Supplementary Proof of Evidence of Lisa Cheung BSc (Hons), MA MRTPI

Appeal by Maurice Nixon

Site Address: 77 Drayton Gardens, London, SW10 9QZ

PINS References: APP/K5600/X/15/3136227 and APP/K5600/C/16/3143934

This supplementary proof is to be read in conjunction with the Proof of Evidence of Lisa Cheung submitted on 15th June 2016. It will include comments on the appellant's proof of evidence where necessary and any changes which have taken place since the submission of the Proof of Evidence including any policy updates, appeal decisions and any other information deemed relevant to this appeal.

1.0 COMMENTS ON THE APPELLANT'S PROOF OF EVIDENCE

1.1 Paragraph 3 of Section 1 of the appellant's proof of evidence sets out that the appeal against the enforcement notice is on grounds a, b, c and g. The appeal form submitted on 5th February 2016 clearly sets out that the appeal grounds were a, c and g. It has now transpired that the appellant raised the issues surrounding ground b in their Pre-Inquiry Statement of Case which has only just been provided to the Council on 2nd September 2016 following a request for it.

1.2 Whilst the Council accepts that the appellant may well have raised this issue prior to the submission of the initial proofs of evidence, although it was after the submission of the appeal, the Council has not been made aware of this and can only assume that the Inspector will not accept such a late addition at this stage. To do so, in our view would be unreasonable.

1.3 Notwithstanding this point however, the Council wishes to make the following comments on the appellant's proof of evidence including those relating to ground b.

1.4 In paragraphs 48 and 50 of the appellant's proof, the appellant has raised a number of issues with regards to the enforcement notice. Firstly the appellant asserts that as the amalgamated property is yet to be occupied, a change of use has therefore not occurred and the enforcement notice has been served in anticipation of a breach of planning control. Works have been carried out to amalgamate the two properties. A site inspection undertaken in April 2016 confirmed that the works carried out have in fact resulted in the two properties being amalgamated. The layout of the second and third floors reads as one unit. The alleged breach of planning control which is the 'amalgamation of two separate self-contained residential units on the second and third floors of the property' has occurred. A property can be used in a particular way before actual occupation occurs. It is clear that the property has been amalgamated. It therefore stands that the alleged breach is correct and that the enforcement notice should stand.

1.5 The Council considers that the appellant's assertion that a material change of use to a single dwelling has not occurred and therefore the notice should be quashed is not correct. The correct approach is that one could start to use a building or part of a building for some purpose even though not everything has been completed or made good or occupation started. The appeal decision at 78 Fanshawe Road, Barking, Essex is pertinent to this point and is attached as an appendix to this proof (Appendix A). The Inspector in this instance makes clear that occupation does not have to have occurred for enforcement action to be taken. Paragraph 14 of the appeal decision outlines that this is the case for two reasons: 1) conclusions contrary to this would mean that the local planning authority, who became aware at an early stage of unauthorised subdivision would have to consciously allow the works to be completed and the flats to be let before an enforcement notice could be served thus requiring all the work to be undone; 2) the logical consequence of such a conclusion would be that a developer could then carry out works of subdivision and hold onto the property for four years before letting it as separate flats, thereby gaining immunity from enforcement action. With regards to the subject appeal case the local planning authority has been made aware of the subdivision and as such has sought

to act accordingly to enforce against the unauthorised change of use.

1.6 Secondly, the appellant asserts that if the enforcement notice relates to operational development, as the title to the notice suggests, then because the work that has taken place is entirely internal and so does not require planning permission, no unlawful development has taken place and the notice should be quashed. Section 173 of the Town and Country Planning Act 1990 ("the Act") specifies what the enforcement notice must contain and there is no requirement to add a title. However in this instance, the Council accepts that the title is wrong and that it should state "Material Change of Use".

1.7 An enforcement notice is required to state the matters which appear to the local planning authority to constitute a breach of planning control. Section 171A of the Act sets out what constitutes a breach of planning control. The enforcement notice identifies that the breach of planning control falls within section 171A(1)(a) of the Act.

1.8 At paragraph 3 of the notice, the Council has identified the alleged breach of planning control which is as set out in paragraph 1.1 of this supplementary proof. It is clear from this that the two residential units are being used as one and the critical word in this expression is 'used'. The Council asserts that the description of the alleged breach identifies that there has been a change of use. Furthermore, amalgamation if it is to constitute development will be a material change of use.

1.9 Paragraph 4 of the notice refers to the breach being within the last four years. This would only arise if there has been a change of use as a single family dwelling house which would come under section 171B(2) of the Act. This serves to confirm that what has been alleged is a material change of use as one dwelling house.

1.10 Paragraph 5 of the notice requires the land in question to be restored so that there are two separate self-contained dwellings. Therefore this requires the amalgamated arrangement to cease, that being the material change of use to cease.

1.11 It is clear that the content of the notice includes all the relevant material required by section 173 of the Act. While the (unnecessary) title is erroneous it is an error on the face of the document. It is clear from the remainder of the notice, which is acceptable, that it relates to an allegation of material change of use.

1.12 With this in mind, section 176 of the Act enables errors or misdescriptions to be corrected or for the notice to be varied provided there is no injustice to the appellant. The case of *Wealden DC v Secretary of State for the Environment* [1983] JPL 234 is authority for the proposition that variation of a notice allows a material change of use to be changed to operational development. Whether it can be done without injustice will depend on the circumstances of each matter. In this instance, the Council considers that changing the unnecessary title would not cause injustice to the appellant based on the above analysis of the notice and at the Inquiry the Inspector will be invited to correct or vary the terms of the notice so that it is entirely clear that it relates to an allegation of material change of use.

1.13 Paragraphs 91-97 of the appellant's proof relates to small units and why this may be a material consideration which would justify the loss of one unit. The appellant

concludes that because the 2015 Strategic Housing Market Assessment (SHMA) identifies a 50/50 split between smaller and larger units there is therefore no overriding need to retain 1 bed units on the appeal site. The Council would argue that there is also no overriding need to provide 3 bedroom units on the appeal site and therefore it is not clear why the appellant presents this argument. It is abundantly clear that there is a pressing need for more housing and it follows that existing housing should be protected where possible. The fact that the SHMA may no longer identify a greater need for one size dwelling over another does not justify the loss of an existing residential unit at the appeal site.

1.14 Paragraph 108 raises the issue of whether or not a material change of use has occurred as the amalgamated unit would also be in the C3 use class. In the *Richmond*[1] case, the judge concluded that if one could say that before proposals for amalgamation were implemented the use of the building had been as a dwellinghouse for occupation by one or other of the persons or groups set out in C3(a), (b) or (c) of the Use Class Order, then the provisions of section 55(2)(f) and Article 3(1) could come into play. However, if that were not the case those provisions would not apply. In this instance, the building is not in use as a single dwellinghouse, but was as five separate dwellinghouses each in Class C3 use and therefore those provisions do not apply here. The use of C3 is not disputed but that is not the substance of the appeal. In the case of amalgamation, the comparison of before and after development is not between a flat's use before and after a specific date but that one flat has now become part of another building (as a result of the amalgamation into another flat).

2.0 RELEVANT CHANGES SINCE THE SUBMISSION OF THE PROOF OF EVIDENCE OF LISA CHEUNG ON 15TH JUNE 2016

2.1 There have been no policy changes which are relevant to this appeal.

2.2 There have been a number of appeal decisions received which are relevant to this appeal. These are discussed below.

- APP/K5600/X/15/3133521 (118 Portland Road) against the Council's decision to refuse CL/15/00678 for the 'internal alterations to link all floors as a single family dwelling use, including re-insertion of internal stairs linking the basement and ground floors'. The Inspector found that:

  "*In my opinion, as a matter of fact and degree the existing use as four flats fulfil a legitimate and recognised planning purpose in contributing to the housing stock of the Borough, and that the change to a single dwelling may have significant consequences in reducing that stock. This is a matter that should be properly consulted upon and considered on its merits by means of a planning application*"

- APP/K5600/X/15/3141220 (Flat 2, 6 and Flat 2, 9 Cheyne Gardens) against

[1] The London Borough of Richmond-upon-Thames v SSETR and Richmond-upon-Thames Churches Housing Trust

the Council's decision to refuse CL/14/06087 for the 'amalgamation of two individual flats into a single dwelling'. In determining this appeal, the Inspector found that:

"*In my opinion, as a matter of fact and degree the existing use as two flats fulfils a legitimate and recognised planning purpose in contributing to the housing stock of the Borough, and that the change to a single dwelling may have significant consequences in reducing that stock. This is a matter that should be properly consulted upon and considered on its merits by means of a planning application*"

2.3 These appeal decisions are appended as Appendix B and C.

2.4 On 27th November 2015, the Planning Inspectorate allowed two appeals at 44 Stanhope Gardens, one in respect of a certificate of lawfulness and the second in relation to a planning application and associated listed building consent application, all relating to the amalgamation of two residential units into one self contained residential unit. The Council applied to the High Court to quash these decisions along with associated cost decisions. On 15th June 2016, the appeal decision for the certificate of lawfulness was quashed and the appeal returned to the Planning Inspectorate for re-determination. A copy of the now quashed appeal decision (in respect of the certificate) and judgement are attached as Appendices D and E.

2.5 On 5th November 2013, the Planning Inspectorate allowed an appeal at 78 Fanshawe Road regarding an appeal against an enforcement notice issued by the London Borough of Barking and Dagenham (previously referred to in paragraph 1.5 of this supplementary note). The notice primarily requires the cessation of the premises as flats. In this statement the Inspector outlines that operation does not have to have begun for a change of use to have occurred. This is attached as Appendix A.

3.0 COSTS

3.1 At this time, a full costs application has not been submitted but it is considered that one could be made. A final decision will be made on this during the inquiry and any costs application made before the Inquiry closes.