was no utility bill or other document to suggest occupancy of the ground floor flat during those 5 months. There appeared to be no such evidence to account for the gap.

13. The statutory declaration from Austin Chambers said the ground floor flat was occupied by a family member between 18/02/2018 until 25/01/2020. It was accepted that there was sufficient evidence to suggest a reasonable probability that the flat had been converted and occupied between the period of 18 February 2018 and 25 January 2020. The Council also accepted the evidence for dates 25 January 2020 to 25 January 2022 as sufficient to provide evidence of occupancy of the ground floor flat.

14. But it was decided that on balance the information provided was not sufficient to show continuous occupation of the ground floor flat between 13 September 2017 and 25 January 2020. The Council tax bill in the 6 month period of 13 September 2017 and 18 February 2018 was noted. But there was no proof of occupation such as an accompanying utility bill. Also, the statutory declaration for 18 February 2018 to 25 January 2020 and the Dampcure receipt were only of medium weight to prove occupation.

15. As the LDC application related specifically to the lawful use of both self-contained units, the decision to refuse to issue an LDC was based upon the unlawful use of the ground floor flat. From the information provided, it could not be absolutely certified that the ground floor flat was in occupation for the full 4 years prior to the application date of the certificate.

Inspector's considerations

Selected legal background:

16. S.55(3) of the Act says: "*For the avoidance of doubt it is hereby declared that for the purposes of this section — (a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used*;".

17. S.171B(2) of the Act says: "*Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the*

period of four years beginning with the date of the breach.". Self-contained flats are considered to be dwellings for the purposes of the Act.

18. A "dwelling" means any building or part of a building occupied or intended to be occupied as a separate dwelling. A "flat" means a separate set of premises (a) which forms part of a building, and (b) which is constructed or adapted for use for the purposes of a dwelling - Leasehold Reform, Housing and Urban Development Act, s.101(1).

19. S.191(1) of the Act provides that if any person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; ….. they may make an application for the purpose to the Local Planning Authority. Where that application is refused and an appeal against that decision is made, the burden of proof to show that the decision was not well founded lies with the appellant.

20. S.193(4)(a) of the Act provides that an LDC may be issued under s.191 or s.192 for the whole or part of the land specified in the application.

21. S.195(1) provides that an appeal may be made to the SoS where an application under s.191 or s.192 is refused. S.195(2) and (3) provide that, on appeal, the SoS shall grant an LDC if refusal is not 'well-founded'.

22. The purpose of the LDC provisions is to enable the making of an objective decision based on the best facts and evidence available when the decision is taken. Evidence should not be rejected simply because it is uncorroborated. If there is no evidence to contradict the appellant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted, (*Gabbitas v SSE & Newham BC [1985]* JPL 630, also see *Ravensdale Ltd v SSCLG*).

Considerations:

23. The Appellants here needed to show that an unlawful use of No. 15 Parkhurst Road as 2 separate residential units started more than 4 years before the LDC application was made and that it continued thereafter to the extent that the Council could have taken enforcement action at any time in that period. The case of *Thurrock BC v SSETR & Holding (COA 27.2.02, J 1080)* is authority for that position. That is unlike the situation where, with a lawful residential use, a dwelling could be unoccupied for sometimes lengthy periods of time without losing that lawfulness, (*Panton & Farmer v SSETR & Vale of White Horse DC [1999] JPL 461*). In the case of an unlawful use, if that use ceased during that period, the time would not count towards immunity. The "clock" would restart if and when the unlawful use recommenced. The critical question is whether the use was continuous, not whether the dwelling was continuously fitted out or intended for residential use, (*Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)).

24. The Appellants were dismayed that the Council had disregarded evidence showing that No. 15 had been divided into 2 flats several years before the start of the 4 year period up to the application date. That is, some years before August 2017. I agree that this earlier period is relevant. To go back

a number of years before August 2017 is significant for a claim that use of No. 15 as 2 flats may have become lawful or was in the process of becoming lawful before August 2017. S.171B(2) of the Act says: *Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.* Examination of evidence of an ongoing breach of planning control is not limited to only the 4 year period dating back from the date of an LDC application. That date just 4 years back from the LDC application date is crucial in a situation where an applicant states that the unlawful use had begun by that date and where the LPA are not persuaded that a start had been made by that date. The only limitation back in time for a claimed start date of the breach is when the Act came into force.

25. In my view, there was sufficient evidence to show that the dwelling at No. 15 Parkhurst Road was converted into 2 self-contained residential flats a number of years before 2017. An EPC assessment was issued in respect of the ground floor flat on 8 March 2013. A gas safety record for the ground floor flat was dated 18 February 2012. A gas safety record for the upper floor flat was dated 14 January 2011. However, evidence of a continuous occupancy of the flats was sparse. Had the Appellants provided sound evidence of an unlawful 2 flats use of No. 15 starting and continuing uninterrupted for a 4 year period up to 2017, the Council should have considered that carefully. As it was the Council were critical of the worth of a statutory declaration, (April Farr, para. 5 above). They therefore concentrated on the 4 year period dating back from the LDC application date.

26. If, as the Appellants said, the dwelling at No. 15 was converted into 2 separate self-contained flats and which were occupied as such before 13 August 2017, (4 years back from the date of registration of LDC application 13 August 2021), it has to be shown that such occupation continued throughout a 4 year period to 13 August 2021. Mere physical subdivision of the property into 2 flats during the period would not be sufficient. Any occupation gap of any consequence in one or both flats in that period would mean that the "clock" would restart from the date of the end of the gap in either or both flats.

27. Having acknowledged that the upper floors flat had gained lawfulness, (para. 9 above), the Council's refusal to accept that the ground floor flat's residential use had become lawful rested mainly on their view that the Council tax bill in the 6 month period of 13 September 2017 and 18 February 2018 was not proof of occupation, (para. 14 above). However, it appears that merely an accompanying utility bill might have been persuasive. Although it is for the Appellants to show a continuity of occupation, the Council did not provide any evidence that the Appellants' claim was incorrect. The Council's basis for their doubt about the Appellant's case for the lawfulness of the ground floor flat is frail.

28. The Council's position that although the upper floors flat was now lawful, an LDC could not be issued because the application was in respect of 2 flats, seems at odds with s.193(4)(a) of the Act which says an LDC may be issued

under s.191 for the whole or part of the land specified in the application. Had they done that, No. 15 would have remained as 2 flats, one lawful, the other unlawful. That would have been an unrealistic position, especially as the Appellant suggested that from 18 February 2018 onwards, the ground floor flat was likely to have gained lawfulness during the tenancy agreement valid until 25 January 2022 and either the current tenant's extension of the lease or a new tenant occupying the unit from 26 January 2022.

29. The wording of subsections (2) and (3) s.195 of the Act might suggest that appeals are strictly limited to a review of the local planning authority's decision. However, they are invariably treated as de novo appeals...the parties and interested persons may submit additional evidence to the Secretary of State which was not before the authority at the time of its decision. It is appropriate for me to take this approach because s.195 refers to the 'refusal' being well-founded – meaning the Council's decision, not the reasons for the decision. Also, the application appealed is made to ascertain what is or would be lawful.

30. It is therefore reasonable for me to have considered any relevant fresh evidence advanced at the appeal, including where that evidence was not advanced at application stage. The purpose of the LDC provisions is to enable the making of an objective decision based on the best facts and evidence available when the decision is taken. In any event, it would serve no public purpose for me to refuse an LDC here strictly on the basis of the evidence submitted with the application, because it would always be open to the Appellants to make a further LDC application on the basis of evidence that came to light after the Council's refusal.

FORMAL DECISION

31. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful development for the use of existing dwelling as 2 no. self-contained flats at No. 15 Parkhurst Road, London N11 3EN was not well founded and that the appeal should succeed. I exercise the powers transferred to me by s.195(2)(a) of the Act accordingly and I issue a Certificate of Lawful Development for the development as applied for. It is attached to this decision, as are the relevant plans.

John Whalley

INSPECTOR

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191 (as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE) ORDER 1995: ARTICLE 24

IT IS HEREBY CERTIFIED that on 13 August 2021 the development described in the First Schedule hereto in respect of the premises specified in the Second Schedule hereto, was lawful within the meaning of section 191(1)(a) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of the existing dwelling as 2 no. self-contained flats at No. 15 Parkhurst Road, London N11 3EN by virtue of s.171B(2) of the Act in that a period of 4 years had passed that began from the date of the breach.

John Whalley

INSPECTOR

Date: 15 August 2022

Reference: APP/N5090/X/21/3288781

First Schedule

The use of the existing dwelling as 2no. self-contained flats.

Second Schedule

The dwelling at No. 15 Parkhurst Road, London N11 3EN.

IMPORTANT NOTES OVERLEAF

NOTES

1. This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

2. It certifies that the development described in the First Schedule and specified in the Second Schedule was lawful on the certified date and thus would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.

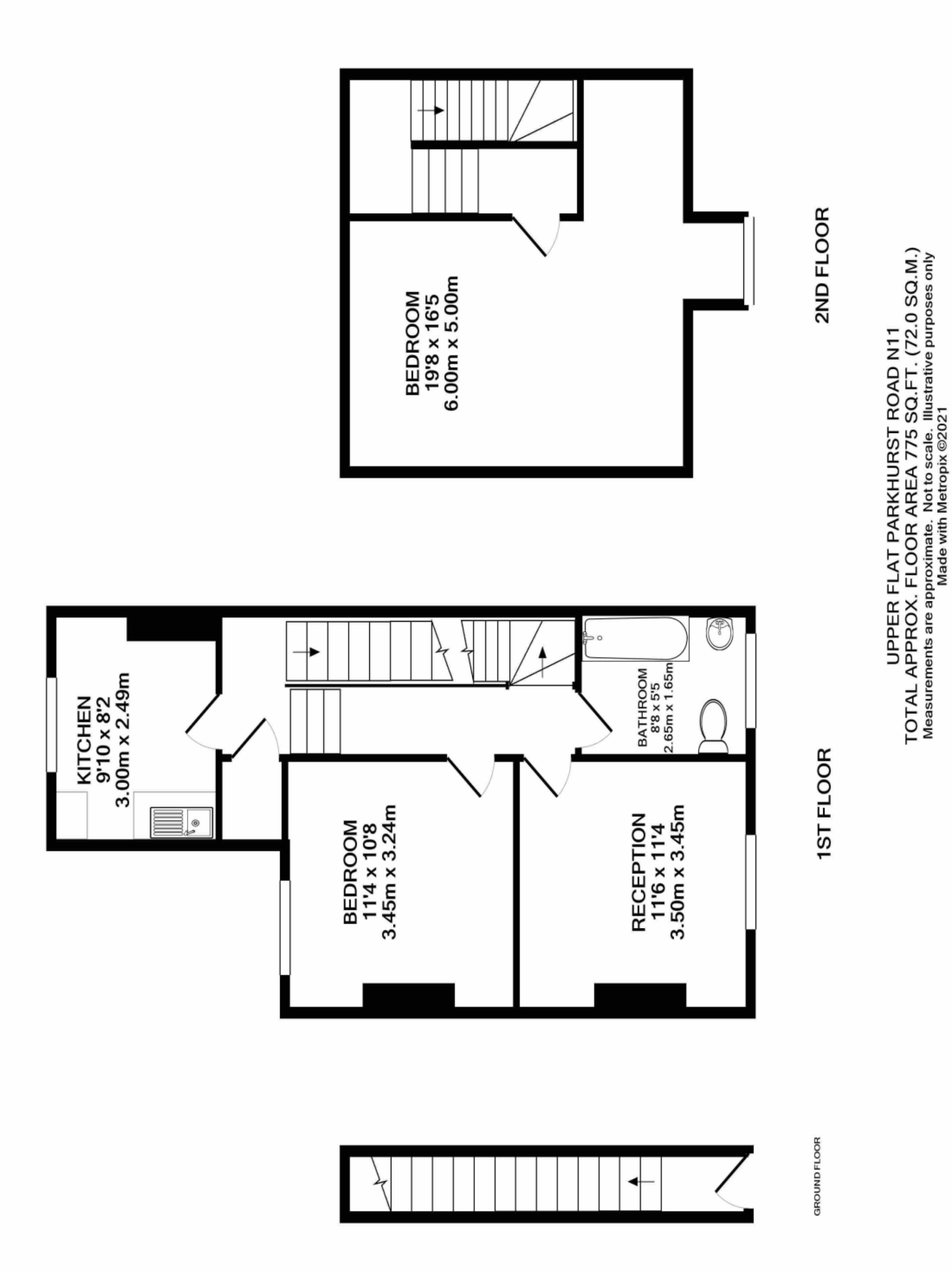
3. This certificate applies only to the development described in the First Schedule and specified in the Second Schedule and identified on the attached plan. Any development materially different from that described, or which relates to any other land, may result in a breach of planning control that is liable to enforcement action by the Local Planning Authority.

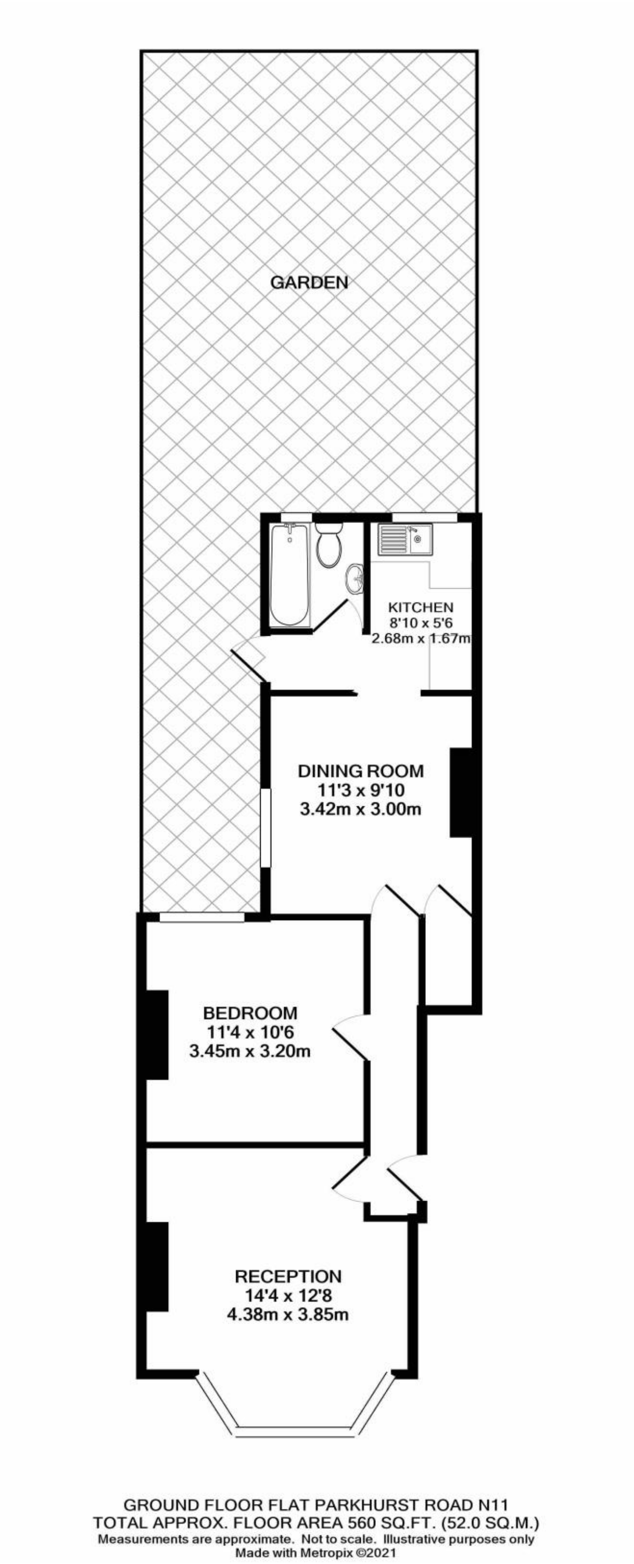
4. The effect of the Certificate is subject to the provision in Section 192(4) of the 1990 Act, as amended, which states that the lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

Lawful Development Certificate Plans

Appeal reference: APP/N5090/X/21/3288781 Date: 15 August 2022

The dwelling at No. 15 Parkhurst Road, London N11 3EN





Plans attached to the Lawful Development Certificate – dimensions as shown

John Whalley INSPECTOR