



Appeal Decisions

Site visit made on 26 June 2023

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 October 2023

Appeal A Ref: APP/N5660/X/22/3302513

26 and 27 Peninsula Heights, 93 Albert Embankment, London SE1 7TY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 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 Kathryn van Rooyen against the decision of the Council of the London Borough of Lambeth (the LPA).
- The application Ref 21/04308/LDCP, dated 4 November 2021, was refused by notice dated 23 May 2022.
- 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 the deconversion of 2 flats to a single dwelling.

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Appeal B Ref: APP/N5660/W/22/3302512

26 and 27 Peninsula Heights, 93 Albert Embankment, London SE1 7TY

- 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 Kathryn van Rooyen against the decision of the Council of the London Borough of Lambeth.
- The application Ref 21/04309/FUL, dated 5 November 2021, was refused by notice dated 17 May 2022.
- The development proposed is the amalgamation of flats 26 and 27 to form a single dwelling.

Summary of Decision: The appeal is allowed and planning permission is granted.

PROCEDURAL MATTERS

1. The appellant sought for the appeals to be dealt with by way of the Hearing procedure. However, the main issues in respect of Appeal A are essentially legal points, which are subject to comprehensive written submissions from the main parties and can be fully understood without the need to test them orally. Likewise, the main issues in respect of Appeal B are considered not to be ones which need to be tested by the questioning of oral evidence. As a result, the Planning Inspectorate concluded that the most appropriate procedure to determine the appeals was written representations. The appeals proceed on that basis.

2. Appeal A is made under S195 of the Act against the refusal of an application for an LDC. Appeal B is made under S78 of the Act against the refusal to grant planning permission. The appeals relate to the same proposed development and are made by the same appellant. As such, I have dealt with them in a single decision letter, although separate conclusions and decisions have been reached on each.

APPEAL A

Main Issue

3. The main issue is whether the LPA's decision to refuse the LDC application was well-founded, with particular regard to whether the proposed use would amount to a material change of use and therefore development for the purposes of S55(1) of the Act.

Reasons

4. S191(2) of the Act states that uses are lawful at any time if: (a) 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); and, (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
5. S55(1) of the Act defines the term development as, *inter alia*, the making of a material change in the use of any buildings or other land. S55(3)(a) of the Act states 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 Act is, however, silent on whether the inverse, that being the change from two or more separate dwellinghouses to a single dwellinghouse, constitutes a material change of use.
6. The appellant's case is that the proposed amalgamation of the two flats of 26 and 27 Peninsula Heights into one flat does not amount to a material change of use and thus, is not development for the purposes of S55(1). In contrast, the LPA argues that the change of use is material and therefore amounts to development for which planning permission is required. As no such permission has been granted, the LPA says it would not have been lawful at the date the LDC application was made.
7. The concept of what is a material change of use is not defined in statute or statutory instrument. The courts have established that there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
8. A general approach has been established in which the decision maker must first consider the primary use of the land, the scope of that use and the extent of any lawful ancillary use. Thereafter one must consider the planning unit which the primary use is attached to, whether the primary use is lawful and then whether the change to the new use represents a material change to the use of the planning unit.

9. In *Richmond*¹ the High Court held that considering a material change of use is not solely confined to examining the external manifestations of the change. In that case, the court established that an Inspector, in granting an LDC, should have taken account of the planning considerations, including the effect of the loss of the flats, in the consideration of materiality.
10. In *Royal Borough of Kensington and Chelsea (RKBC)*², an Inspector allowed an appeal against the refusal of an LDC application for the amalgamation of two flats to a single, self-contained maisonette. In that case, the Council refused the LDC on the basis that the amalgamation would constitute a material change of use, primarily because the change would result in the loss of a housing unit from the borough's overall housing stock. In that decision, the Inspector set out that, for the loss of the unit to be material to the concept of materiality, such a loss must have been expressed in, and supported by, a development plan policy. Whilst there were development plan policies which supported the provision of new housing and which sought to resist the loss of five or more residential units, there were no specific policies which resisted the loss of single units. The Inspector thus concluded the amalgamation did not conflict with any development plan policies and allowed the appeal on the basis the change was not material.
11. The High Court concluded that the Inspector had erred in their approach. Holgate J held that *Richmond* did not determine that any planning consideration must be supported by planning policy if it is to be relevant to determine whether a material change of use would be involved. Rather, the Council could rely on their analysis of the effect of conversion on housing supply in support of their view on materiality and the Inspector should have considered whether that factor was significant in their assessment of materiality. The Inspector was not entitled to exclude the matter from their assessment solely on the basis it was unsupported by any planning policy.
12. Overall, the relevant principles derived from case law are that a planning purpose is one that relates to the use of land. The concept of a material change depends upon a change in the character of the land. The need for a specific land use is a planning purpose which relates to the character of the use of land and whether the loss of an existing use would have a significant planning consequence is relevant to the assessment of whether the change is material. These matters are matters of fact and degree. Whether such a loss is explicitly addressed in a planning policy is relevant but not determinative.
13. Turning then to the proposed change. The flats of 26 and 27 Peninsula Heights comprise the entire seventh floor of the building. The existing primary use of the land is residential. It seems clear on the face of the evidence that the residential use is lawful. The two flats are at present, physically and functionally separable and thus having regard to the relevant tests laid down in *Burdle*³, I am satisfied they comprise separate planning units.
14. No external works are proposed. The amalgamation would be achieved solely by internal works comprising the removal of an internal wall between the family room in No 27 and a bedroom in No 26. Both existing external entrance doors would be retained. The change would result in a three-bedroom flat and

¹ *Richmond upon Thames LBC v SSETR* [2001] JPL 84

² *Royal Borough of Kensington and Chelsea v SSCLG and others* [2016] EWHC 1785 (Admin)

³ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

- a two-bedroom flat becoming a single, four-bedroom dwelling. Likewise, the patterns of use in terms of the comings and goings associated with a single dwelling would be of a similar level to the two separate flats given the number of people they would comparably be able to house.
15. Policy H3 of the Lambeth Local Plan 2020-2035 (2021) (the LP) states that existing self-contained C3 housing will be safeguarded in accordance with London Plan policy. It goes on to state that, exceptionally, the net loss of self-contained residential accommodation may be acceptable where the proposal is for specialist non-self-contained accommodation to meet an identified local need.
 16. The relevant London Plan⁴ Policies include H1 and H2. London Plan Policy H1 is a strategic policy which sets out the ten-year net housing completion targets for Lambeth as 13,350. The Policy states that boroughs should optimise the potential for housing delivery on all suitable and available brownfield sites through their development plans and planning decisions. The LPA states that one means of delivery is through resisting amalgamations of existing flats or houses into larger homes. However, Policy H1 does not specifically refer to such circumstances in the list of sources of capacity under point 2 of the Policy. Indeed, the policy does not specifically resist the loss of housing, only the need to boost the supply. Policy H1 does nevertheless refer to delivery through small sites in accordance with Policy H2.
 17. Policy H2 of the London Plan seeks to significantly increase the contribution of small sites (less than 0.25ha) to meeting London's housing need. The target for Lambeth is to achieve 4,000 net housing completions on small sites over the ten-year period. Thus, at 400 per annum against an overall target of 1,335 per annum, the small sites contribution to Lambeth's housing target equates to around 30% of its total net completions.
 18. Policy H2 does not, however, set out how the LPA should deal with the amalgamation of dwellings. Rather the Policy sets out support for new homes on small sites in order to significantly increase the contribution of small sites to meeting London's housing needs. It does not specifically refer to resisting amalgamations as a means to boost the supply of housing through small sites.
 19. It is only in paragraph 4.2.8 of the supporting text to the policy that it states where the amalgamation of separate flats into larger homes is leading to the sustained loss of homes and is not meeting the identified requirement of large families, boroughs are encouraged to resist this process.
 20. To my mind, both London Plan Policy H1 and H2 are concerned with the broader purpose of increasing the overall supply, not specifically seeking to resist amalgamations. The fact the Policies set out net completion targets is the logical corollary of such a conclusion. Indeed, paragraph 4.1.9 of the supporting text to London Plan Policy H1 states that ten-year housing targets should be monitored in net terms taking into account homes lost through demolition, amalgamations or change of use.
 21. London Plan Policy H8 states that the loss of existing housing should be replaced by new housing at existing or higher densities with at least the equivalent level of overall floorspace. To my mind, whilst the proposal may

⁴ The London Plan: The Spatial Development Strategy for Greater London March 2021

- result in the loss of housing, it would be replaced with the equivalent level of floorspace, since the amalgamation would not result in the loss of any residential floorspace.
22. In the previous Lambeth Local Plan of 2015, Policy H3 stated that existing housing should be safeguarded but that exceptionally, the net loss of units may be accepted where it arose from the amalgamation of smaller, separate flats to create a unit of family accommodation. The appellant argues that the draft revised Local Plan in 2018 maintained this policy exception, notwithstanding that it post dated the 2017 SHMA and points to representations from the London Mayor as the prompt for the LPA to change the approach on the policy. The LPA does not necessarily dispute this, indicating the change was intended to support the borough's ability to meet its housing target. Ultimately, whilst the background to the formulation of Policy H3 provides context, it does not deter from the fact that I must consider the wording of the Policy as it has been adopted.
23. As a result, since LP Policy H3 refers to housing being safeguarded in accordance with the London Plan, and the London Plan contains no policies which restrict amalgamations, then Policy H3 does not prohibit amalgamations.
24. However, the London Plan does, particularly through Policies H1 and H2, require the borough to increase its supply of housing. Whilst I note that Flats 26 and 27 would remain as self-contained C3 housing, I cannot agree with the appellant that there would be no net loss of self-contained residential accommodation. The number of bedrooms, habitable rooms and floor space may well remain the same, but fundamentally, the number of single households able to occupy the properties will reduce from two to one. It will, as of a matter of fact, result in the creation of a single residential unit, where previously there were two.
25. Nonetheless, the particular site and its circumstances must be considered individually in the context of the relevant development plan policies. It is not possible to take a blanket approach to a local authority area and say that housing need is so great and supply so tight that any amalgamations would be development. One must apply the relevant test established in the courts.
26. To my mind, having regard to the relevant tests, the proposed dwelling would continue to serve the planning purpose of providing housing, in this case a four-bedroom dwelling. However, the change would have planning consequences as a result of the net reduction of one unit from the borough's housing stock. The need for housing is clearly also a planning purpose which relates to the character of the use of land. The question in this case is therefore whether the planning consequences are of significance. In that context, it is important to examine the delivery of housing within the borough in line with the relevant development plan policies, and the effect of the loss of the unit upon that delivery.
27. The borough's historic performance against its London Plan target over the ten-year period saw the annual target going unmet in four of the years between 2011/12 and 2020/21. The most recent year of shortfall is said to be 2020/21. The data in the Lambeth Housing Development Pipeline Report 2020/21 shows that a total of 1,195 net additional dwellings were completed against a target of 1,335, in part as a result of a shortfall in completions on small sites. Some 47 fewer units than the 400 target were completed.

28. The Pipeline Report does, however, state that the failure to meet the target in 2020/21 can be attributed to delays in a specific development which did not deliver 106 units in 2020/21 as expected.
29. Moreover, as the Pipeline Report sets out, Government housing delivery test results were eased for the financial year, allowing the borough to subtract four months from the requirement figures due to the disruption of the pandemic. Thus, Lambeth's requirement for 2020/21 has been revised down to 869 rather than the 890 anticipated in the Pipeline Report. To that end, completions actually exceeded the requirement accounting for the housing delivery test allowance.
30. The LPA indicates that provisional data for the year 2021/22 indicates that fewer than 800 net additional units were completed in that year which equates to around 60% of the 1,335 target. However, it is accepted by the LPA that the under performance is partly a result of the impact of the Covid-19 pandemic and the consequent economic downturn. Moreover, as the LPA points out, housing delivery is prone to external shocks and targets reflect market fluctuations. In any event, final delivery figures for that financial year are not before me. To that end, 2020/21 and 2021/22 should be discounted as being years of under-performance.
31. In any event, the LPA's position that there has been under performance in four of the 10 years neglects to demonstrate that, in years where the target was met, it was actually substantially exceeded. For example, in 2015/16, there were 2,505 net completions, a delivery of 946 additional homes above the then target, whilst in 2018/19 completions were 543 above the then target with a total of 2,102. In contrast, the total shortfall in years of under delivery amounts to 1,007 net units. Thus, this total shortfall has been considerably exceeded in years where there has been delivery above the target.
32. Ultimately, London Plan Policy H1 sets out the housing targets across the ten-year period rather than breaking it down into annual delivery. To my mind this allows for fluctuations from year to year, taking account of the degree of uncertainty in the delivery of housing. Thus, the overall picture presented to me in the evidence is one of the Borough substantially exceeding its delivering targets in boosting the supply of housing.
33. The LPA states that the amalgamation of separate flats into large homes is leading to the sustained loss of homes in the borough. Updated versions of tables which formed part of the evidence base for the LP examination have been provided which show net change in units as a result of amalgamations from 2008-2021. The tables show a total net loss of 185 units in that period, averaging at 14 per annum.
34. However, such a rate is equivalent to only 1% of the borough's annual net housing delivery target. Moreover, it is apparent from the aforementioned record of outperforming the housing delivery targets, that the net change from amalgamations has not materially impacted upon the borough's ability to boost the supply of housing.
35. The LPA says that the amalgamation of flats is failing to meet the borough's identified housing needs. The Lambeth Strategic Housing Market Assessment (2017) (SHMA) shows that, in relation to marketing housing, the significant

majority of housing need is for one and two bedroom units with only 6-8% households needing four bedroom units.

36. However, the SHMA identifies that there will be an increase by 12.7% in the number of households with dependent children from 2016 to 2036. Total households are projected to increase by 20.2% over same period. Whilst the number of households with children is expected to reduce proportionally, projections suggest that there will be an increase of 19.2% in the number of households with one child in Lambeth between 2016 and 2036, an 8.1% increase in households with two children, and an increase of 2.8% in households with three or more children. Furthermore, paragraph 4.8 of the SHMA does point out that it is reasonable to presume a degree of under occupation will continue in market housing and that the figures overstate the need for small accommodation.
37. Thus, whilst the majority of the housing need may be for smaller units, there is still a housing need for larger family dwellings which the proposal will contribute to.
38. I note that 65% of completed amalgamations between 2008 and 2019 in the borough resulted in the creation of units with four bedrooms or more, whilst 90% created units of three bedrooms or more. I also note the LPA's concern that a conclusion that the loss of one unit is not material would set a precedent for future losses, resulting in every growing cumulative losses to the borough's housing stock.
39. However, as I have set out, one must consider each case individually, in the context in which it sits and, with regard to the question of materiality, the significance of the planning consequences of that particular change.
40. The LPA indicates that there has been a steady stream of applications for amalgamations in the years up to and following adoption of the Local Plan. It says from 22 September 2021 to 31 July 2022, 18 applications have been made, of which 15 were refused, one was withdrawn and two were granted planning permission.
41. However, it seems to me that, in the context of a housing delivery target of 1,355 a year, such numbers are proportionally very small. Moreover, the fact that the LPA refused so many of them, supports the view that they retain the ability to assess each case and the impacts it will have on the housing stock.
42. The appellant indicates that, as the flats are high value, they do not fall to be considered as meeting the general market housing need within the borough. The appellant also points to evidence that the local area is undergoing significant increases in the supply of open market flats, drawing particular attention to difficulties experienced by developers at the nearby Nine Elms development where it is said that a number of flats remain unsold. Thus, it is said that the amalgamation would not affect the availability of flats in the area.
43. However, neither the LP nor London Plan policies in respect of housing delivery differentiate between the contribution of housing stock based on value. Housing need across the borough will inevitably span a wide range of household incomes. Nonetheless, as I have set out above, in this case I consider the loss of a single unit, in the context of current housing delivery in the borough, would not be a planning consequence of significance.

44. As a result, taking all of the above into account, I find that the proposed deconversion of the two flats to a single dwelling would not result in any significant difference in the character of the activities from what has gone on previously as a matter of fact and degree nor would there be no planning consequences of significance as a result of the change.
45. As a result, I conclude that the proposed deconversion of 2 flats to a single dwelling would not result in a material change of use. The proposal would not therefore constitute development under S55(1) of the Act and no enforcement action make have been taken in respect of it.
46. There is no evidence that the proposal would constitute a contravention of any of the requirements of any enforcement notice then in force.
47. Consequently, the proposal would have been lawful in the meaning of S191(2) of the Act at the date the LDC application was made.

Conclusion

48. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the deconversion of 2 flats to a single dwelling was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

APPEAL B

Main Issue

49. The main issue is the effect of the development on the supply of housing in the Borough.

Reasons

50. The main issue is a matter to which I have given consideration in Appeal A. As I have set out, the proposed net loss of a single dwelling would be a planning consequence of no significance.
51. There would be no conflict with London Plan Policy H1 as the proposal would not materially affect the LPA's ability to boost the supply of housing. Likewise, there would be no conflict with London Plan Policy H2 as it would not materially affect the LPA's ability to increase the contribution of small sites to meeting housing need. I have found that there is no evidence that the proposal will lead to a sustained loss of homes or fail to meet the identified requirement of large families.
52. In addition, there would be no conflict with London Plan Policy H8 as there would be no loss of residential floorspace. Finally, in light of my findings in respect of London Plan Policies H1 and H2, I find that there would be no conflict with LP Policy H3 as housing would be safeguarded in accordance with London Plan policies.
53. Boosting the supply of housing does not mean deliver an unlimited number of homes. The relevant development plan policies are clear in their purpose to deliver what is needed and where it is needed. Indeed, the National Planning Policy Framework is likewise clear at paragraph 60 that to support the Government's objective of significantly boosting the supply of homes, it is

important that a sufficient amount and variety of land can come forward where it is needed. As it is, section 5 of the Framework is titled 'delivering a sufficient supply of homes'. Paragraph 66 sets out that policies should establish a housing requirement figure which shows the extent to which identified housing need can be met over the plan period.

54. Thus, in the context where Lambeth has an evidence-based target set on a regional basis through the London Plan, which is designed to deliver the right number of homes to address housing need within the area through development plan policies, and where that target is being exceeded, it cannot be right that those policies unequivocally prevent the loss of homes.
55. Whilst that may well be the case where there is evidence that such changes are undermining the supply of housing, as suggested by the supporting text to London Plan Policy H2, that is not the evidence before me here.
56. Ultimately, as Holgate J pointed out in paragraph 53 of *RKBC*, "a decision that a planning consideration is not significant for the purposes of section 55(1) means that it does not even merit assessment under section 70(1) in the exercise of planning control.
57. It thus follows that I conclude the proposal would not have a harmful effect on the supply of housing in the Borough and would not therefore conflict with the Development Plan as a whole.

Conditions

58. In accordance with statute, I have imposed the standard time limit condition. However, since the proposal involves only a change of use and no operational development, it is not necessary to impose a condition requiring compliance with the approved plans. For the same reason, it is not necessary to impose a condition requiring all new external work to match the existing since no external work is proposed.
59. The Council has suggested I impose conditions which tie the occupancy of the dwelling to the appellant only and which require the change back to two flats when their occupation ceases. However, such conditions would only be necessary had I found the personal circumstances of the appellant were a consideration which sufficiently outweighed conflict with the development plan. As it is, I have found no conflict with the development plan and thus it is not necessary to impose such a condition.
60. The Council has suggested a series of informatives to be placed on any decision. However, informatives are of no legal weight and cannot be used in place of a condition. I will not therefore place such informatives on my decision.

Conclusion

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

FORMAL DECISIONS

APPEAL A

62. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed use which is considered to be lawful.

APPEAL B

63. The appeal is allowed and planning permission is granted for the amalgamation of flats 26 and 27 to form a single dwelling at 26 and 27 Peninsula Heights, 93 Albert Embankment, London SE1 7TY in accordance with the terms of the application, Ref 21/04309/FUL, dated 5 November 2021, and the plans submitted with it, subject to the following conditions:

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.

J Whitfield

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 4 November 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended) (the Act), for the following reason:

The proposed deconversion of two flats to a single dwelling would not be a material change of use. Consequently, the proposal would not constitute development under S55(1) of the Act and therefore would have been lawful at the date the LDC application was made.

Signed

J Whitfield

Inspector

Date: 13 October 2023

Reference: APP/N5660/X/22/3302513

First Schedule

The deconversion of 2 flats to a single dwelling.

Second Schedule

Land at 26 and 27 Peninsula Heights, 93 Albert Embankment, London SE1 7TY

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 13 October 2023

by J Whitfield BA(Hons) DipTP MRTPI

Land at: 26 and 27 Peninsula Heights, 93 Albert Embankment, London SE1 7TY

Reference: APP/N5660/X/22/3302513

Scale: Not to scale

