



Appeal Decision

by **S A Hanson BA(Hons) BTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 21 November 2022

Appeal Ref: APP/X1165/X/22/3297275

The Lawn, 32 St Andrews Road, Paignton, Devon TQ4 6HA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr & Mrs Christopher Harrison against the decision of Torbay Council.
 - The application ref P/2021/1098, dated 22 September 2021, was refused by notice dated 16 February 2022.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The use for which a certificate of lawful use or development is sought is use as '5no. dwellings (C3 use) - see attached drawings which illustrate the proposed internal alterations'.
-

Decision

1. The appeal is dismissed.

Preliminary Matters

2. It has not been necessary to carry out a site visit. This is because all the required information is included with the application and appeal documents, and a decision can be reached on the papers. Both parties were contacted regarding this matter and given the opportunity to comment on the appropriateness of the proposed approach. No comments were received.
3. Section 192(2) of the 1990 Act indicates that if, on an application under that section, the Council is provided with information satisfying it that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.
4. For the avoidance of doubt, the planning merits of the matters applied for do not fall to be considered. The decision will be based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case.
5. The council describe the proposal as 'internal and structural alterations to alter the layout from eight flats to five dwellinghouses'. This seems to be because the extensions to the building, granted by planning permission reference

2021/0453¹, which would facilitate the proposed change of use had not been implemented at the time of the application for the LDC.

6. There is no equivalent power to that set out under s191(4) for the local planning authority to modify the terms of an LDC application without the agreement of the applicant. It is for the applicant to propose the use or operation that they wish to ascertain the lawfulness of. Accordingly, the use sought is as described in the banner heading and the appeal shall be determined on that basis.

Main Issue

7. The council's sole reason for refusal, considered that the proposal could not be carried out at the date of the application because the building did not exist as shown on the application plans. Nevertheless, the officer report expanded the reasons why it considered that the proposal would not be lawful. This was said to be due to the loss of 3 units which would reduce the council's housing stock and thus constitute a change of use that was consider material.
8. Notwithstanding this, the main issue for me to consider is whether the council's decision to refuse to grant an LDC was well-founded. In this case, I consider that the decision turns on whether the proposal would constitute a material change of use pursuant to s55 of the Town & Country Planning Act 1990, which would require planning permission.

Reasons

9. The appeal property is a detached Victorian villa, set within the Roundham and Paignton Harbour Conservation Area. The property is presently in use as eight flats/bedsits. An LDC was issued on 18 July 2016² for the existing use of the land as permanent residential lettings on assured shorthold tenancies.
10. Section 55(3)(a) of the 1990 Act provides that 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. The 1990 Act does not state whether the reverse change of use would be material, and so that is a question which must be considered on the facts of the case. Whether something constitutes a change of use, and if so, whether it is material, is a matter of fact and degree. In this case, the change of use would amount to being material if there would be some significant change in the character of the activities taking place from what has gone on previously, as a matter of fact and degree.
11. Case law³ has established that the extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether a change of use is material. A more recent High Court judgement⁴ summarises the principles to be applied when determining whether a change of use is material:

¹ Granted by notice dated 21 June 2021 for 'Extension to existing extension on unit 6; installation of dormer extension to west elevation on unit 5; and external alterations to the building, including window replacements' ("the 2021 permission").

² P/2016/0454

³ The London Borough of Richmond upon Thames v. the Secretary of State for the Environment, Transport and the Regions and Richmond upon Thames Churches Housing Trust [2000] 2 PLR 115

⁴ Royal Borough of Kensington and Chelsea v. Secretary of State decision [(2016) EWHC 1785].

- 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 1990 Act 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."
12. This sets out that a change resulting in the loss of an existing use, including the loss of a residential unit or units, may be material even where there would be no amenity or environmental impact, and despite not having a specific policy in place. The mere absence of support from a planning policy may not suggest that a planning consequence is of no significance. It is necessary to consider the extent to which an existing use fulfils a proper planning purpose and whether the loss of the use would have a significant planning consequence as a matter of fact and degree.
13. The development plan comprises the Torbay Local Plan 2012 – 2030 (adopted December 2015) (the TLP). Policy SS13 of the TLP provides that the council will maintain a rolling 5 year supply of housing to deliver 8,900 dwellings over the plan period 2012-2030. The council's latest published 5 year housing land statement for 2020/21 shows a 2.75 year housing land supply. The figure clearly demonstrates that there is a significant deficit in housing.
14. The council considers that the loss of 3 units of housing would reduce its housing stock and should be considered material in the context of the Council's declared housing crisis, meeting housing targets and the general need for additional housing, and the ambition of Policies SS1 and SS13 of the Torbay Local Plan 2012 – 2030 (adopted December 2015) and the National Planning Policy Framework, which emphasises the government's intention to significantly boost the supply of housing.
15. The supply and maintenance of appropriate housing provision is a proper planning purpose. The provision of these units of accommodation fulfils a proper planning purpose in providing residential accommodation and each contributes to meeting housing need. By itself, the loss of 3 units of

accommodation may be seen to have a marginal impact. However, the cumulative effect of amalgamations could have a considerable impact on housing supply targets and an adverse effect on housing stock. 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. Such changes must be considered in relation to the area as a whole, and the demand for such changes if each were to be allowed on the basis that such a loss of a small number of units is not 'material'.

16. While I note that Policy SS11 of the TLP seeks to retain small to medium sized homes (2–4 bedrooms) and resisting change of use of these homes to HMOs and small self-contained flats, this relates to the retention of this type of accommodation and not the creation of such units. I also acknowledge that the appellant aims to improve the quality and size of the accommodation. However, although this would be a positive action, it carries no weight regarding whether the proposed change in the number of residential units would be a material change of use.
17. I accept that there are no development plan policies which would prevent or discourage the amalgamation of smaller homes to create larger homes. However, it was held in *Kensington* that, when considering a case such as this, while it may be relevant if a planning policy addresses a planning consequence of the loss of an existing use, that will not be determinative as to whether the change of use is or is not material.
18. Overall, I find that the appellant has failed to demonstrate that the proposed change of use, and resultant loss of 3 residential units, would not have significant planning consequences as a matter of fact and degree. It does not follow that the consequences would amount to planning harm, but I must conclude on the balance of probabilities that the change of use would be a material change of use requiring planning permission as set out in section 55 of the 1990 Act.
19. Although not strictly necessary, I have also considered whether, if I had come to the view that the proposed use itself would not require planning permission, an LDC should be granted in the terms applied for. The proposal relies upon operation development, comprising extensions, which has not been built but for which planning permission remains extant. However, it is not absolutely clear from the description of development that the operational development permission would be fully implemented prior to the change of use. Without full implementation in accordance with the permitted plans the building shown in the proposed development would not be lawful, so the LDC could not be issued. Section 192 of the Act does not include provisions to enable the description of development to be changed, so the onus is squarely on the applicant to adequately specify the development proposed, but in this case there is sufficient ambiguity to justify withholding the LDC.
20. The appellant has referred to other cases for the amalgamation of units in the area. However, the decision on this case turns solely on whether the proposal before me would be lawful. As previously referred to, the decision is made strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case.

Conclusion

21. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development was well-founded and the appeal should not succeed. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

S A Hanson

INSPECTOR