



Appeal Decisions

Site visit made on 9 May 2019

by Jean Russell MA MRTPI

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

Decision date: 12 September 2019

Appeal A: APP/Q1455/C/18/3212345

Land at 62 Bernard Road, Brighton, BN2 3EQ

- Appeal A is made by Mr Andrew Marchant o/b Alium [sic] Properties Ltd under section 174 of the Town and Country Planning Act 1990 (TCPA90) against an enforcement notice issued by Brighton and Hove City Council on 14 August 2018.
 - The breach of planning control as alleged in the enforcement notice is: *without planning permission the construction of a dormer to the rear roof slope, 2no rooflights to the front roofslope and a single storey rear extension to facilitate an unauthorised change of use from a small House in Multiple Occupation (C4 dwelling) to a large House in Multiple Occupation (HMO) (Sui Generis) which has since ceased.*
 - The requirements of the notice are to *remove the dormer to the rear roof slope and remove the single storey rear extension.*
 - The period for compliance with the requirements is six (6) months.
 - Appeal A is proceeding on the grounds set out under section 174(2)(a), (c), (d), (e), (f) and (g) of the TCPA90. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the TCPA90.
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Appeal B: APP/Q1455/W/18/3210718

62 Bernard Road, Brighton, BN2 3EQ

- Appeal B is made by Allium Investments under section 78 of the Town and Country Planning Act 1990 against the decision of Brighton and Hove City Council to refuse an application to grant planning permission for development.
 - The application ref: BH2017/00319, dated 30 January 2017, was refused by notice dated 24 April 2018.
 - The development proposed is the change of use of an existing C4 House in Multiple Occupation to a Sui Generis large House in multiple Occupation (retrospective)
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DECISIONS

Appeal A: APP/Q1455/C/18/3212345

1. The enforcement notice is quashed.

Appeal B: APP/Q1455/X/18/3210718

2. Appeal B is dismissed.

PRELIMINARY MATTERS

3. Like the parties, I shall refer to a 'house in multiple occupation' by the acronym 'HMO'. Other terms in this decision include:
 - 'TCPA90' means the Town and Country Planning Act 1990 (as amended).

- 'GPDO 1995' and 'GPDO 2015' mean the *Town & Country Planning (General Permitted Development) Order 1995* and *Town & Country Planning (General Permitted Development) (England) Order 2015*.
 - 'UCO' means the Town and Country Planning (Use Classes) Order 1987.
 - 'C3' means 'use class C3' or use as a dwellinghouse as set out in the Schedule to the UCO.
 - Class 'C4' is use of a dwellinghouse by not more than six residents as an HMO as set out in the Schedule to the UCO.
 - 'Sui generis' denotes a use which falls outside of any class as set out in the Schedule to the UCO – such as an HMO with more than six residents.
 - 'The Framework' means the National Planning Policy Framework 2019.
 - 'PPG' means Planning Practice Guidance.
4. Class C4 was introduced by amendment to the UCO in April 2010. The GPDO 1995 was amended in April and November 2010 so as to grant planning permission initially for a change of use from C4 to C3, and then from C3 to C4 under Article 3 and Schedule 2, Part 3, Class I. Both changes of use remain 'permitted development' (PD) under the GPDO 2015 as amended.
 5. The appeal building lies within an area that is subject to an 'Article 4 Direction' which came into force on 5 April 2013. The Article 4 Direction withdraws PD rights for a change of use from C3 to C4, meaning that express planning permission must be granted on application for such development.
 6. The Council refused the application subject to Appeal B with reference to the Framework as originally issued in 2012. The Framework was revised in July 2018 and February 2019 – and the parties have had opportunities to comment on the key policy changes through the appeal process.
 7. The appellant stated on p6 of their letter of 26 March 2019: '*We ask that the Inspector seriously consider awarding costs against the Council...*' essentially because the Council refused the application subject to Appeal B for reasons related to the appearance of the dormer and extension, even though those structures are not mentioned in the description of the proposed development.
 8. I cannot take the appellant's request as constituting a formal application for an award of costs because he did not explain how, in his view, the actions of the Council amounted to unreasonable behaviour or caused him to incur wasted or unnecessary expense in the appeals process in accordance with the PPG.
 9. For the same reason, and since the Council referred to other appeal decisions as justification for their raising objections to the built structures, I shall not make an award of costs myself; it makes no difference that I agree with the appellant that the planning application was for a change of use only.

APPEAL A – THE ENFORCEMENT APPEAL

10. The Planning Inspectorate wrote to the Council on 17 January 2019 and questioned whether the enforcement notice ought to be withdrawn for reasons expanded upon below. The Council responded on 23 January and declined to withdraw the notice – but I still have concerns regarding their approach.

11. As noted in the decision header, the notice alleges that the dormer, rooflights and extension are in breach of planning control because they facilitated a change of use – but the unauthorised use has ceased.
12. The Council is correct that an unauthorised change of use may be facilitated by operations and, in such cases, the notice may enforce against the works as well as the use. The Council has not appreciated that the court judgments which established or applied that principle were concerned with notices which were fundamentally directed at a change of use¹. The cases also related to the requirements of such notices, as paragraph 1 of *Kestrel Hydro* makes clear:
'In what circumstances may an enforcement notice issued...against an unlawful change of use require the removal of structures connected with that unlawful use? That question lies at the heart of this appeal'.
13. The Courts held that if an enforcement notice is issued 'against an unlawful change of use', the steps that the notice requires to be carried out may include the removal of 'structures connected with that unlawful use' because restoring the land to the condition it was in before the change of use occurred may be necessary to remedy the breach of planning control.
14. It is apparent that a notice may include a requirement to remove 'connected structures' which – had they not facilitated a change of use – would not have been in breach of planning control in their own right, perhaps because they would have been 'permitted development' under the relevant GPDO or become immune from enforcement action due to the passing of time.
15. Operational development becomes immune from enforcement action under the 'four year rule' set out in s171B(1) of the TCPA90 – whereas any change of use, other than to use as a dwellinghouse, is subject to a 'ten year rule' under s171B(3). If a notice is directed at a change of use, and issued within the relevant ten year period, it may require the removal of structures which are more than four years old but facilitated the change of use.
16. However, it is not possible to enforce against building works under the ten year rule set out under s171B(3) if the notice is not directed at a change of use. In this case, the allegation is clear that no unauthorised use was taking place when the notice was issued. None of the reasons for issuing the notice and none of the requirements of the notice relate to the use of the building. It cannot be said that the notice is directed at or against a change of use.
17. That the appellant has sought permission for the alleged use under Appeal B makes no difference because the notice must be coherent within its four corners. I find that the alleged breach is profoundly misdescribed – and that has led the Council to apply the wrong immunity period. I have had regard to the other decisions cited by the Council, but none concerned enforcement appeals where the notice was not directed at a change of use.
18. Under s176(1)(a) of the TCPA90, an Inspector may correct any error, defect or misdescription in an enforcement notice so long as doing so would cause no injustice to the Council or appellant. If I amend the notice so that the allegation and requirements relate to the change of use as well as building works, that

¹ *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598; *Somak Travel Ltd v SSE & Brent LBC* [1987] JPL 630; *Bowring v SSCLG & Waltham Forest LBC* [2013] EWHC 1115 (Admin); and *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784

would cause injustice to the appellant. The notice would be widened in scope, if not made more erroneous than it is now.

19. Amending the notice so that the allegation only refers to building works would remedy the misdescription but cause injustice to the Council by fundamentally altering the basis on which they took enforcement action.
20. I conclude that the notice does not specify the alleged breach with sufficient clarity and cannot be corrected without injustice being caused. The notice is invalid and will be quashed. The grounds of appeal pleaded under s174(2)(a), (c), (d), (e), (f) and (g), and the application for planning permission deemed to have been made under s177(5) do not fall to be considered.

APPEAL B – THE PLANNING APPEAL

Preliminary Matters

21. The proposed development is for a change from C4 use to use as a sui generis HMO. As the enforcement notice suggests, the building was previously used as an HMO with seven occupiers, but it is now occupied by six persons.
22. As noted above, the Council's reasons for refusing the application subject to Appeal B concerned the effects of the dormer and rear extension as well as proposed use. However, those structures are not mentioned in the description of development for which permission is sought, and they are shown on the 'existing' as well as 'proposed' floorplans submitted with the application. Paragraph 4.4 of the appellant's appeal statement is clear that 'the works do not form part of the application'.
23. I do not have the power to determine whether permission ought to be granted or refused for development that is not subject to the appealed application. My approach is consistent with that of the Inspectors who decided the Coronation Street and Fairhaven appeals cited by the appellant². The decisions put before me by the Council do not alter my finding³.

Main Issues

24. I consider that the main issues are the effect of the proposed change of use on the balance of housing uses in the community; and whether occupiers of the appeal HMO would have adequate living conditions.

Reasons

Balance of Housing Uses

Policy CP21

25. Policy CP21 of the *Brighton and Hove City Plan Part 1 2016* (CP) explains that, in order to meet increasing accommodation demands from students and create mixed, healthy and inclusive communities, the Council will actively manage the location of new HMOs. In order to support mixed and balanced communities and ensure that a range of housing needs continue to be accommodated, applications for the change of use to a Class C4 use, mixed C3/C4 use⁴ or sui

² APP/Q1445/W/18/3194945 and APP/Q1445/W/17/3183901

³ Appeal refs: APP/Q1445/W/17/3166975, /3180711, /3184922, /3183594, /3184207, and /3189350

⁴ Mixed uses are in fact normally outside of any use class, although one qualified exception to that rule is specified in Article 3(4) of the UCO: use for purposes consisting of or including purposes falling within classes B1 and B2.

generis HMO use will not be permitted where more than 10% of dwellings within a radius of 50m of the site are already in such uses.

26. With regard to other decisions put forward by both parties, I find that the proposed development falls to be considered under this policy even if the building is already in C4 use. CP Policy CP21 is relevant because it restricts a change of use to any kind of HMO regardless of the existing use.
27. The appellant rightly submits that Policy CP21 must be interpreted on the basis of how a 'reasonable reader' would understand the language used. In my view, such a person would understand that a proposal to change a use from C4 to a large HMO is a proposal to create a 'new' HMO, and why the acceptability of its location should be considered on the basis of the '10%' rule.
28. A straightforward reading of CP21 also shows that the policy seeks to limit HMO numbers not only to 'ensure that a range of housing needs continue to be accommodated' but also to 'support mixed and balanced communities'. I am satisfied that the concerns discussed below regarding the effects on the community of the change of use do not amount to 'demographic micro-management' but rather reflect, at least in principle, the wording of the policy.
29. There is no dispute that more, if not considerably more than 10% of dwellings within a radius of 50m from 62 Bernard Road are in HMO use; the appellant gave a figure of 37.68%. It follows that the proposed change of use to a large HMO would conflict with Policy CP21.

Impacts of the Use

30. The appellant argues that because the existing use is C4, the change of use would have no actual effect on the balance of housing uses in the area. Since Policy CP1 refers to the percentage of dwellings in HMO use, not the number of residents in HMOs, the appellant claims that increasing the occupation of the appeal HMO from 'up to six' to seven would cause no adverse impacts.
31. The appellant also suggests that the Council has failed to 'demonstrate any actual or demonstrable impact' arising from the previous use of the building as a large HMO. However, I do not know what the percentage then was of other HMOs within a 50m radius of the site.
32. The Council argues that, since they are occupied by definition by unrelated adults, HMOs generate more activity (such as more frequent comings and goings) compared to 'typical family' homes, even if there is a similar number of occupiers in each case. It is said that each additional occupier of an HMO will increase the level of activity in the area, and so the intensification of existing HMOs can cumulative cause imbalanced communities, 'overloaded' areas and impacts such as disturbance.
33. Local residents have raised much the same objection and described noise, parking and refuse storage problems from the number and size of HMOs in and around Bernard Road. The appeal HMO has been and would likely continue to be occupied by students – who can be expected to live in accommodation such as this for just one or two years and be relatively transient members of the local community. It is not unusual for young adults to have highly active and/or late lifestyles, and while one can expect to hear diverse activities in any residential area, it does not follow that any kind or level of noise is acceptable.

34. There is no suggestion that the proposed HMO would cause unacceptably harmful disturbance, parking pressure and/or refuse storage problems on its own. The occupier of 64 Bernard Road said that they have a good relationship with their neighbours in the existing HMO on the site. However, it is still necessary to consider the likely impact of the proposed use in the context that the 10% limit has been exceeded.
35. The evidence before me suggests that the proportion of HMOs in this area has resulted in there being a disproportionate number of student residents, with the imbalance manifest in dissonance between the activities and needs of students with those of other occupiers. In this situation, allowing the proposed sui generis HMO use would not have a neutral or indiscernible effect but exacerbate an imbalance of housing uses within the community.
36. Adding weight to that finding, that the appellant has applied for planning permission is an indication that the proposed change of use is or could be 'material'. The appellant has also reminded me that individual bedrooms may be occupied by more than one person, and the physical subdivision of a room would not normally require permission⁵. If I approve the proposed sui generis large HMO use, occupation would not necessarily increase just to seven.

Other Material Considerations

37. The site is within the 'Lewes Road Area' or 'academic corridor' where the Council seeks to 'promote and enhance the role...for higher education' through CP Policy DA3. That policy does not contain any exemption from CP21 – and it would be surprising if it did, given the co-existence of the Article 4 Direction. The priorities set out under DA3 include delivering appropriate accommodation for students' and 'housing...to meet other needs of local communities.
38. I do not doubt that the area is popular with students because it is 'lively, vibrant...and reasonably close to the city centre' with good access to public transport, shops and services as well as academic institutions. However, the appellant has not shown that the neighbourhood is not equally popular with persons who require family homes; by contrast, he has rightly characterised the area as including a mix of residential uses.
39. Saved Policy HO14 of the *Brighton and Hove Local Plan 2005* (LP) resists the net loss of residential units that are not self-contained, such as HMOs – but dismissing the appeal would not lead to the loss of the existing C4 use, or indeed the loss of a home for any existing occupier. I agree with the appellant that buildings in sui generis HMO use are no more or less likely than those in C4 use to be put back to C3 dwellings, but that is not a positive consideration in favour of the proposed use, not least because C3 is not the existing use.
40. The proposed HMO could not make more than a minor contribution to the 'student economy' – especially if occupation would only increase by one as the appellant suggests. The same can be said of the contribution to student housing needs, which fall to be considered under Policies CP21 and DA3 in any event. There would be economic and social benefits of the use, but they would not justify a grant of permission.

⁵ Unless the works are part and parcel of or facilitate a material change of use.

41. The appellant has submitted appeal decisions where the Inspector permitted a change of use from C4 to use as a large HMO⁶. In a recent case at Newmarket Road, the Inspector found that there would only be a 'technical breach' of Policy CP21. He took account of the Council's concern regarding 'intensification' but found that there would be no loss of a family home and no change to the proportion or concentration of HMOs, or range of housing types in the area.
42. The Newmarket Road appeal is cogently reasoned but I have not seen the evidence before my colleague Inspector – and that is important because, where regard is to be had to the development plan, the determination should be in accordance with the plan unless material considerations indicate otherwise. The other appeal decisions are themselves important considerations but do not alter my view of the merits of this particular case.

Conclusion

43. I conclude that the proposed sui generis HMO use would exacerbate an imbalance of housing uses in the community in conflict with CP Policy CP21. The considerations raised in support of the case, individually or collectively, would not justify a grant of permission contrary to the development plan.

Living Conditions – Proposed Occupiers

44. The rear-facing second floor bedroom in the proposed HMO would provide some 6.64m² floorspace – when the Government's nationally described space standards (NDSS) require that single person bedrooms should have 7.5m² floorspace⁷. This bedroom was not in use on the date of my visit, but it had a sink and was furnished with a desk, chair, wardrobe and bed. Even with no personal belongings in the room, it lacked space for circulation or relaxation.
45. The front-facing second floor bedroom also appears oppressive. It has sufficient floorspace in NDSS terms – 9m² – but a good deal of that is set under the roof slope. I saw that much of the ceiling is so low that there is only space below for the foot of the bed, the edge of the desk and the storage of items on the floor. The part of the room which is full height is dominated by a sink and furniture; again, there are facilities for study but there is little usable space for relaxation.
46. The NDSS include that any area with a headroom of less than 1.5m is not counted within the Gross Internal Area unless used solely for storage; any other area that is used solely for storage and has a headroom of 900-1500mm is counted at 50% of its floor area; and any area lower than 900mm is not counted at all. The appellant has not shown that the front-facing second floor bedroom would have a floorspace of 7.5m² if the under-eaves area is properly assessed – and I find in any event that the room is unacceptably cramped.
47. I also saw that the living/dining/kitchen area has a long galley shape and would feel crowded or be noisy if many occupiers are there at the same time. The garden at the site has a confined L-shape, with the area used for sitting out being too small to hold more than a few people at once. Even if these

⁶ APP/Q1445/W/15/31408 (incomplete reference given – land at 9 The Crescent), APP/Q1445/W/16/3150798, APP/Q1445/W/16/3154217, APP/Q1445 /W/16/3162725, APP/Q1445/W/17/3167367, APP/Q1445/W/18/3211788

⁷ Set out in the Government's 'Technical housing standards – nationally described space standard' document as referenced in paragraph 127 and footnote 46 of the Framework, and also referenced in and linked to PPG paragraph ref ID: 56-004-20150327.

- communal spaces are adequate for a seven person HMO on paper, they are not large enough to compensate for the lack of space in the second floor bedrooms.
48. The appellant claims that the bedrooms have functioned effectively for years, the HMO has always been fully let and occupiers can request single beds if they need more room. He has also referred, however, to there being a housing shortage; that it may be lived in cannot be sufficient reason to permit substandard accommodation, the argument could be repeated too often.
49. I realise that if the property remains in C4 use, the second floor bedrooms may be used as they are now, and the garden would remain as it is. However, dismissing the appeal would reduce pressure on the communal areas because there would by definition be fewer than seven occupiers, and one of the (ground floor) bedrooms could be freed up for use as extra shared space.
50. The appellant has shown that both second floor bedrooms comply with local HMO licencing standards – and that is important because planning permission is not necessarily required for internal works of ‘subdivision’ or increasing HMO occupation by having two or more persons sleeping in any bedroom. However, by the fact that they are set out under housing legislation, compliance with licencing standards cannot be taken as compliance with planning policy.
51. The NDSS are not referenced in any adopted development plan policy, but they are endorsed in the Framework and PPG which post-date the CP and LP. For that reason, and because my view is that the second floor bedrooms would be too small and cramped for occupiers of the proposed large HMO, I attach significant weight to the NDSS as a material consideration.
52. I accept that the Inspector in the Nyetimber Hill case took a different approach⁸, but the dispute there concerned the adequacy of communal space rather than bedrooms, and he found the HMO acceptable on its merits. He described compliance with HMO licencing standards as reinforcing rather than being the basis of his findings – and his decision was made on 9 May 2018, before the Framework was revised to include reference to the NDSS.
53. Saved LP Policy HO14 resists the net loss of non-self-contained accommodation that complies with or is realistically capable of reaching standards set out in the Housing Acts. Again, the policy predates the revision to the Framework and dismissing the appeal would not lead to the loss of a C4 use.
54. I conclude that the occupiers of the second floor bedrooms of the proposed HMO would have unacceptably poor living conditions, in conflict with Saved LP Policy QD27, which resists any change of use that would cause loss of amenity – and in conflict with the Framework, which seeks to ensure that development provides a high standard of amenity for users.

Other Matters and Conclusion

55. The appellant has not described any environmental benefit of the proposed change of use; an absence of visual harm is not a positive consideration which could tip the balance in favour of Appeal B. I conclude that the change of use would exacerbate an imbalance of housing uses within the community and cause unacceptable harm to the living conditions of future occupiers.

⁸ Appeal refs: APP/Q1445/C/17/3177383 and 3177384

56. The presumption in favour of sustainable development as set out in paragraph 11 of the Framework means that development proposals which accord with an up-to-date development plan should be approved without delay. Where there are no relevant development plan policies or the policies that are most important are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework as a whole.
57. I have found that the development does not accord CP Policy CP21 and Saved LP Policy QD27. There may be a shortfall in the delivery and supply of land to meet recognised needs 'for all types of housing' in Brighton, but the appellant has not shown that the policies relevant to this decision are out of date. The Framework would not justify a grant of permission for the change of use, and nor would CP Policy SS1, which seeks to secure development that improves social as well as economic and environmental conditions.
58. The appellant has referred to his rights under the Human Rights Act 1998 (HRA98), albeit largely in relation to the dormer which is not subject to Appeal B. For completeness, I acknowledge that dismissing the appeal would interfere with the appellant's right to peaceful enjoyment of his property as set out under Article 1 of the First Protocol (A1FP) to the HRA98. However, A1FP rights are qualified; interference may be justified where in accordance with the law and the public interest.
59. With regard to the legitimate planning policy aims to manage housing uses in the interests of the community and protect residential living conditions, I find that a refusal of permission would be proportionate and necessary. It would not unacceptably violate the appellant's rights under A1FP; the protection of the public interest cannot be achieved by means that are less interfering.
60. Dismissing the appeal would not violate the rights of occupiers of the HMO to a private and family life, home and correspondence under Article 8 of the HRA98. Since the building is currently in C4 use and the enforcement notice subject to Appeal A is quashed, no existing occupier should need to lose their home. I have had regard to all other matters raised but conclude that Appeal B should be dismissed.

Jean Russell

INSPECTOR