
Appeal Decision

Inquiry held on 22 & 23 February 2017

Site visit made on 23 February 2017

by B.S.Rogers BA(Hons) DipTP MRTPI

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

Decision date: 06 March 2017

Appeal Ref: APP/P1560/C/16/3149395

The Frandon Hotel, 13 Beach Road, Clacton On Sea, Essex, CO15 1UF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Deepak Sharma against an enforcement notice issued by Tendring District Council.
- The enforcement notice, numbered 15/00014/CHGUS, was issued on 18 March 2016.
- The breach of planning control as alleged in the notice is without the benefit of planning permission the material change of use of the Land from a hotel (within use Class C1 of the Town and Country Planning (Use Classes) Order 1987 as amended) to use as a hostel for the homeless (a "sui generis" use).
- The requirement of the notice is to cease the unauthorised use.
- The period for compliance with the requirement is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(d) & (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed and the notice is quashed.

Application for costs

1. At the Inquiry an application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

The Procedural Matter

2. All the evidence at the inquiry was taken on oath.

The appeal on ground (d)

3. The appeal property is a double fronted, late Victorian/early Edwardian mid-terrace property, located a short distance from the sea front. It was originally a dwelling house but, by at least 1972, its lawful use had changed to a hotel, which falls within Class C1 of the Town and Country Planning (Use Classes) Order 1987 [UCO]. It is now agreed that its current use is a hostel for the homeless, as alleged in the notice.
4. Use as a hostel was originally included in Class C1 of the UCO but, in the 1994 amendment, was explicitly excluded from any use class. The reason given for the amendment was the real threat to the amenity of tourist areas from the establishment of hostels which had been attracting large numbers of benefit claimants, in traditional tourist areas.
5. It is the appellant's case that the material change of use to a hostel took place more than 10 years before the issue of the notice (i.e. before 18 March 2006)

and that there has been no intervening materially different use. The Council's position is that the material change of use to a hostel took place in 2009. There no longer appears to be a contention by the Council that there was an interim period of use before 2009 as a house in multiple occupation (HMO). During the Inquiry, the Council submitted that there may well have been a mixed use as a hotel and hostel between 2002-2009 but I heard little of substance that might have endorsed that contention.

6. A hotel is not defined in planning law beyond the description of Class C1 in the UCO as *"Use as a hotel or as a boarding or guest house where, in each case, no significant element of care is provided"*. Care is defined in the UCO as *"personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in class C2 also includes the personal care of children and medical care and treatment"*. The now cancelled ODPM Circular 03/2005 referred to Class C1 uses as *"premises which provide a room as temporary accommodation on a commercial, fee-paying basis, where meals can be provided but where residential care is not provided .."*.
7. A hostel is also not defined in planning law and, from my examination of a variety of dictionary sources, I have found no consistent 'ordinary meaning' of the word. In 1981, Glidewell J¹ commented that a hostel *".. means a building in which people either live or stay which provides communal facilities. The sleeping accommodation is often, although by any means not always, in dormitories rather than single rooms and provides shared cooking, eating and recreational facilities. It is of the essence of a hostel that its accommodation is relatively basic and inexpensive ..."*. The courts have recognised that the distinction between a hotel use and hostel use is a fine one and have commented that the guidance given by Circular 03/2005 can be seen to have been expressed in cautious terms².
8. This now cancelled circular indicated that *".. A hostel usually provides overnight or short term accommodation which may be supervised, where people (including sometimes the homeless) can usually stay free or cheaply. Hostels may provide board, although some may provide facilities for self-catering. The element of supervision should not be relied upon as a determining factor but as a factor to take into account in considering the use class of the premises .."*.
9. The question of whether a property is a hostel or another use is a matter of judgement to be determined on a fact and degree basis. As the distinction is a fine one, it was common ground that, in relation to many elements, there would ordinarily be a substantial degree of overlap. In the High Court judgement in the case of *Panayi*³, it was argued that the presence and use of some of the following features combined to distinguish the use of the premises as that of a hostel: i) the description of the premises; ii) the use to accommodate homeless families, referred by local authorities; iii) whether the premises are supervised and/or serviced; iv) whether payment is made by the local authority on a nightly basis; v) whether residents are transient, in that they are placed in the accommodation whilst awaiting rehousing elsewhere; vi) the requirement for a fire certificate indicating use by the homeless; and vii)

¹ Commercial and Residential Property Development Company Ltd v SSE [1981] 80 LGR 443

² Westminster City Council v SSCLG [2015] EWCA Civ 482

³ Panayi v SSE & LB Hackney [1985] 50 P & CR 109

the display of notices to guide staff and guests in the event of fire. However, this guidance must be treated with caution, in that the change of use to a hostel in *Panayi* was not from use as a hotel, as in the present case, but from an authorised use as 4 self-contained flats.

10. The appellant stated in evidence that he purchased the premises in 2002 as a managed hostel. The letter of 4 April 2016 from his conveyancing solicitors echoed this point but provided no detail that might substantiate it. By way of contrast, the February 2003 Pinders' valuation report described the business as a *"Hotel catering for a mixture of client types"*. Furthermore, the appellant's solicitors who responded formally on his behalf in February 2015 to the Planning Contravention Notice (PCN) stated that *".. our client remains of the view that the Frandon Hotel is and has always been, since our client's ownership and use of it, a hotel under Class C1."* Accordingly, I find it less than probable that the appellant could reasonably have believed he was buying a hostel in 2002 and I find no basis for regarding a hostel use as being lawful at that time.
11. The characteristics that appear to support the agreed view of both parties that the present use (and, from the Council's perspective, the use since 2009) is a hostel are numerous. It is run by a charitable trust as a night shelter. Referrals are made from the Council, from Colchester Borough Council and from the Prison Service and, together, these referrals comprise the predominant client group. Occupants are vetted via a risk assessment. Residency is conditional on actively seeking accommodation and attending appointments with resettlement officers. A number of support services are provided. The larger rooms may be shared by unrelated occupants. All occupants are required to vacate their rooms by 0900 to enable a sweep for alcohol and drugs to take place. There is a zero tolerance policy on drugs, alcohol and violence. The terms of the HMO licence require the rooms to be vacated during the day, albeit that occupants are allowed to pick up and drop off their belongings, which remain in their rooms. There is no (or negligible) passing trade.
12. Whilst I note that there are seldom any meals provided, this in itself is of limited weight in determining whether a material change of use has occurred. I also note that the property is still identified on its signage as "The Frandon Hotel". That is clearly not determinative of its actual use and the various references over the years in valuation reports to "hotel", in the rates invoices to "boarding house" and in the HMO licences to "HMO" are similarly not determinative.
13. Turning to the situation in the disputed period from March 2006 to 2009, the accommodation appears always to have been fairly basic and inexpensive. The physical layout of the property did not change during these years. There has been sharing of communal facilities, such as bathrooms and dining facilities.
14. It is clear that a very substantial part of the trade throughout this period has been the accommodation of the homeless, whether families or individuals, referred by Tendring Council. Although the schedule of payments provided by the Council from 2002 to 2008 is redacted, I agree with the appellant that, together with other documentation, it indicates a high level of usage by this Council. When added to other payments made direct to the Frandon by this client group (food, laundry etc), it is credible that around half the Frandon's

turnover came from these referrals. However, added to this was the accommodation of the homeless referred by Colchester BC and by HM Prison Service. Correspondence provided by the appellant (in DS1) seems to indicate the Frandon has, from before 2006, been known as the 'go to' place for the homeless.

15. The extent of use of the premises by the homeless, with their acknowledged vulnerability and potential mental health, alcohol and drug problems was likely to have had an impact on the welfare services in the area and on the character of the premises and its locality. It was, in turn, likely to have had an adverse impact on the attractiveness of the premises to any passing trade. Whilst I appreciate that the Council would not have had access to the appellant's accounts, the highest proportion of commercial, non-referred trade suggested by them during this period was 20%, hardly indicative of a hotel use. Although the Pinders' report referred to in para.10 above did not quantify the proportion of each type of trade, it commented that *"The subject concern predominantly caters for the homeless and DSS type trade ..."*.
16. From 2002, payment has been made by local authorities on a nightly basis and residents have been transient, in that they were placed in the accommodation whilst awaiting rehousing elsewhere. This is reflected in correspondence indicating the Council's concern when periods of occupancy have become extended.
17. It appears to me that, from before the relevant date in 2006, the appellant and/or his staff has exercised a considerable degree of supervision over the occupants of the premises. The submitted documents seem to indicate considerable liaison with the Council over the suitability and the welfare of the residents. The letter from the fire risk assessor who first inspected the premises in January 2006 indicates a strict management of the vulnerable residents and the affidavit from Mr Devinder Singh, an employee between 2002 and 2007, indicates close control, including a requirement for occupants to vacate the rooms by 0900. This is consistent with the appellant's own sworn evidence that he and his staff provided support and advice on a range of social, medical and financial matters. Furthermore, occupants were moved from room to room at the direction of the management of the premises in order to achieve a better 'fit' for the residents, according to their needs e.g. to accommodate disabled residents or family groups.
18. Fire inspections were carried out during this period, certificates were obtained and appropriate guidance notices for staff and residents posted, albeit this does not appear indicative of a distinction between hotel or hostel use.
19. It is the Council's contention that a material change of use to a hostel took place in November 2009, coinciding with the formation of the charitable trust which took over the running of the premises as a night shelter. However, I heard evidence that officers of the Council's Environmental Health and Housing Departments have had regular contact with the appellant going back to 2002, including regular inspections of the premises throughout this whole period. Yet the Council's Planning Enforcement Officer (Mr Stathers) stated that it was not until January 2015 that a complaint was received from his colleague (Mr Fenton-Jones) of a possible breach of planning control. The Council was unable to offer an explanation as to this delay of more than 5 years in pursuing the

alleged material change of use. This leads me to doubt whether there was a readily apparent change in the character of the use in 2009.

20. The Council wrote to the appellant as far back as June 2006 advising him that, as a result of the Housing Act (2004), a HMO licence would be required. The subsequent issue of such licences in 2010 and 2015 does not appear to reflect a change in the character of the use. It is common ground that in 2009 there was a change in the way benefits were paid to fund the residents' occupation costs. That does not appear to me to be significant in land use terms. It is also not in dispute that, on the formation of the charitable trust, the level of care was increased and formalised, albeit not to the extent that it would bring the use into a Class C2 residential institution. The charitable trust's web site set out the rules of the occupancy, there was a more formal risk assessment of potential occupants and the 'zero tolerance' policy on alcohol, drugs and violence was made more explicit. However, from the evidence before me, the operation and management of the use does not appear materially different from the way in which it was operated in 2006.
21. The shared use of rooms by unrelated occupants is one indication of hostel use. It is not in dispute that this currently takes place. However, Mr Russell for the Council stated that he would not have condoned such accommodation for the Council's own referrals. The position with referrals from other bodies was not made clear and the appellant gave sworn evidence that such use has always gone on to some degree during his ownership. The evidence on this point is not conclusive either way.
22. Neither do I find the evidence on daytime occupancy to be conclusive. It appears that the requirement to vacate rooms by 0900 began prior to 2006 (see para.17 above), although residents have always been able to store their belongings in their rooms throughout the daytime and have been allowed to drop off and collect items. Whether they have been allowed to occupy their rooms in the daytime is disputed. None of the Council's witnesses who visited the premises pre-2009 said that they witnessed any daytime exclusion of residents. The HMO licence of 2015 made daytime exclusion a condition and Mr Fenton-Jones said that there was an informal agreement to that effect from around 2010. In an interview with Council officers in February 2015, the manager of the premises confirmed that the terms of the licence were complied with and that residents were excluded in the daytime. On the other hand, the appellant stated that, to his knowledge, in practice, residents have been allowed to return to their room right up until he ceased his day to day management role in 2015. Whilst a limitation on daytime access to a room would be more indicative of a hostel than a hotel use, it is not unheard of at the lower end of the guest house market. Given the doubt as to whether such an exclusion operated in practice, I find this aspect of the use not to be determinative.
23. Overall, the Council sought to cast doubt on the credibility of the appellant's evidence and of the range of documentation provided, having regard to the onus on him to substantiate his case, on the balance of probability. Whilst I observed some inconsistencies in his evidence, that is not entirely surprising, given the timescale under discussion from 2002 to the present, and the vast range of documentation submitted in this case. Overall, I found him to be a credible witness on the main determining issues in this case.

24. In conclusion, my view is that when it was purchased by the appellant in 2002, the lawful use of the Frandon was as a hotel. Between that date and 18 March 2006 there was, on the balance of probability, a material change of use to a hostel. The hostel use has continued with no material change in character in planning terms for more than 10 years. Accordingly, at the time the enforcement notice was issued, it was too late to take action against the matters stated in the notice and the appeal on ground (d) succeeds.

The appeal on ground (f)

25. In the light of my conclusion above, there is no need to go on to consider the appeal on ground (f).

Formal Decision

26. The appeal is allowed and the enforcement notice is quashed.

B.S. Rogers

Inspector

Appearances

For the Appellant:

Mr M.Dale-Harris of Counsel - instructed by DAC Beachcroft LLP

He called:

Mr D.Sharma - the appellant

For the Council:

Mr A.Ranatunga of Counsel - instructed by the Solicitor to the Council

He called:

Mr G.Fenton-Jones - Environmental Health Team Leader, TDC

Mr I.P.Kavanagh - Technical Officer, Housing, TDC

Mr R.Goswell - Technical Officer, Housing, TDC

Mr P.E.Russell - Housing Needs & Strategic Policy Manager, TDC

Ms J.Haggis - Benefits Manager, TDC

Mr C.B.Stathers - Enforcement Team Leader, TDC

Interested Person:

Cllr P.Honeywood - Ward Councillor, TDC

Documents

1. Attendance lists for both days
2. Letter of notification of the inquiry
3. Statement of Common Ground