

Appeal Decisions

Hearing held on 8 November 2016

Site visit made on 8 November 2016

by P N Jarratt BA DipTP MRTPI

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

Decision date: 30 November 2016

Appeal A Ref: APP/K5600/X/16/3146855 10 Pembridge Place, London, W2 4XB

- 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 Alejandro Santo Domingo against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref CL/15/08049, dated 16 December 2015, was refused by notice dated 29 February 2016.
 - 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 for the amalgamation of the property from four flats to a single dwelling house.
 - **Summary of decision: appeal dismissed**
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Appeal B Ref: APP/K5600/W/16/3146856 10 Pembridge Place, London, W2 4XB

- 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 Alejandro Santo Domingo against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref PP/15/08048, dated 18 December 2015, was refused by notice dated 29 February 2016.
 - The development proposed is the amalgamation of the property from four flats to a single dwelling house.
 - **Summary of decision: appeal dismissed**
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Preliminary Matters

1. A signed Statement of Common Ground (SoCG) was submitted at the hearing (Document 1).
 2. For the avoidance of doubt, I should explain that in respect of Appeal A, the planning merits of the proposed use or operations 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, 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.
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Relevant planning history and the appeal site

3. The planning history is set out in detail in the SoCG. There is an extant permission relating to alterations to Flat E.
4. The appeal site is a semi-detached property arranged over four floors situated within the Pembridge Conservation Area. It was originally built as a single dwelling but it was subsequently sub-divided into 5 flats although two flats were amalgamated in 2009. Flat A is located on the lower ground floor and ground floor. Flat B-C (amalgamated in 2009) is located across the lower ground, ground floor and first floor. Flat D is on the second floor and Flat E is on the third floor.

Reasons

Appeal A

5. The main issue in Appeal A is whether the Council's refusal to issue a certificate of lawful development is well founded.
6. As the proposed amalgamation would only affect the interior of the appeal property and would not materially affect its external appearance, the question to be determined is whether the amalgamation of four flats into a single dwelling house would constitute a material change of use requiring planning permission as set out in section 55.
7. There is no statutory definition of "material change of use". Whilst section 55(3)(a) provides that, "for the avoidance of doubt, the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change of use...", there is no similar clarification with respect to the opposite process, namely amalgamations.
8. Since August 2014, the Council has taken the view that, in most cases, as a matter of fact and degree, amalgamations are a form of development which requires planning permission, although prior to that a different approach was taken. The appellant is highly critical that the Council's decision to change its approach was not accompanied by any evidence base or record of the decision, although the Council states that prior to 2014 there was no way in which losses could be monitored. However the Council advises that LDCs and more recent permissions have been used as an indicator of loss which is estimated to be over 400 dwellings over the period 2009/10 to 2014/15¹.
9. The Council has relied on the legal opinion² provided by Timothy Straker QC who advises that 'what is material is affected by the existence or otherwise of planning policies. However, these matters do not exhaust or substantively reveal what may render something material or immaterial'. The Council considers that the use of the appeal property for four separate residential units rather than one fulfils a legitimate and recognised planning purpose, thereby having significant planning consequences on the Borough's housing stock as outlined in the policies of the development plan.

¹ Paragraph 3.6 and table in the Council's statement

² Appendix A to the Council's statement

10. This approach is supported in the recent judgement of Holgate J relating to appeal decisions³ at 44 Stanhope Gardens, London SW7 5QY (*R (oao) The Royal Borough of Kensington and Chelsea v (1) SSCLG (2) David Reis (3) Gianna Tong [2016] EWHC 1785 (Admin)*) which summarises the principles to be applied when determining whether a change of use is material⁴:
- “(1) A planning purpose is one which relates to the character of the use of land;
 - (2) Whether there would be a material change in the use of land or buildings falling within the definition of “development” in section 55 of the TCPA 1990 depends upon whether there would be a change in the character of the use of the land;
 - (3) The extent to which an existing use fulfils a proper planning purpose is relevant in deciding whether a change from that use would amount to a material change of use. Thus, the need for a land use, such as housing or a type of housing in a particular area is a planning purpose which relates to the character of the use of land;
 - (4) Whether the loss of an existing use would have a significant planning consequence(s), even where there would be no amenity or environmental impact, is relevant to an assessment of whether a change from that use would represent a material change of use;
 - (5) The issues of (2) and (4) above are issues of fact and degree for the decision maker and are only subject to challenge on public law grounds;
 - (6) Whether or not a planning policy addresses a planning consequence of the loss of an existing use is relevant to, but not determinative of, an issue under (4) above.”
11. Holgate J noted at paragraph 47, that under principle (6) “a decision maker may have regard to the extent to which a planning consequence is, or is not, supported by planning policy when considering the significance of that consequence. But because that is not determinative of the question whether planning control should apply, and because circumstances may vary widely, some care will need to be taken in the application of that principle. The mere absence of support from a planning policy may not suggest that a planning consequence is of no significance. For example, the current Local Plan may not have addressed the circumstances which have arisen because they were not foreseen when the Plan was proposed and adopted, or because the use involved is of a specialist nature not addressed by the Plan, or because circumstances have materially changed.”
12. This appears particularly apposite in respect of planning policy relevant to this appeal.
13. The development plan comprises The Royal Borough of Kensington and Chelsea Local Plan (2010, consolidated with revisions in 2015) (CLP); the saved policies of the Royal Borough of Kensington and Chelsea Unitary Development Plan (UDP), adopted 2002, saved 2007; and, The Further Alterations to the London Plan and Minor Alterations (2016) (London Plan 2016). The Council is undertaking a partial review of the local plan, including a

³ APP/K5600/X/3028049; 3028100; 3028120

⁴ Established in *Westminster City Council v Great Portland Estates plc* [1985] AC661, 669 to 670; *Mitchell v SSE* (1995) 69 P&CR 60, 62; *Richmond LBC v SSETR* [1004] 2 PLR 115, 120 to 124

review of housing policies and amalgamations, but the review has not reached the stage where any significant weight can be attached to it.

14. CLP Policy CH1 states that the Council will ensure that sufficient housing sites are allocated in order to meet housing targets. It initially sets a target of a minimum of 350 net additional dwellings a year until replacement of the London Plan (estimated as 2011-12) and thereafter a minimum of 600 net additional dwellings a year until 2027-28, but it provided that the exact target would be set through the London Plan Process. The London Plan 2016 at Table 3.1 sets a target of 733 dwellings a year, although this includes vacancies returning to use and non-self-contained units.
15. The appellant contends that the proposed development would not have significant planning consequences and challenges the Council's housing supply figures (summarised in Document 4) and, in particular, that the Council has taken a cautious approach in calculating the headroom over the 5 year housing target. I consider this further in Appeal B.
16. CLP Policy CH2 says that the Council will ensure new housing development is provided so as to further refine the grain of the mix of housing across the borough. As part of the means of delivering this, in relation to housing mix and types, CH2(f) states that the Council will resist development which results in the net loss of five or more residential units.
17. Paragraph 35.3.18 of the supporting text for policy CH2 refers to the creation of larger dwellings through the amalgamation of smaller ones and the resulting loss of dwellings. It recognises the demand for larger dwellings of 3 or more bedrooms and says a balance needs to be struck which is done through limiting the loss of residential units while allowing some flexibility in terms of the creation of larger units. The amalgamation of 4 units in this appeal does not conflict with this policy, but CH2(f) does not go so far as to say that the net loss of fewer than 5 units complies with the Development Plan.
18. CLP Policy CH3 states that to deliver a net increase in residential accommodation, the Council will "(a) protect market residential use and floor space" subject to five exceptions (i) – (v) although none of the specified exceptions applies in this appeal; and (b) resist the net loss of both social rented and intermediate affordable housing floor space and units throughout the borough, although this also does not apply in this appeal. I note that the appellant contends that there is no breach of Policy CH3 because units are not protected in the policy, the use remains residential and there is no loss of residential floor space. The appellant relies on the Stanhope Gardens decision to support the view that housing is quantifiable as floor space rather than units.
19. Policy 3.3 of the London Plan 2016 is a strategic policy relating to the provision of housing and it sets out the parameters by which the London Boroughs will achieve and exceed the minimum housing targets, which for Kensington and Chelsea is set at a 2015-2015 minimum 10 year target of 7330 additional dwellings.
20. Policy 3.14B of the London Plan 2016 places emphasis on residential floor space, rather than the number of units. It indicates that the loss of housing, including affordable housing, should be resisted unless the housing is replaced at existing or higher densities with at least equivalent floor space. The Mayor

of London's Housing Supplementary Planning Guidance (SPG), dated March 2016, includes a density matrix that takes habitable rooms per hectare as the starting point for the measurement of density and then converts that to dwellings per hectare.

21. Paragraph 1.2.38 of the SPG indicates that the de-conversion of a number of smaller units into larger accommodation can reduce capacity to meet the requirements of small households and 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 this process in line with London Plan Policy 3.14. Paragraph 3.81 of the supporting text of Policy 3.14 says that to address London's housing need, existing housing should be retained where possible and appropriate. Whether or not local evidence demonstrates a sustained loss of housing through amalgamations in this case, that paragraph and paragraph 1.2.38 of the SPG together provide strong support for the most logical interpretation of London Plan Policy 3.14B. That is that it seeks to resist the loss of housing units and density relates to the number of units, rather than habitable rooms.
22. The parties refer to a number of other appeal decisions where the Inspector has taken a particular view on the weight attached to particular policies and the loss of housing units. For example, the inspector in an appeal decision for 62 Palace Gardens Terrace⁵ recognised that whilst the proposal would protect the total amount of residential floor space, the use of part of it would not be protected and the loss of a dwelling unit would be contrary to the objectives set out in CLP Policy CH3.
23. The parties also refer to the recent Drayton Gardens decision (Document 2, APP/K5600/C/16/3143934) in which an appeal against the refusal of an LDC for the amalgamation of two flats was dismissed. The same development plan policies as set out above were considered by the Inspector who concluded at paragraph 30 that 'Whilst the wording of CLP Policy CH2(f) might appear to imply that the loss of fewer than 5 residential units would be acceptable, it does not say that and CH2(f) does not conflict with Policy CH3. In short, taken together, CH2(f) and CH3 provide that the net loss of 5 or more residential units will be a breach of policy in any event but, whether the loss of a smaller number will be a breach of policy depends on whether any of the exceptions in CH3 are met'. In reaching this view he acknowledged that this was contrary to the view of the Stanhope Gardens Inspector.
24. Paragraph 47 of the National Planning Policy Framework (the Framework) emphasises the government's intention to boost significantly the supply of housing. Strategic and local policies in the London Plan and the Local Plan seek to provide for housing need and there is a recognition that the amalgamation of dwellings leads to a loss of homes. The loss of one or a small number of homes may seem initially to have a marginal impact but the cumulative effect is material and would have significant planning consequences through its impact on the delivery of housing in the Borough. Accordingly, I consider that the amalgamation of four flats into a single dwelling would constitute a material change of use requiring planning permission as set out in section 55.

⁵ Paragraph 10, APP/K5600/W/15/3010078

Conclusions on Appeal A

25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the amalgamation of the property from four flats to a single dwelling house was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal B

26. The main issues in Appeal B are firstly whether the amalgamation of four flats into a single residential unit would be contrary to the development plan policies aimed at ensuring an adequate supply and choice of housing to meet identified needs and, secondly, the effect of the proposed development on the character or appearance of the Conservation Area.

Housing Supply

27. The 2015 Annual Monitoring Report (AMR) at paragraph 10.13 indicates that the 5 year housing supply requirement (April 2015 – March 2020) is 4398 dwellings and that the supply is 4416 dwellings. This provides a very small buffer of 18 units over the 5 year period. The Council estimates that when amalgamations are factored in, this is estimated to reduce supply by 50 units pa over the 5 year period.
28. The appellant's analysis of housing supply and targets is based on the 2014 and 2015 AMRs, the DCLG housing statistics and the 2015 Strategic Housing Market Assessment (attached to the SoCG). The appellant challenges the Council's housing supply figures (summarised in Document 4) and, in particular, Mr Miles, on behalf of the appellant, considers that the Council has taken a cautious approach in calculating the headroom over the 5 year housing target. In reaching this view Mr Miles provided the following analysis.
29. For 2015-2016, the Council projected 377 completions (Appendix P, P179, 2015 Annual Monitoring Report) although the Council recorded 522 completions for the period. The Council has taken a historic approach to returning vacancies of 118 dwellings pa in the 2014 AMR but an estimate of 46 vacant homes pa brought back into use is included in the projected future completions in Appendix P of the 2015 AMR. The DCLG Table 615 on vacant dwellings (Appendix 4, SoCG) shows 295 dwellings pa returning between 2012 -15 and 124 in 2014-15. The appellant suggests a conservative estimate of 100 returning dwellings pa. Table 5 of Document 3 shows the effect of allowing an additional 54 dwellings pa providing a difference in supply over the 5 year target (2016/17 – 2020/21), or headroom, of 1036 dwellings. Allowing for a 20% buffer there would be a 288 dwelling headroom.
30. I have some concern over the estimated figures. The nature of housing supply is that it is subject to considerable fluctuations based on numerous economic and other factors. As a fundamental point, housing figures should be looked at over a long period so that spikes are smoothed out in the longer term. At paragraph 5 of the Council's statement net residential completions fluctuated from 65 in 2012/13 to 982 in 2014/15. In my view it would be imprudent to place too much weight on the most recent figures in making forecasting assumptions as it may not represent a trend but only spikes in a year or two.

Kensington and Chelsea is a small borough in terms of its area with few large sites coming forward for development. I note also that the Council's and the DCLG's figures for completions vary widely as the Council figures are based on site visits and not building control returns.

31. Although some figures considered by the Inspector in the Drayton Gardens appeal (Document 2) are the same as in this appeal, that Inspector formed a view on the basis of the evidence before him that the headroom would be 618 dwellings pa. In view of the Drayton Gardens inquiry being held only 4 weeks before the hearing subject to this appeal, I find such a huge variation to be puzzling and whilst Mr Miles explained the difference as resulting from him giving the figures greater scrutiny, it leaves me in some doubt over the reliance that should be placed on the figures. I note that if the figure of 100 returning dwellings pa proves to be a more realistic estimate, this would be reflected in the next Strategic Housing Land Availability Assessment.
32. Notwithstanding the different estimates reached, I am inclined towards concluding that there may be more latitude in the returning vacancies than the Council accepts, whether it may be somewhere in the order of 100 as estimated by the appellant or another figure, is unclear. Nevertheless, the headroom over the 5 year supply figures would be likely to exceed the 18 estimated by the Council. In these circumstances any harm caused to the strategic housing needs and supply policies of the development plan (Policies CH1 of the CLP and Policy 3.14 of the London Plan 2016) would be lessened, but this would not necessarily mean any remaining harm would not be significant.
33. The proposed development would not conflict with Policy CH2 which at (f) explicitly resists development which results in the net loss of 5 or more residential units. Whilst the Council is reviewing its housing policies and amalgamations, the review has not reached the stage where any significant weight can be attached to it.
34. The proposal would conflict with CLP Policy CH3 which seeks to protect residential accommodation as it does not fall within one of the exceptions provided for.
35. The appellant draws attention to the identification of dwelling size requirements in the 2015 SHMA. This indicates that 48% of the need is for larger units of 3 or more bedrooms and the proposed amalgamation would serve this need. However, the statistics also show that the greatest need is for 1 and 2 bed units, at 52% of total need. This has changed since the adoption of the Local Plan which, at that time, indicated that 80% of the need was for 3 and 4 beds. Nevertheless, the text supporting CLP Policy CH2 recognises the demand for larger dwellings of 3 or more bedrooms and says a balance needs to be struck which is done through limiting the loss of residential units while allowing some flexibility in terms of the creation of larger units. The proposed development would result in the loss of two 2 bed and two 3 bed dwellings producing a 630sqm property considered by the Council to be aimed at the super prime level, although it is stated to be intended for the appellant's own family. The loss of 3 units as a result of the proposed development would therefore adversely affect the diversity of house types.

36. In concluding on the first issue with regard to the development plan policies described under Appeal A and in my assessment above, the amalgamation of 4 units of accommodation into a single residential unit would reduce the supply and choice of housing contrary to development plan policies (Policies CH1 of the CLP and Policy 3.14 of the London Plan 2016). Although the effect on housing targets of this reduction would not be as great as the Council concludes because of the greater potential headroom over the 5 year housing supply, I consider the loss of three units of accommodation will nevertheless remain significant because of the cumulative effects of such losses. Whilst the proposal is contrary to CLP Policy CH3, it falls below the threshold of 5 dwellings set out in CLP Policy CH2f.

Conservation Area

37. There is an argument in favour of any proposal that restores a building to its original purpose where it contributes to a heritage asset. In this case a single large dwelling having many bedrooms would result. This which would reflect the established character of that part of the Conservation Area around Pembridge Place and Dawson Place which has retained a high proportion of single dwellings, although at my site inspection it was evident that some of the properties had been sub-divided into flats albeit that the only external evidence was the presence of multiple bells and intercoms adjacent to front entrances. The majority of properties in the area are in good repair and from the proliferation of builders' hoardings outside many properties, it was clear that maintenance and improvement works were continuing to take place.
38. In view of the absence of any external alterations to the appeal property, the only likely manifestation of its use as a single dwelling could be a reduced level of activity which the Council considered would have an effect on vitality and social cohesion within the area. However there was no evidence that this would be at a degree where harm would be caused to the character and appearance of the Conservation Area.
39. I therefore conclude on this issue that the proposed development would have no significant positive or harmful impact on the character or appearance of the Conservation Area.

Conclusions on Appeal A

40. Whilst the proposed development would protect the total amount of floor space in residential use, it would nevertheless result in the loss of three residential units which would conflict with the aims of the CLP and the London Plan 2016 in respect of the delivery of increased housing numbers and to which I attach considerable weight. Notwithstanding the Council's caution in their estimation of headroom in the 5 year housing supply on balance I conclude that the loss of 3 units would still be harmful. Although the CLP specifically considers amalgamations of 5 or more units and the appeal proposal is less than this, it remains in conflict with CLP Policy CH3. I attach less weight to the contribution that the proposed development would have towards meeting a current identified need for larger dwellings.
41. I have also concluded that the proposal would have a neutral effect on the character and appearance of the Conservation Area.
42. Having had regard to all other relevant matters, I conclude that, on balance, the appeal should be dismissed.

Decisions

Appeal A Ref: APP/K5600/X/16/3146855

43. The appeal is dismissed.

Appeal B Ref: APP/K5600/W/16/3146856

44. The appeal is dismissed.

P N Jarratt

Inspector

APPEARANCES

FOR THE APPELLANT:

C Lockhart-Mummery QC
T Miles MRTPI, Montagu Evans LLP
D Farrand, Solicitor, Mishcon de Reya
Ms L Mills, Montagu Evans LLP

FOR THE LOCAL PLANNING AUTHORITY:

J Wade, Head of Forward Planning
Ms E Walsh, Senior Planning Officer

INTERESTED PERSONS:

None

DOCUMENTS

- 1 Statement of Common Ground
- 2 APP/K5600/C/16/3143939, Land at 77 Drayton Manor Gardens, London SW10 9QZ (Council)
- 3 Housing data – Tables 1 – 5 (Appellant)
- 4 Explanation of housing supply and target (Appellant)
- 5 Extract from London Plan March 2016, P101 (Council)
- 6 Closing comments on behalf of the appellant