



Appeal Decision

Site visit made on 15 October 2015

by D A Hainsworth LL.B(Hons) FRSA Solicitor

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 February 2016

Appeal Ref: APP/K5600/X/15/3006157
14 St Charles Square, London W10 6EE

- The appeal is made by Mr & Mrs Luke McDougall under section 195 of the Town and Country Planning Act 1990 against a refusal by the Royal Borough of Kensington and Chelsea to grant a lawful development certificate.
 - The application Ref: CL/15/00325, dated 19 January 2015, was refused by notice dated 9 February 2015.
 - The application was made under section 192(1)(a).
 - The development for which the certificate is sought is "Internal alterations only to amalgamate flat A, which has 2 bedrooms (one single and one double) and Flat B, which has 2 bedrooms (one single and one double) into one 4 bedroom flat (three double and one single)".
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Decision

1. The appeal is dismissed.

Reasons for the decision

Procedural matters

2. Section 195 requires an assessment to be made as to whether the Council's refusal of the application is or is not well-founded. The assessment is based on whether or not the amalgamation of the flats would be lawful if instituted or begun at the time of the application. The planning merits of the application are not relevant and there is no planning application before me.
 3. The Council refused the application because they consider the amalgamation of the flats to be a material change of use within the meaning of section 55 and therefore to be development requiring planning permission. The appellants contend that this interpretation of the legislation is incorrect and that planning permission is not required for the amalgamation. My decision turns on which of these standpoints I believe to be correct.
 4. In reaching my conclusion on this matter, I have taken into account all the representations I have received from the Council and the appellants. These include the representations made in relation to the information that has come to my attention since the site visit took place, namely: -
 - The opinion of Timothy Straker QC dated 11 July 2003, which was supplied by the Council on 20 October 2015. This is general advice given to the
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Council about the need for planning permission for the amalgamation of residential units.

- The opinion of C. Lockhart-Mummery QC dated 10 October 2014, which was supplied by the appellants on 21 October 2015. This is advice given in connection with a proposal to amalgamate two flats to form one residential unit elsewhere in the Borough, which later became the subject of appeal APP/K5600/X/15/3028049.
- Appeal decisions APP/K5600/X/15/3028049 and APP/K5600/W/15/3028100 dated 27 November 2015. The appeal against the Council's refusal to grant a lawful development certificate for the amalgamation of the two flats was allowed and a certificate was granted.
- The High Court details of claim served on the Secretary of State by the Council on 18 December 2015 in relation to the appeal decisions APP/K5600/X/15/3028049 and APP/K5600/W/15/3028100.
- Appeal decisions APP/K5600/X/15/3049304 and APP/K5600/W/15/3049301 dated 3 February 2016. An appeal against the Council's refusal to grant a lawful development certificate for the conversion of four flats into one dwellinghouse was dismissed.
- Appeal decision APP/K5600/X/15/3051160 dated 4 February 2016. An appeal against the Council's refusal to grant a lawful development certificate for the amalgamation of two flats was dismissed.

Whether the amalgamation of the flats proposed in this appeal would be a material change of use requiring planning permission

5. 14 St Charles Square is a substantial terrace property, which has a flat on each of its four floors. The proposal would amalgamate the flats on the ground and first floors. The question that arises is whether this would amount to a change of use at all and, if it would do, whether it would be a "material change of use" within the meaning of section 55. The terms "change of use", "material" and "material change of use" are not statutorily defined, so far as the proposal in this appeal is concerned.
6. The leading case relating to this question is *Richmond upon Thames LBC v Secretary of State for the Environment, Transport and the Regions* [2001] JPL 84, which concerned an application for a lawful development certificate for the change of use of a property from seven self-contained flats to a single dwellinghouse. In this case, the High Court reviewed the previous case law and explicitly adopted as correct a principle put forward by the planning authority, namely that "The extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether a change from that use is a material change of use".
7. The significant parts of the Counsel's opinion supplied by the Council, so far as this appeal is concerned, appear to me to be the following extracts from paragraphs 6, 26 and 27: -

'... I suspect the Court would take the view that, in the conventional situation, the building under consideration for the purpose of section 55(2)(a) was the building containing the flats rather than the individual

flats ... the materiality of a particular matter is driven by the underlying facts which may have also influenced the creation of various policies which, in their turn, then provide part of the basis which make such a change material. Thus, whether a particular proposal produces a material change of use will depend on a view being reached as to the planning circumstances which obtain at that time ... if amalgamation of residential units produces material planning consequences then such amalgamation constitutes a material change of use and requires a planning application.'

8. The significant part of the Counsel's opinion supplied by the appellants, so far as this appeal is concerned, appears to me to be the following advice, which I have extracted from paragraphs 9 to 12: -

'... I do not think that the current proposals [the amalgamation of two flats] would even constitute a change of use. The whole of the relevant land has a current lawful use as private residential accommodation, and that will not change. The only factor that will change will be that two residential units (planning units) are amalgamated into a single unit. But this does not mean that there will be a change of use, let alone one that is material ... assuming for present purposes the most unlikely suggestion that a change of use would be involved, the question is whether it could rationally be found to constitute a material change of use. Plainly, there will be no effect on "the residential character of the area" whatsoever. There can be no detectable effect in terms of transport, effect on neighbouring amenity, effect on employment, and effect on the stock of affordable housing, and ... no external manifestation of a change of use ... Accordingly, it seems clear that the sole basis for any finding of a material change of use would be [what Counsel describes for shorthand as] the policy factor. In my opinion, such a finding would be legally unreasonable, for reasons given above. ... Even if the policy factor were legally relevant as a sole factor, the proposal would result in the "loss" of one unit among approximately ninety thousand units in the Council's area. It could not rationally be concluded that this was material ...'

9. At 14 St Charles Square, the works that would be carried out to amalgamate the flats would all be internal and the property's external appearance would be unaffected. The application was therefore made under section 192(1)(a), which relates to the lawfulness of "any proposed use of buildings", on the basis that the works would be excluded from the definition of "development" by section 55(2)(a), since they would constitute the carrying out of works for the alteration of a building which affected only the interior of the building and did not materially affect the external appearance of the building.
10. Section 336(1) states that the term "building" in the Act includes "any part of a building", "except in so far as the context otherwise requires". I note that the inspector in the *Richmond* case dealt with the proposal in that appeal on the basis that the "building" was the whole of the property, rather than on the basis that each flat was a separate building, and that the High Court did not depart from this approach. No-one could in my view, when looking at 14 St Charles Square, reasonably conclude as a matter of fact that the building in this instance was other than the whole of the property; a conclusion that each flat was a separate building would distort the ordinary meaning of the word.

11. The circumstances in this appeal are the same as those referred to in the Counsel's opinion supplied by the appellants insofar as the whole of the building "has a current lawful use as private residential accommodation, and that will not change" as a result of the amalgamation of the two flats. The opinion, however, does not mention the statement in the *Richmond* judgement that "it would be very odd if one could not go further than merely determine that because it is residential that is an end of the matter". The amalgamation would result in 14 St Charles Square undergoing a change of use, on the straightforward basis that it is currently used as four flats and would thereafter be used as three.
12. This change of use, applying the principle which the High Court adopted as being correct in the *Richmond* case, is capable of amounting to a material change of use within the meaning of section 55. Whether it does so depends on the extent to which the use of 14 St Charles Square as four flats rather than as three flats "fulfils a legitimate or recognised planning purpose".
13. The Counsel's opinion supplied by the appellants does not mention this principle, although it assumes for the purposes of the opinion that the *Richmond* case was rightly decided. Nor does it mention the statement in the judgement that "The fact that, in the broadest sense, the property continued to be used for residential purposes does not mean that there could not have been a material change of use". Furthermore, "a legitimate or recognised planning purpose" is to my mind a more wide-ranging concern than the "policy factor" referred to by Counsel – an expression which is not used in the *Richmond* judgement and which he associates with planning policies that have been through proper procedures. It seems to me that the approach advocated in the Counsel's opinion supplied by the Council, which I have quoted in paragraph 7 above, is to be preferred since it applies the principle which the High Court adopted as being correct in the *Richmond* case.
14. The background to the Council's refusal of the application is their view that the reduction in the number of flats from four to three is "material", because it would involve the loss of a residential unit at a time when a pressing need has been identified to retain the existing stock and increase the supply of housing in the Borough. In support of this view, they refer to adopted planning policies relating to housing targets and to recent statistical evidence relating to housing completions and the loss of residential units.
15. The appellants' position is that they are residents in the Borough who wish to remain there; they own both flats and need to amalgamate them to provide suitable family accommodation for themselves and their children. In support, they are able to point to adopted planning policies identifying a need for family dwellings, as well as to their own and their children's personal circumstances.

Conclusion

16. Both the standpoints set out in paragraphs 14 and 15 above give rise to important planning issues that would be dealt with on their merits if a planning application were submitted or a section 78 planning appeal were made. As far as this appeal is concerned, I am satisfied that the use of 14 St Charles Square as four flats rather than as three flats fulfils a legitimate and recognised planning purpose of sufficient significance to make the proposed amalgamation

a material change of use within the meaning of section 55. I have noted that the reduction in the number of residential units that would occur would be very small in comparison to the number of residential units that would remain in the Borough, but that in my view is a planning merits issue.

17. Planning permission is required for the amalgamation of the flats and the amalgamation would therefore not be lawful if begun at the time of the application. I am satisfied that the Council's refusal of the application is well-founded. The appeal has been dismissed, as required by section 195(3).

D.A.Hainsworth

INSPECTOR