

Appeal Decision

Inquiry held on 1 March 2017

Site visit made on 1 March 2017

by Katie Peerless Dip Arch RIBA

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

Decision date: 23 March 2017

Appeal Ref: APP/P1560/C/16/3154130 2 Edith Road, Clacton-on-Sea CO15 1JU

- 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 Nash & Sharpe Ltd against an enforcement notice issued by Tendring District Council.
 - The enforcement notice, numbered 14/00298/CHGUS1, was issued on 27 May 2016.
 - The breach of planning control as alleged in the notice is the creation, as an unauthorised material change of a mixed use of a house in multiple occupation (Class C4 of the Town And Country Planning (Use Classes) Order 1987 as amended) together with associated rooms used as self-contained flats. The Council currently believes these flats to be called Room/Units 1 and 17.
 - The requirements of the notice are 1. Cease the unlawful mixed change of use set out in paragraph 3 of the enforcement notice. 2. Cease any unlawful use as a house of multiple occupation 3. Cease any unlawful use of any Rooms/Units used as self contained flats including Rooms/Units 1 and 17 as self contained residential flats. 4. Remove from any self contained residential flats including Rooms/Units 1 and 17 any locks, numbers, kitchenettes and self contained meters which would enable them to be used as self contained residential flats.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.
 - All the evidence to the Inquiry was given under oath.
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Decision

1. I direct that the enforcement notice be varied by the deletion of the allegation and the substitution of the following words: *'an unauthorised material change of the property to a mixed use of a house in multiple occupation (Class C4 of the Town And Country Planning (Use Classes) Order 1987 as amended) together with associated rooms and units used as self-contained flats.'*
 2. I also direct that the requirements of the enforcement notice be deleted and replaced with the following words: *'1. Cease the unauthorised material change of use of those parts of the premises in use solely as a house of multiple occupation (i.e. all units except 13, 16, 17 & 18). 2. Cease the use of unit 2 as a self-contained flat. 3. Remove from unit 2 any locks, numbers, kitchenette, and self contained meters which would enable it to be used as self-contained residential flat.'*
 3. Subject to these corrections and variations, the appeal is dismissed and the enforcement notice is upheld.
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Procedural matter

4. The wording of the enforcement notice is, in my view, somewhat confusing in its phrasing and, after discussion at the Inquiry, it was agreed by the parties that it could be altered to read more clearly without prejudicing either side. I have therefore altered the allegations accordingly.

Appeal Site

5. The appeal premises is a former private house, with accommodation on 3 storeys, in a street of similar properties near the seafront in Clacton. It is semi-detached and attached to No. 4, although in different ownership. It has been extended into the roof space, to the side and at the rear. It was previously known as the Marine View Guest House.
6. At the time of the site visit there were bedsitting rooms within the main building, some with facilities in the form of kitchenettes and en-suite shower rooms (Nos. 2, 16 and 17), a communal kitchen on the first floor, a kitchen that was not in use on the ground floor and communal bath or shower rooms and WCs on the first and second floors. There are also 2 separate units, (13 and 18) both self-contained with kitchen and bathrooms, accessed separately from the rear of the main building. Room 1 has a kitchenette but no bathroom. The present owners acquired the property in 2013 and have been operating it as an House in Multiple Occupation (HMO) since that time.

Reasons

7. The defining characteristic of an HMO is a property where some of the facilities needed for day to day living, such as food preparation and storage areas or bathrooms are shared between more than one household occupying a single dwelling. It is not generally the case that meals or other such services are supplied and each occupant normally fends for themselves in this regard. It is also normal for the occupants to have some form of tenancy agreement, which is obviously not the case with hotel guests.
8. The appellants consider that the enforcement notice was issued well after the time for taking action against any change of use expired. The onus is firmly on them to demonstrate, on the balance of probabilities, that their version of events is correct and, provided this is sufficiently precise and unambiguous it will be accepted, unless it is undermined or contradicted by other evidence from the Council.
9. To refute the appellants' claim that the property had been an HMO for more than 10 years prior to the issue of the enforcement notice and is thereby immune from enforcement action, the Council has produced evidence that shows it was sending people in need of emergency accommodation to the properties well after the relevant date of 27 May 2006 and its witnesses told the Inquiry that premises used by the Council for this purpose were expected to provide a bed and breakfast service. The Inquiry was also told that complaints were received from occupants referred by the Council up to 2009, including some relating to the quality of the breakfasts served, which indicates a bed and breakfast use rather than HMO occupation. This evidence casts doubt on the claim that the premises were in a full HMO use by May 2006.

10. Planning applications made by the previous owners described the property as a 'B & B' in 2004 and a 'guest house' in 2010. The 2004 application notes that the rear unit (now known as unit 13) was to be converted from a garage and outbuilding into a bedroom for the residential use of the owners. An email dated 22 June 2006 records a telephone call to the Council made by the owner, in which she apparently queried a letter asking her to apply for an HMO licence, stating that she *'runs a B & B and has no long termers'*. A hand written note on the email states that builders come and stay 4 nights a week and there was *'a different lot every week'*.
11. It therefore seems that the owner considered that she was running a guest house or B & B rather than an HMO in 2006, and indeed up to 2010, after the licence was issued. This indicates to me that there is a strong likelihood that No. 2 was in a mixed use as an HMO and a guesthouse at that time. The former owners were not available to give evidence on their use of the property and, whilst I was told that they were unwilling to attend for fear they might have infringed some of the Council's regulations at the time because they were actually running an HMO, I can give this speculative evidence very little weight.
12. The reason for the HMO licence request letter stemmed from a change in regulations in 2004, after which a licence was required for premises over 2 storeys high where there were 5 or more occupants in 2 or more households being housed on a long term basis. Whilst not all guest houses used by the Council needed such a licence, No. 2 Edith Road appeared to the Council to meet the above criteria. These regulations did not, however, apply in the case of hotel guests staying for business or leisure purposes and consequently the eventual issue of a licence in 2008 does not confirm that there was no C1 guest house use operating at that time or in 2006.
13. The appellants also point to the evidence of the Council's Environmental Health Officer, who told the Inquiry that, when he visited the property in November 2006, it was in use as a HMO. Nevertheless, this officer was not assessing whether there had been a change of use in planning terms, but only whether the property needed to be licenced, given the use that the Council was then making of it. However, the site visit notes also record that there were still occasional lets to paying members of the public and that tenants were served breakfast daily.
14. The Council's evidence is that it was still sending people to stay at No. 2 Edith Road on a temporary basis until after May 2006. I have been given no details of any tenancy agreements for these people and can only conclude that, whilst their stay might have lasted some time, their use of the rooms was on the basis of guest house or bed and breakfast occupation.
15. The numbers of referrals for emergency housing from the Council may have varied over time, but as long as the property was available for such clients and also, as confirmed by some of the Council's evidence, for members of the general public, I consider that the guest house use has not been shown to be ancillary to any HMO use or that the HMO use had been established without the guest house element by the relevant date. I therefore conclude that the property was in a mixed use as a C1 hotel and HMO until after 27 May 2006.
16. However, this does not necessarily mean that any self-contained flats within the building can now also be enforced against as part of the change of use. Although the Council submit that the whole of the property was in a mixed use and that the '10 year rule' relating to time limits for enforcement should apply to the flats or units with kitchen and bathroom facilities, I disagree.

17. A planning unit can be formed from only part of a building and a self-contained flat can be a 'dwellinghouse' for the purposes of s.171B(2) of the Town and Country Planning Act 1990 (as amended) to which a time limit for enforcement action of 4 years applies. I consider that those units within the property that have private cooking and bathroom facilities are self-contained flats, to which the '4 year rule' applies. I therefore need to consider whether these rooms have been self-contained for more than 4 years prior to the issue of the enforcement notice on 27 May 2016.
18. As noted above, the planning history of the property records that unit 13 at the rear of No. 2 Edith Road was granted planning permission for a change of use to owners' accommodation in 2004 although there is no kitchen shown on the plans submitted with the application. The unit is not shown on the plan accompanying the fire certificate issued in 2008, however the Council officer who visited at the time noted that there was '*owners' accommodation at the rear of the property*' and the Council were writing to No. 2 Edith Road to contact the owners. I consider that, on the balance of probabilities, this indicates that the owners were living at the property at the time and, if so, it is reasonable to assume that they would have been using the cooking facilities that are now in place in the flat.
19. The findings of the *Gravesham*¹ case confirmed that the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. The notion that a building which had that characteristic ceased to be a dwellinghouse because it was occupied only for a part or parts of the year or at infrequent or irregular intervals or by a series of different persons was firmly rejected. Therefore, whether or not the unit was rented out or used by the owners, it is nevertheless a self-contained dwellinghouse and has been for many years.
20. There was a suggestion made that, as there is a connecting door to the office of the HMO, through the kitchen of the flat, the unit is not self-contained. However, there is an independent access to the flat and the presence of another route into the main building does not, in my view, mean that the flat no longer qualifies as a 'dwellinghouse' for the purposes of s.171B(2). Consequently, I find that unit 13 has been a dwellinghouse for more than 4 years prior to the issue of the enforcement notice and is therefore immune from enforcement action.
21. Turning to the other units that have kitchenettes and shower rooms, the investigation undertaken in 2006 noted there were '*no provisions for storing, preparing or cooking a full meal within any bedsit*' and this indicates that rooms 2, 16, 17 and 18 were not 'dwellinghouses' at that time. By the time a fire certificate was issued in 2008, I am told that substantial works had been carried out to bring the building up to standard and, in conjunction with these works, a plan of the ground floor shows units 16, 17 and 18 as being self-contained and the former 'breakfast room' had been replaced by unit 16. The plans have been amended from earlier drawings by hand drawn additions but their authenticity was not challenged. I therefore conclude that these units are also immune from enforcement action.

¹ *Gravesham Borough Council v Secretary of State for the Environment and Michael W. O'Brien* (1984) 47 P&CR 142 [1983]

22. However, I have no such amended plan showing unit 2 and the plan attached to the fire certificate does not show a kitchen or bathroom in this room. The appellants did not own the building at the time the alterations to meet the licence and fire certificate were made and cannot therefore confirm the status of that room until 2013, which is still within the period when any alteration could be enforced against. Consequently, I consider that there is insufficient evidence to conclude, on the balance of probabilities, that unit 2 is immune from enforcement action.
23. In summary, I consider that the appellants' evidence, as challenged by the Council, is not precise and unambiguous enough to allow me to conclude that No. 2 Edith Road has been an HMO with associated self-contained flats for long enough to be immune from enforcement action.
24. I conclude that parts of No 2. Edith Road were in a mixed use as an HMO and a C1 guest house on the relevant date in 2006 when the Council was still referring residents to the guest house. Nevertheless, even if the self-contained flats in units 13, 16, 17 and 18 had not been created by 2006, they were present by 2008 at the latest and are now separate planning units that are immune from enforcement action. However, as noted above, the material change from a guest house/HMO to an HMO is not immune and neither is unit 2. Consequently, the enforcement notice will be varied to reflect my findings and the appeal on ground (d) succeeds only in respect of the units noted above.

Katie Peerless

Inspector

APPEARANCES

FOR THE APPELLANT:

Peter Le Grys MA DipTP MRTPI

Stanfords Land and Property Consultants

FOR THE LOCAL PLANNING AUTHORITY:

Asitha Ranatunga

Of Counsel instructed by L Trembath , Solicitor
for Tendring District Council

He called

Grant Fenton-Jones BSc
(Hons)

Environmental Health Team Leader, Tendring
District Council

Robert Goswell

Technical Officer, Private Sector Housing Team,
Tendring District Council

Ian Kavanagh

Technical Officer, Private Sector Housing Team,
Tendring District Council

Peter Russell

Housing Needs and Strategic Policy Manager,
Tendring District Council

Jenny Haggis

Benefits Manager, Tendring District Council

Christopher Stathers

Enforcement Team Leader, Tendring District
Council

DOCUMENTS

- 1 Statement of Common Ground
- 2 Notes of Council's opening statement
- 3 Information from County Fire Service for 2 Edith Road
- 4 Supplementary proof of evidence from Ms Haggis
- 5 Response to Planning Contravention Notice
- 6 Notes of meeting 29/4/2016 for 2 Edith Road