
Appeal Decision

Accompanied site visit made on 30 June 2014

by Felix Bourne BA(Hons) LARTPI Solicitor

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

Decision date: 11 July 2014

Appeal ref: APP/C5690/X/13/2208218
10 Dartmouth Road, London, SE23 3XU

- 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 lawful development certificate (LDC) by Lewisham London Borough Council.
- The appeal is made by Mr D Ramadhin.
- The application Ref DC/13/83594 dated 21 May 2013 was refused by notice dated 4 October 2013.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a lawful development certificate is sought is described in the application as "works authorised by 13/82441". In the Notice of Appeal it is described as "Change of Use to a mixed use of commercial on ground with 2 flats above, authorised under Sch. 2 (3) (Class F) Town and Country Planning (General Permitted Development) Order 1995."

Summary of decision: The appeal is dismissed.

Preliminary matters

1. For the avoidance of doubt, I should explain that the planning merits of any future 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.
2. The onus of proof in an application for a LDC rests with the appellant, the relevant test of the evidence being the balance of probability.
3. For the purposes of the decision I shall adopt the description of the proposed development employed in the Notice of Appeal, excluding that part which presumes the scheme to constitute 'permitted development', for it provides a clearer explanation of what is proposed.

Main Issue

4. I consider that the main issue is whether the Council's decision to refuse to grant a LDC was well-founded.

Discussion

5. No. 10 Dartmouth Road is an attractive building, probably nineteenth century, with a retail unit, currently vacant, on the ground floor, and a flat occupying the first and second floors. The reference to "13/82441" in the original application is a reference to a planning permission granted on 15 July 2013 for alterations to the existing shopfront at 10 Dartmouth Road, together with the formation of a new entrance on the side elevation.
6. As to the flat, access is now gained by the side entrance, adjacent to Century Yard. There is no internal access from the flat to the retail unit on the ground floor, though each has a door leading to the patio area to the rear.
7. Whether or not the development subject of appeal requires express planning permission depends on the correct interpretation of Article 3 and Class F in Part 3 of Schedule 2 to the Town and Country (General Permitted Development) Order 1995, as amended by the Town and Country Planning (General Permitted Development)(Amendment)(England)(No. 2) Order 2012 (the 2012 Order). This provides, amongst other things and subject to conditions contained at paragraph F.1, that a change of use of a building to a mixed use for any purpose within Class A1 (shops) of the Schedule to the Use Classes Order and as up to two flats, from a use for any purpose within Class A1 of that Schedule, constitutes 'permitted development' not requiring express planning permission.
8. The appellant contends that, as the existing flat is on the first and second floors of a building where the ground floor is a shop, the 2012 amendment to Class F now authorises the development of a shop and a flat into a shop and two flats. The Council, on the other hand, do not accept such a wide interpretation of the provision. They point out that 10B Dartmouth Road (the flat) has been classified as a domestic dwelling since 2000 and that the applicant has not provided evidence that the floors above the ground floor retail units have been used for storage or for any other use associated with the ground floor retail use.
9. In other words what the Council is in effect arguing is that two flats above a shop may only be created under permitted development where the change is from a use falling within Class A1; i.e. a shop and its ancillary storage space. Unfortunately for the appellant I believe that the Council's interpretation is correct, for it is consistent with the Explanatory Memorandum to the 2012 Order, issued by the Department of Communities and Local Government. Paragraph 7.2 of the Memorandum explains what the Government is doing, and why, indicating that 'while the current provision allows for converting ancillary A1/A2 space into a single flat, we now want this provision to be extended to no more than two flats so as to incentivise the conversion to housing of vacant space above retail units in town centres'. The purpose of the 2012 Order is also explained at paragraph 2.1 of the Explanatory Memorandum and this refers to amending the 1995 Order to 'allow buildings used as shops, or for financial and professional services, to change to a mixed use incorporating up to two flats (increased from one), and to revert back to those non-residential uses, without the need to apply for planning permission'.
10. In this case, however, the scheme is not one to convert ancillary Class A1/Class 2 space into residential use: it is instead to convert one residential flat, into two residential flats: indeed, in the application for a LDC, the existing or last known use was described as "retail on ground residential above". I note the appellant's argument that it is the aim of this part of the Order to breathe

renewed life and vitality into town centres. However, the interpretation that I have adopted is consistent with that, as it brings unused or underused areas of retail units into residential use, whereas the first and second floors of the appeal property are already in use as a flat. I have also had regard to the access enjoyed by both the flat and the ground floor to the open area to the rear of the property, and to the plan dated 15 November 2012 showing the Existing and Proposed Ground Floor Plans, but these do not affect the inevitable conclusion, which is that the appellant has failed to prove that, on the balance of probability, the proposed development constitutes 'permitted development'. The appeal must accordingly be dismissed.

11. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a lawful development certificate in respect of the "Change of Use to a mixed use of commercial on ground with 2 flats above" at 10 Dartmouth Road, London, SE23 3XU was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under section 195(3) of the 1990 Act as amended.

Formal decision

12. The appeal is dismissed.

Felix Bourne

Felix Bourne
INSPECTOR