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## Appeal Decisions

Hearing held on 13 October 2015

Site visit made on 13 October 2015

**by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI**

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

**Decision date: 27 November 2015**

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### **Appeal A Ref: APP/K5600/X/15/3028049**

#### **Flats 1 and 3, 44 Stanhope Gardens, London SW7 5QY**

- 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 Mr David Reis and Ms Gianna Tong against the decision of The Council of The Royal Borough of Kensington & Chelsea.
  - The application Ref CL/14/07295, dated 13 October 2014, was refused by notice dated 11 December 2014.
  - 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 amalgamation of two self contained flats to form one self-contained residential unit involving internal alterations.
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### **Appeal B Ref: APP/K5600/W/15/3028100**

#### **Flats 1 and 3, 44 Stanhope Gardens, London SW7 5QY**

- 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 Mr David Reis and Ms Gianna Tong against the decision of The Council of The Royal Borough of Kensington & Chelsea.
  - The application Ref PP/14/07307, dated 16 October 2014, was refused by notice dated 15/12/2014.
  - The development proposed is the amalgamation of the two flats at raised ground floor and first floor level and the insertion of a window at the rear for a new bathroom.
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### **Appeal C Ref: APP/K5600/Y/15/3028120**

#### **Flats 1 and 3, 44 Stanhope Gardens, London SW7 5QY**

- The appeal is made under section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 against a refusal to grant listed building consent.
  - The appeal is made by Mr David Reis and Ms Gianna Tong against the decision of The Council of The Royal Borough of Kensington & Chelsea.
  - The application Ref LB/14/07308, dated 16 October 2014, was refused by notice dated 15 December 2014.
  - The works proposed are reconfiguration and reordering of drain pipes on rear façade, removal of external railings at front of property for front door to be back in use, insertion of window for new bathroom, and opening up floor plate between flats for internal stairs to be reinserted.
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## Decisions

Appeal A Ref: APP/K5600/X/15/3028049

1. 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 Ref: APP/K5600/W/15/3028100

2. The appeal is allowed and planning permission is granted for the amalgamation of the two flats at raised ground floor and first floor level and the insertion of a window at the rear for a new bathroom at Flats 1 and 3, 44 Stanhope Gardens, London in accordance with the terms of the application, Ref PP/14/07307, dated 16 October 2014, subject to the following conditions:

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

2. The development hereby permitted shall be carried out in accordance with approved plan nos. 44SG/030B, 44SG/031A, 44SG/032B, 44SG/034, 44SG/035, 44SG/036, 44SG/037, 44SG/038, 44SG/039, 44SG/040, 44SG/041, and 44SG/042.

3. The existing timber framed sash windows in the rear elevation of the property at ground and second floor levels shall be retained in their existing state.

4. The window in the rear elevation hereby permitted shall be of white painted timber, shall be single glazed with a bevelled putty finish, and shall have no trickle vents. The window shall be retained as installed.

Appeal C Ref: APP/K5600/Y/15/3028120

3. The appeal is allowed and listed building consent is granted for reconfiguration and reordering of drain pipes on rear façade, removal of external railings at front of property for front door to be back in use, insertion of window for new bathroom, and opening up floor plate between flats for internal stairs to be reinserted at Flats 1 and 3, 44 Stanhope Gardens, London in accordance with the terms of the application Ref LB/14/07308, dated 16 October 2014, and the plans submitted with it subject to the following conditions:

1. The works hereby authorised shall begin not later than three years from the date of this consent.

2. The works hereby authorised shall be carried out in accordance with approved plan nos. 44SG/030B, 44SG/031A, 44SG/032B, 44SG/034, 44SG/035, 44SG/036, 44SG/037, 44SG/038, 44SG/039, 44SG/040, 44SG/041, and 44SG/042. The works as carried out in accordance with the approved drawings shall thereafter be retained as carried out.

3. No works shall commence until details and materials of the new staircase and balustrade have been submitted to and approved in writing by the local planning authority. The staircase and balustrade shall be installed as approved and shall thereafter be retained as installed.

4. The existing timber framed sash windows in the rear elevation of the property at ground and second floor levels shall permanently be retained in their existing state.

5. No works shall commence until details of works to reinstate the ability to open the retained existing front door have been submitted to and approved in writing by the local planning authority. The works shall be carried out as approved and the door shall thereafter be retained as altered.
6. The window in the rear elevation hereby authorised shall be of white painted timber, shall be single glazed with a bevelled putty finish, and shall have no trickle vents. The window shall be retained as installed.
7. All new works and works of making good to retained fabric, both internal and external, shall be finished to match adjoining retained fabric with regard to colour, material, texture and profile.
8. All new rainwater goods and guttering shall be black painted cast metal and shall be retained as installed.
9. No works shall commence until a full photographic survey of the interior and exterior of the property, to detail all of its historic features to be retained, has been carried out and the resultant photographs have been submitted to and approved in writing by the local planning authority.
10. No works shall commence until the position, type and manner of installation of all new and relocated services and related fittings, and of all ducts, methods of concealment and associated building works, have been submitted to and approved in writing by the local planning authority. The works shall be carried out as approved.
11. All existing fabric including wall and ceiling plasterwork shall be retained unless otherwise noted on the approved drawings.

### **Application for costs**

4. At the Hearing an application for costs was made by Mr David Reis and Ms Gianna Tong against The Council of The Royal Borough of Kensington & Chelsea. This application is the subject of a separate Decision.

### **Procedural matter**

5. In all three appeals the description of the proposed development or works is taken from the Council's Decision Notice. In the planning Decision Notice the Council's description included details of works that would be carried out but these have been omitted as being too prescriptive.

### **Reasons**

6. 44 Stanhope Gardens is a mid-terraced property that was originally two houses. The two houses were amalgamated into one dwelling in 1949 and the building was subsequently converted into flats. Flat 1 is at raised ground floor level and includes the original front door to no. 45; though this is fixed shut and railings have been installed alongside the pavement to prevent access to the short flight of steps that lead up to it. Flat 3 is at first floor level. The three appeals all relate to the amalgamation of the two flats to create one residential unit.
7. The appeal property is a Grade II listed building that is situated in the Queen's Gate Conservation Area. The main parties have submitted a Statement of Common Ground. This states that the development and works to the property would not harm the living conditions of neighbours and would preserve the character and appearance of the Conservation Area. The main parties also agree

that the details of the window to be inserted at the rear of the property could be the subject of a condition, and that the principal works to the listed building would enhance its heritage value.

Appeal A Ref: APP/K5600/X/15/3028049

8. The main issue is whether the amalgamation of the two flats to create one residential unit constitutes a material change in the use of the land.

9. The amalgamation of the two flats would have no material effect on the external appearance of the property (the Council accepts, in fact, that the removal of the railings that currently block access to the original front door "...is most welcome") and no harm would be caused to the character of the building or to the surrounding area. The Council has not alleged, in fact, that the proposed amalgamation of the two flats would have any effect on the character of the use of land other than through the loss of a residential unit. They maintain that, taken from the statement of common ground, the "...scale of amalgamation currently under way in this Borough is having a material effect on a matter of public interest, namely it is significantly reducing the number of dwellings in the housing stock".

10. Section 55(1) of the Town and Country Planning Act 1990 (the Act) states that "development" means, amongst other things, the making of a material change in the use of land. The Council maintains that the proposed amalgamation of the two flats to create one residential unit would constitute a material change in the use of the land and that, therefore, it would constitute development for which planning permission is required.

11. Prior to 2000 it was commonly accepted that a reduction in the number of dwelling units on land in residential use did not represent, and could not contribute to, a material change in use of the land. In that year a judgement was made in the case of *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 CO/4083/99 (Richmond)*. The Council relies on this judgement which quashed an Inspector's decision to grant an LDC for the conversion of a property in use as seven flats to one dwelling.

12. The *Richmond* judgement refers to *Mitchell v Secretary of State for the Environment (Mitchell)*, in which it is stated that "It is undoubtedly the law that material considerations are not confined to strict questions of amenity or environmental impact and that the need for housing in a particular area is a material consideration...". But to be a material consideration the need for housing must be expressed in and supported by local planning policy and has thus often been referred to as the policy factor.

13. *Mitchell*, and other case law, set the scene for *Richmond*. The High Court Challenge in *Richmond* was successful because the Inspector had failed to take into account what was found to be a material consideration, the policy factor, which he considered to be "...a question of planning merit than of law". *Richmond* did not establish that the policy factor can be the sole determinative factor in an LDC case but one that must be taken into account with all other considerations. But, in this case, the Council is wholly reliant on the policy factor. Nevertheless, it is necessary to consider whether it is a material consideration of any weight.

14. Policy CH 2 'Housing Diversity' of the Council's Core Strategy (CS) states that the Council will, amongst other things, resist development which results in the

net loss of five or more residential units. The proposed amalgamation of the two flats would result in the loss of only one residential unit. The proposal does not conflict with CS policy CH 2. Saved policy H17 of the Council's Unitary Development Plan (UDP) states that the loss of existing, small, self-contained flats of one or two habitable rooms will be resisted. Both flats have more than two habitable rooms so the proposal does not conflict with UDP policy H17.

15. Policy 3.14 of the London Plan (LP) states, amongst other things, that the loss of housing should be resisted unless the housing is replaced at existing or higher densities with at least equivalent floorspace. The LP is a strategic plan and places an emphasis on the increase or preservation of residential floorspace rather than the number of housing units. This strategic objective is reflected in the CS but the relevant policy in this element of a local plan has been considered above. The proposed amalgamation of the two flats would not result in any loss of residential floorspace. The proposal does not conflict with LP policy 3.14.

16. The Council has referred to similar LDC cases in a neighbouring Council area but planning policy in place, or planning decisions made, in that area cannot be imported to support the Council's case. The scale of amalgamation in the Borough may be having a material effect on the number of dwellings in the housing stock but the proposed amalgamation of the two flats does not conflict with CS policy CH 2, UDP policy H17 or LP policy 3.14. The policy factor, in this case, given that there is no policy conflict, is a material consideration of no weight. Given that the Council accepts that no harm would be caused to the character of the building or to the surrounding area the proposed amalgamation of the two flats to create one residential unit, as a matter of fact and degree, is not a change of use that is material and that constitutes development as defined in Section 55 of the Act. Planning permission is not required for the proposed use.

17. For the reasons given above and on the evidence now available, the Council's refusal to grant an LDC in respect of the amalgamation of two self contained flats to form one self contained residential unit involving internal alterations at Flats 1 and 3, 44 Stanhope Gardens, London was not well-founded and Appeal A thus succeeds. The powers transferred under section 195(2) of the 1990 Act as amended have been exercised accordingly.

Appeal B Ref: APP/K5600/W/15/3028100

18. Planning permission, given the conclusion in the LDC appeal, is not required for the amalgamation of the two flats at raised ground floor and first floor level and the insertion of a window at the rear for a new bathroom, but an application for planning permission was made to the Council and an appeal has been submitted against their refusal of that application. The appeal must therefore be determined.

19. The main issue is the relationship of the proposal that is the subject of the appeal with the Development Plan.

20. The Council has referred to two dismissed appeal decisions for similar applications in their Borough. In APP/K5600/W/15/3030628 the proposed amalgamation of the two flats would have resulted in the loss of a small, self-contained flat of one or two habitable rooms and was thus in conflict with saved UDP policy H17. Whilst the Inspector also found that the proposal would be contrary to the aims of CS and LP policy, the conflict with saved UDP policy H17 was clearly a determinative factor.

21. In APP/K5600/W/15/3010078 the Inspector found that the loss of a housing unit, by reference to CS text, is "...contrary to the objectives set out in CS policy CH 3", which seeks to protect residential uses. She also found that "...the cumulative effect of loss of dwellings through amalgamation of units has (the) potential to have a significant effect on the delivery of much-needed housing in the Borough". In essence this is the Council's concern. But such a possibly negative cumulative effect must be judged against the Council's projections for housing supply set out in their Annual Monitoring Report 2014 (AMR), the latest version of this document. It is not known whether this document was before the Inspectors in the two appeal decisions referred to above.

22. The AMR projects that by 2024/25 housing supply will exceed LP housing targets for the Borough by 1,342 units. However, the LP has recently been altered and the annual housing target for the Borough has been increased by 133 units for each year up to 2024/25. Housing supply for the next ten years must therefore increase by 1330 units, which absorbs the projected surplus. So the loss of housing units over that period through the amalgamation of units could jeopardise the Council's attempts to meet the LP housing targets. It is worth pointing out, though a planning decision must be made in accordance with the Development Plan in place when the decision is made, that the alterations to the LP were published on 10 March 2015, about 3 months after the planning application was determined.

23. The consequences of the loss of housing units through amalgamation is addressed in paragraph 10.23 of the AMR in which it is stated that the Council "...is now of the opinion that any amalgamation is development which does require planning permission. Any such application will be determined in accordance with the policies within the Development Plan". Whether the amalgamation of two units into one is development which requires planning permission, in this case, has been addressed in the LDC appeal. A proposal for the loss of five or more residential units is not in accordance with the Development Plan but the loss of one unit, through the amalgamation of two units, is in accordance with the Development Plan, because it is not in conflict with any policies in the Development Plan.

24. The text to CS policy CH 3 'Protection of Residential Uses' is instructive. In paragraph 35.3.34 it is stated that "To achieve the annual housing target..., which takes account of net losses of units, it is therefore important to protect residential units in most circumstances". Though the text relates to policy CH 3 it comes immediately after policy CH 2, which also seeks to protect residential units. But, currently, this policy only seeks to prevent, for any development that requires planning permission, the loss of five or more residential units. If they wish the policy to prevent any amalgamation the Council should swiftly pursue the alteration of the CS through the statutory process, which includes consultation. The Council cannot expect to change planning policy context in a paragraph in an AMR.

25. Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that planning applications must be determined in accordance with the Development Plan unless material considerations indicate otherwise. Given the AMR projections the loss of one residential unit at this time would not have a material adverse effect on their efforts towards meeting LP housing targets. The proposal is not in conflict with any Development Plan policies and there are no material considerations to indicate that determination of the appeal cannot be made other than in accordance with the Development Plan. Planning permission has thus been granted for the amalgamation of two self-contained flats to form one self contained residential unit at Flats 1 and 3, 44 Stanhope Gardens, London.

26. The Council has suggested four conditions. They are all necessary and otherwise meet the tests set out in National Planning Policy Guidance, and they have therefore been imposed though they have been amended, where necessary, in the interests of clarity and precision. Condition 1 is the standard time limit condition, condition 2 is for the avoidance of doubt and in the interests of proper planning, and conditions 3 and 4 will safeguard the architectural and historic interest and heritage significance of the building.

Appeal C Ref: APP/K5600/Y/15/3028120

27. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that special regard be paid to the desirability of preserving the listed building and any features of architectural and historic interest that it possesses.

28. Ms Bix, at the Hearing and for the Council, did not raise any in principle objection to the proposed works to the listed building. It is clear that the Council's concern in the listed building appeal is that there is insufficient and incorrect information on the drawings submitted with the application to provide certainty that the proposed works to the property would not cause harm to the architectural and historic interest of the listed building. Their principal concerns are with regard to the incorrect subdivision of windows on the drawing of the rear elevation, the lack of detail as to how the existing front door would be returned to its former openable condition, to the internal works that would be required to install services and fittings to a modern standard, and to the lack of detail of the staircase and balustrade that would be reinstated between ground and first floor level.

29. It is a principle of planning and listed building control that if concerns can be overcome by imposition of conditions then planning permission or listed building consent should not be withheld. It became clear at the Hearing that the Council's concerns could be overcome by imposition of conditions, based on the eleven conditions suggested by the Council. Amendments to some of the conditions were discussed and agreed and they have otherwise been amended in the interests of clarity and precision. All of the conditions are required to preserve the architectural and historic interest of the listed building. The proposed works, with the imposition of the eleven conditions, would not adversely affect or otherwise harm the architectural and historic interest of the listed building. No harm, substantial or otherwise, would be caused to the listed building and paragraphs 133 and 134 of the National Planning Policy Framework are not therefore engaged.

*John Braithwaite*

Inspector

## **APPEARANCES**

### FOR THE APPELLANT:

Mr C Lockhart- Mummery	Queens Counsel
Mr S Gray	Principal of The Steven Gray Consultancy

### FOR THE LOCAL PLANNING AUTHORITY:

Ms S Bix	Senior Conservation and Design Officer
Ms A Osbourne	Planning Officer

## **DOCUMENTS**

- 1 Council's letter of notification of the Hearing and list of those notified.
- 2 Statement of Common Ground.
- 3 Judgement in 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.
- 4 Appeal Decision APP/K5600/W/15/3030628.
- 5 Appeal Decision APP/K5600/W/15/3010078.
- 6 Appeal Decision APP/K5600/W/15/3008343.
- 7 Appeal Decision APP/K5600/W/15/3007959.
- 8 Housing Monitoring Report 2014.
- 9 Suggested planning permission conditions.
- 10 Suggested listed building consent conditions.
- 11 Appellants' claim for costs.
- 12 Council's response to the claim for costs.

## 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 2010: ARTICLE 35

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**IT IS HEREBY CERTIFIED** that on 13 October 2014 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and cross-hatched in black 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), for the following reason:

The proposed use does not constitute development for which planning permission is required.

Signed

*John Braithwaite*

Inspector

Date: 27.11.2015

Reference: APP/K5600/X/15/3028049

### ***First Schedule***

The amalgamation of two self contained flats to form one self contained residential unit involving internal alterations

### ***Second Schedule***

Land at Flats 1 and 3, 44 Stanhope Gardens, London SW7 5QY

## 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 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 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: 27.11.15

by **John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI**

**Land at Flats 1 and 3, 44 Stanhope Gardens, London SW7 5QY**

**Reference: APP/K5600/X/15/3028049**

Scale: not to scale

