The Planning Inspectorate

Appeal Decision

Hearing held on 28 June 2016
Site visit made on 28 June 2016.

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 3 August 2016

Appeal Ref: APP/K5600/X/15/3141220
No. 6 (flat 2) & no. 9 (flat 2) Cheyne Gardens, London SW3 5QU

- 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 to grant a certificate of lawful use or development (LDC).
- The appeal is made by Alireza Ittihadieh against the decision of The Council of The Royal Borough of Kensington & Chelsea.
- The application ref. CL/14/06087, dated 20 August 2014, was refused by notice dated 24 October 2014.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
- The proposal for which a certificate of lawful development is sought is to amalgamate two individual flats into a single dwelling. The current flats have an established use as residential.

Decision

1. The appeal is dismissed

Preliminary matters

2. For the avoidance of doubt, I should explain that the planning merits of the proposed use are not relevant, and they are not therefore an issue for me to consider in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended (the Act), which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

Background matters

3. Nos. 6 and 9 are part of a terrace of five storey buildings on the western side of Cheyne Gardens, originally built as flats. The flats in question have ground floor entrances to the common parts in nos. 6 and 9, and parts of the flats are within those buildings, but the flats also oversail the intervening buildings, nos. 7 and 8, and share a party wall. Both flats have two bedrooms, two bathrooms, a reception room, kitchen, entrance hall, and balconies to front and back.

4. The proposal is to interconnect the flats. That in no. 6 would become the entrance hall, living room, kitchen, dining room, office, and WC. That in no. 9 would become a master bedroom with bathroom/dressing suite, and a guest bedroom also with a bathroom.

5. A planning application to amalgamate the two flats, and including other works, was refused, and dismissed at appeal in 2015[1].

Reasons

6. The main issue in a LDC appeal is whether the Council's decision to refuse to grant a certificate of lawfulness of proposed use or development was well-founded. In that regard the principal question in this case is whether there would be a material change of use of the property that would require planning permission.

7. All proposed alterations would be internal, and there would be no changes made to the external appearance of the building. The parties agree that the proposals would not therefore be classed as operational development by virtue of the provisions of Section 55(2)(a)(i) and (ii) of the Act. These exclude building works that affect only the interior of the building, or do not materially affect its external appearance.

8. The appellant argues that under Section 55(3)(a) of the Act the use as two or more separated dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and each part of it which is so used. However, there is no reference to the amalgamation of two or more dwellings into one dwelling. On the other hand Article 3(1) of The Town and Country Planning (Use Classes) Order 1987 (the UCO), provides that where a building or other land is used for a purpose of any class specified in the Schedule to the Order, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land. I note that Section 55(2)(f) of the Act makes similar provision. On this basis it is argued that the statutory intention is that continued use of the same premises within the same use class does not constitute development, whereas subdivision of a dwellinghouse does.

9. One of the issues in the High Court case of *Richmond*[2] concerned whether a proposed amalgamation of flats would be exempted from the definition of development. The judge analysed this in terms of the situation before amalgamation and the situation afterwards. He came to the conclusion 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 UCO, 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 – or the parts of the buildings comprising the two flats[3] - is not in use as a single dwellinghouse, but as two separate dwellinghouses each in Class C3 use. On the basis of the judge's determination in *Richmond* it follows that the provisions of Section 55(2)(f) and Article 3(1) do not apply.

10. The appellant argues that *Richmond* was wrongly decided for three reasons. First, no or insufficient attention was given to the distinction in both the Act and the UCO between the splitting of a residential unit, as opposed to the amalgamation of units. This shows a clear and deliberate choice by Parliament

[1] Decision notice ref. PP/14/07865 dated 13 March 2015. Appeal ref. APP/K5600/W/15/3006728 dated 22 July 2015.
[2] The London Borough of Richmond-upon-Thames v SSETR and Richmond-upon-Thames Churches Housing Trust *[2000] 2 PLR 115*.
[3] Section 336 of the Act states that the meaning of 'building' includes any part of a building.

to regulate one matter but not the other. Second, the UCO was dismissed as being relevant in *Richmond* on the basis that the definition of a dwellinghouse in Class C3 is confined to a single dwellinghouse. It was determined accordingly that if the starting point entails more than one dwellinghouse, the UCO does not apply. The argument continues to state that the reference to 'a dwellinghouse' in Class C3 can be seen to relate, for example to the dwellinghouse being used, singularly, by not more than six residents living together as a single household – as in Classes C3(b) and (c). Furthermore Section 55(2)(f) and Article 3(1) do not, properly interpreted relate only to a single building. Section 55(2)(f) relates to *'buildings … which are used for a purpose of any class…'*. While Article 3(1) refers only to *a 'building'*, this too must be read as incorporating the plural. It was wrong in *Richmond* to say that these provisions applied only to individual buildings.

11. In my opinion, while Article 3 refers to *'a building'* in the singular, it goes on to refer to *'that building'* indicating that there should be the self-same building in both before and after situations. Even if the reference were to *'buildings'* in the plural – as is the case with s55(2)(f) – this clearly still refers to the self-same buildings. In this case the 'before' situation is that two units are used separately, each as a single dwellinghouse, and each used by a single person or household in the case of Class C3(a), or by the other groups defined in C3(b) and (c). The proposed 'after' situation is that there would be one unit also used by one or other of those groups.

12. I consider the two existing flats should be considered each as a separate building – indeed they have different street addresses. It follows that the proposal would lead to part of building no. 6 being combined with part of building no. 9 – as well as substantial parts within buildings 7 and 8. While the new configuration would be used for one of the purposes of Class C3, it would not be the self-same building that would be put to that use. In the light of this I do not consider the amalgamation can be excluded from being regarded as development under the provisions of Article 3 of the UCO, and s55(2)(f) of the Act, but is capable of amounting to a material change of use.

13. The question remains of whether the change of use would be material in planning terms. It is common ground between the parties that the proposals would not affect the appearance of either flat or of the area, and that there would be no impact on amenity, including by reason of such things as increased movements, nor would there be increased impact upon services. Furthermore, the character of the use of the appeal site would be unaffected. However, as the Council argued, unchecked amalgamations could well affect the character of an area.

14. It is apparent that prior to August 2014 the Council took the view that amalgamation of two or more dwellings into a single dwelling did not constitute a material change of use for which planning permission would be required, but since then have taken the opposite view. This has been justified on the basis of the judgement in the *Richmond* case, and that the planning circumstances concerning housing supply have significantly changed. The Council maintain that the amalgamation would result in the loss of a unit of housing, and that this would contribute to the difficulties of meeting increased housing targets now faced in the Borough.

15. In deciding whether a change of use is a material change or not the judge in *Richmond* adopted the formulation that it depended upon the extent to which a particular use fulfils a legitimate or recognised planning purpose as to whether a change from that use is material. In that regard the character of the existing and proposed uses must be examined against the background of development plan policy and any other material considerations.

16. In terms of development plan policy, Policy 3.3 of the Further Alterations to the London Plan of 2015 seeks to increase housing supply and to meet the housing need by provision of an annual net average of at least 42,000 dwellings. For Kensington and Chelsea this includes a minimum 10-year target to 2025 of 7,330 dwellings, with an annual monitoring target of 733 homes. Regarding existing stock, London Plan Policy 3.14 seeks to support its maintenance and enhancement, and includes aims to resist loss of housing unless it is replaced at the existing or higher density with at least equivalent floorspace. Supporting text to this Policy states that (in order) to address London's housing needs and sustain its neighbourhoods, existing housing should be retained where possible and appropriate, except where there are acceptable plans for its replacement. Furthermore, recent Supplementary Planning Guidance[4] (SPG) advises that where there is local evidence that the amalgamation of separate flats into larger units is leading to the sustained loss of homes, boroughs are encouraged to resist the process, in line with London Plan Policy 3.14.

17. Policy CH1 of the Royal Borough of Kensington and Chelsea Consolidated Local Plan (CLP) of 2015 seeks to ensure sufficient housing sites are allocated in order to ensure that housing targets are met. CLP Policy CH2 seeks to ensure that new housing development further refines the grain and mix of housing across the Borough, and includes aims to resist development proposals that would result in the net loss of five or more residential units, and to prevent development that results in the amalgamation of units from further amalgamation in the future. Policy CH3 seeks to protect residential uses and ensure a net increase in residential accommodation through a number of measures, including protection of market residential use and floorspace.

18. It appears to me that the general principles of the relevant London Plan and CLP policy are to increase housing supply and maintain the stock of existing housing. There may be debate about whether this is achieved by retention of residential floorspace, irrespective of how this is arranged. However, at the base must be consideration of the number of individuals and families that can be accommodated. In this particular case it is notable that the number of bedrooms provided would be reduced from four to two, with a resultant decrease in the numbers that could be accommodated. The Council's most recent assessment of dwelling size requirements[5] indicates an approximately 50/50 split between the need for smaller, 1 or 2 bedroom units, and larger, 3-4+ bedroom units – a significant change from the 2010 assessment, when there was a need for 80% of larger units. In those terms this proposal would have a neutral impact, although at the cost of reducing population density.

19. The Council have put forward their Planning and Borough Development Monitoring Report of 2015. Regarding de-conversions and amalgamations it is apparent that these have given rise to the loss of between 40 and 80

[4] The Mayor of London's Supplementary Planning Guidance 'Housing' of March 2016.
[5] The Council's Strategic Housing Market Assessment of December 2015.

residential units for each year from 2010 to 2014, and an estimated loss of 112 units in 2015. A total in the region of 400 units for the entire period.

20. This amounts to a significant number of losses per year in comparison with the target for new dwellings, and is even more significant in comparison with actual residential completions. In this context the loss of one dwelling would, as a matter of fact and degree have a significant impact in planning terms. Kensington and Chelsea is clearly a Borough in which a sustained loss of homes is occurring as a result of amalgamations. Although the appellant claims that losses through amalgamation are taken into account in the London Plan housing targets, the advice of the SPG appears to contradict this assertion. Furthermore, while this proposal would result in the loss of fewer than the five units referred to in CLP Policy CH2, circumstances have changed significantly since the CLP was adopted in 2010, and it cannot necessarily be concluded that the loss of one unit would not be material. In ant case this Policy does not automatically justify the loss of fewer than 5 dwellings.

21. The appellant suggests that the loss of one dwelling should be seen as *de minimis* in the context of something in the order of 90,000 dwellings in the Borough. I accept that this would be an almost infinitesimal change, but in my view the loss should realistically be considered against the need for the Council to make provision for 733 new dwellings each year.

22. 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.

23. It is the case that there had been no significant change to the Council's development plan policy at the point when it was decided that proposals for amalgamation of flats amounted to material changes of use. Nor indeed had there been any changes to relevant law. However, the Council had become aware of increasing difficulty in meeting their housing supply targets, and in my view this was a sufficiently material consideration for them to reconsider their stance. The appellant may have demonstrated that the proposals accord with various development plan policies, but it is not the purpose of a LDC application to test the merits of a proposal against development plan policy.

24. It was argued that flats of the type in Cheyne Gardens are different and distinct from run-of-the mill housing, forming part of an exclusive, stable, and rather small niche market for very rich people. That may be the case, but there would inevitably be a knock-on effect resulting from a reduction in the number of dwellings in that part of the market for those occupying, or hoping to occupy, more affordable accommodation.

25. I conclude on the main issue in the LDC appeal that the proposal constitutes a material change of use of the building, for which planning permission would be required. It follows that the Council's decision to refuse the grant of a LDC was well-founded.

Conclusions

26. I have taken account of all other matters raised, but I have found none sufficient to outweigh the considerations which have led me to my decision.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Andrew Byass	of Counsel.
John Dingle	Planning Consultant.

FOR THE LOCAL PLANNING AUTHORITY:

Simon Westmoreland	Planning Officer The Royal Borough of Kensington and Chelsea Council.
Jonathan Wade	Head of Forward Planning The Royal Borough of Kensington and Chelsea Council.

DOCUMENTS

1 Attendance list.
2 Extract from the Mayor of London's Supplementary Planning Guidance on Housing of March 2016.
3 Extract from the Council's Issues and Options for Housing Policies for the Local Plan Partial Review.
4 List of property sale prices for Cheyne Gardens.