



Appeal Decision

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 ref: APP/Q1455/C/18/3199387

Land at 27 Hollingbury Road, Brighton, BN1 7JB

- The appeal is made by Mr Andrew Marchant under section 174 of the Town and Country Planning Act 1990 (TCPA90) against an enforcement notice (ref: 2016/05062) issued by Brighton and Hove City Council on 13 February 2018.
- The breach of planning control as alleged in the enforcement notice is: *without planning permission the material change of use from a dwellinghouse (C3) to a 7 bedroom House in Multiple Occupation (HMO) (Sui Generis), and the construction of a dormer to the rear roof slope and a single storey rear extension to facilitate the unauthorised change of use to HMO (Sui Generis).*
- The requirements of the notice and periods for compliance with the requirements are: *Cease the use of the property as a House in Multiple Occupation (HMO) – within 3 months.*
Remove the dormer to the rear roof slope – within 6 months.
- The appeal is proceeding on the grounds set out under section 174(2)(a), (b), (c), (d), (f) and (g) of the TCPA90. With an appeal brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the TCPA90.

Summary of Decision: the appeal succeeds in part and permission for that part is granted, but otherwise the appeal fails, and the enforcement notice is upheld with a variation as set out in the Formal Decision.

PRELIMINARY MATTERS

1. 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.

2. 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.
3. 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.
4. A planning application (ref: BH2016/06556) for a change of use of the appeal building from C4 to sui generis large HMO use was received or validated by the Council on 21 December 2016. I shall refer to it as the '2016 application' but it was refused on 7 February 2018 before the issue of the notice. While the 2016 application is not subject to this appeal, the building is currently in C4 use.
5. The Framework was revised in July 2018 and February 2019; the parties have had opportunities to comment on changes to it through the appeal process.

THE APPEAL ON GROUND (B)

6. The appeal on ground (b) is that the matters alleged by the enforcement notice have not occurred. The onus is on the appellant to make the case for grounds (b), (c) and (d) on the balance of probabilities.
7. The appellant's case is that the alleged change of use has not occurred because the building has been in C4 use since 2017, as shown by evidence including Assured Shorthold Tenancy (AST) agreements. I saw that one of the bedrooms in the property was furnished but included no personal possessions.
8. However, s174(2) of the TCPA90 frames ground (b) in the past tense – and the appellant himself has said that the building was used for 'four years [as a] sui generis large HMO use by seven persons' until September 2017. It has not been shown that the alleged change of use 'has not occurred'; the reverse seems true on the balance of probabilities.
9. The appellant also claims that the previous and lawful use of the building was not C3 but C4. It is not necessary for an enforcement notice concerned with a change of use to recite what the change was from; where the notice wrongly describes the existing use, it can normally be corrected without causing injustice. I shall consider the lawful use through ground (c).
10. The difference between C4 and sui generis HMO uses depends on the number of occupiers not bedrooms. For the avoidance of doubt, the reference to seven bedrooms does not render the notice defective since it is clear that the alleged use is as a sui generis HMO. The appeal fails on ground (b).

THE APPEAL ON GROUND (C)

11. Ground (c) is that what is alleged by the enforcement notice does not amount to a breach of planning control. The appellant's case is that the change of use to use as a large HMO did not require planning permission, and the alleged dormer was constructed as PD under Article 3 and Schedule 2, Part 1, Class B of the GPDO 1995. The rear extension is not subject to the ground (c) appeal because the notice does not require its removal.

The Change of Use

12. Picking up from ground (b), the appellant claims that the use of the building changed from C3 to C4 in September 2012 – and that was PD under the GPDO 1995 because the Article 4 Direction had not come into force. The appellant further asserts that the subsequent change from C4 to a sui generis large HMO was not a ‘material’ change of use which required planning permission. The Council contends, however, that there was a material change of use in September 2012 from use as a C3 dwellinghouse to use as a sui generis HMO.
13. The appellant has submitted an AST agreement that is dated 24 September 2012 and lists the names of six tenants. The header on some pages says “page x of 8” and on others “page x of 9” – begging a question as to whether the full original agreement has been provided. Crucial dates and names are all on “of 8” pages, but one of the named tenants did not give their signature, and one of the signatories did not have their name printed on that page.
14. The appellant has also submitted extracts from his bank statements to show that the same six tenants paid rent on 27 November 2012, and on 2 and 14 January 2013. However, there are no bank statements for other days in those months or other months in those years. Taken together, the AST agreement and bank statements do not provide precise or unambiguous evidence that the appeal building was *only* occupied by six people from September 2012.
15. That finding is significant because Council Tax records show that the six tenants named by the appellant plus two others occupied the building from September 2012 until, at least, June 2013. One of the additional people was registered from 26 September 2011 but even if they are then discounted for uncertainty, the records would still suggest that the building was occupied by seven people from September 2012.
16. Moreover, the Council has shown that the appellant applied for an HMO licence for seven persons on 2 October 2012. The application is not conclusive of use, but a licensing officer wrote to the appellant on 25 January 2013 to state that ‘following my inspection of the property...a licence may be granted for up to 7 households...planning permission may be required to use the house as a [HMO] because the property has more than 6 occupiers’.
17. The appellant has not demonstrated that there was a change of use of the building from C3 to C4. It seems on the balance of probabilities that the change was from C3 to use as a sui generis HMO – and so the next question is whether that was material. The appellant is right that the answer is not automatically yes, but his assertion of that principle does not make his case. It is necessary to consider whether there was any significant difference in the character of the activities as a matter of fact and degree.
18. The appellant accepts the building was used as a C3 dwellinghouse use prior to September 2012. Yet he has not shown that the then letting of the property to a group of probably seven (or even six) unrelated occupiers – with or without regard to the building works described below – did not denote a material change of use. The onus is not on the Council to show whether an increase in occupants is or is not important.
19. I find on the balance of probabilities that there has been a material change of use as alleged, and the notice should not be corrected to delete the reference

to C3 use. The appellant has not shown that planning permission was granted for the change of use.

The Dormer

20. Article 3 and Schedule 2, Part 1, Class B of the GPDO 1995 permitted the 'enlargement of a dwellinghouse consisting of an addition...to its roof'. The parties agree that the dormer did not breach any of the limitations to PD under Class B at the relevant date as set out below; the determinative issue is whether the dormer was built as an 'enlargement of a [lawful] dwellinghouse'.
21. The answer to that question will bear not only on whether the dormer was PD but also whether the allegation set out in the notice is correct – in the sense that the breach of planning control is essentially said to be the unauthorised change of use; the dormer (and rear extension) are mentioned in the allegation on the basis that they facilitated the unlawful use.
22. The Council has referred to judgments which established or applied the principle that, if an enforcement notice is directed at a change of use, and operational development took place to facilitate the unauthorised use, the notice may enforce against the works as well as use¹. The principle was applied in *Bowring v SSCLG* [2015] EWHC 1027 (Admin) as cited by the appellant.
23. I agree with the appellant that the timeline is crucial to establishing whether the dormer was PD². An application (ref: 2012/1214/MULFP) was made on 7 June 2012 under Building Control regulations for a loft conversion, rear kitchen extension and other alterations to the building; the commencement inspection took place on 20 June 2012³. It is undisputed that the dormer and extension were built between June and September 2012, and the property was not inhabited at that time. I have found that the building was let to a group of probably seven unrelated individuals from September 2012.
24. The appellant suggests that a change of use is a separate act of development to operations and occurs 'when a new use is introduced'. When dating a change of use, however, it is necessary to consider the situation in the round and take account of any relevant physical changes as well as changes to activity or occupation. It cannot be assumed that operations must take place later to be part and parcel of a change of use – and it does not matter that seven bedrooms are not strictly needed for use as a sui generis HMO.
25. The evidence before me does not show that the construction of the dormer was 'undertaken for a...lawful use' as described in *Bowring* [2015], or as a separate act of development to the alleged change of use. The timeline rather implies such a close association that I find, on the balance of probabilities, that the dormer was built to facilitate the alleged change of use. My approach is consistent with that of other Inspectors who determined the Old Shoreham Road and Bristol Street appeals, although it was found on the timeline in the first of those cases that a dormer on an alleged HMO was PD⁴.
26. PD rights set out under Part 1 of the GPDO 1995 were not limited to C3 or any particular type of dwellinghouse(s). However, I do not need to assess whether

¹ *Murfitt v SSE* [1980] JPL 598; *Somak Travel Ltd v SSE* [1987] JPL 630; *Bowring v SSCLG* [2013] EWHC 1115 (Admin); *Kestrel Hydro v SSCLG* [2016] EWCA Civ 784

² *Makanjuola v SSCLG* [2013] EWHC 3528 (Admin)

³ A completion certificate for the works was not issued until 2014 but was chased well before then.

⁴ Appeal refs: APP/Q1445/C/18/3199391 and APP/Q1445/C/18/3195789 with /3199883

the alleged HMO is a 'dwellinghouse' in the sense of affording to those who use it the facilities required for private domestic existence. The appellant has not shown that the change of use to a large HMO was lawful, and it follows that the construction of dormer to facilitate the use could not have been PD, because Article 3(5)(b) of the GPDO 1995 provided that any permission granted in connection with an existing use would not apply if that use is unlawful.

Conclusion

27. I conclude on the balance of probabilities that there was a material change of use from C3 use to use as a sui generis HMO as alleged, and this required but did not benefit from any grant of planning permission. The dormer was built to facilitate the unauthorised change of use and was not PD as set out under Article 3 and Schedule 2, Part 1, Class B of the GPDO 1995. There has been a breach of planning control as alleged and the appeal on ground (c) fails.

THE APPEAL ON GROUND (D)

28. Ground (d) is that it was too late for the Council to take enforcement action on the date that the notice was issued. The appellant's case is that the dormer is immune from enforcement action under s171B(1) of the TCPA90 because it was substantially completed in or by September 2012, more than four years before the notice was issued.
29. However, a change of use of a building to use as an HMO becomes immune from enforcement action after ten years under s171B(3). The appellant makes no claim that it was too late for the Council to enforce against the change of use which, I have found, was facilitated by the construction of the dormer. In accordance with *Bowring* [2015] and the judgments cited by the Council, the notice may enforce against the dormer – and whether or not it should do so is a question to be considered through ground (f).
30. In the Bristol Street appeals, the Inspector corrected a notice which alleged the construction of a dormer so as to clarify that the immunity period would be four rather than ten years. However, while that notice stated that dormer facilitated a change of use, it only enforced against the works; the change of use itself was subject to a separate notice.
31. I find that it was not too late for the Council to take enforcement action against the alleged dormer. The appeal fails on ground (d).

THE APPEAL ON GROUND (A) AND THE DEEMED PLANNING APPLICATION

The Description of Development

32. Where an appeal is made on ground (a), the description of development for the deemed planning application (DPA) is taken from the allegation. I cannot decide whether to permit a change of use from C4 use to use as a large HMO.
33. As noted above, the enforcement notice does not require the removal of the rear extension that is mentioned in the allegation. Under s173(11), where a notice could require the removal of works but does not do so, and the requirements of the notice are complied with, planning permission shall be treated as granted for the works. If the appealed notice is upheld and complied with, the extension will have deemed planning permission.

34. Accordingly, the appellant has not made any case for the extension under any of the grounds of appeal. However, since he has paid the requisite fee, ground (a) and the (DPA) fall to be considered for the whole development alleged including the dormer and extension. S177(1) of the TCPA90 provides for the making of a split decision on a ground (a) appeal, including where permission is granted for the whole or part of the matters. There are no objections to the rear extension and so I shall grant express planning permission for it.

Main Issues

35. I consider that the main planning issues are the effect of the change of use on the balance of housing uses within the community; the effect of the HMO use on the living conditions of nearby occupiers; whether occupiers of the appeal HMO have adequate living conditions; and the effect of the dormer on the character and appearance of the surrounding area.

Reasons

Balance of Housing Uses

36. 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 Class C4 use, mixed C3/C4 use⁵ or sui 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.
37. The appellant has not refuted the Council's claim that some 16.7% of dwellings within a radius of 50m of the site are already in HMO use. It follows that the alleged change of use conflicts with Policy CP21 and would exacerbate a loss of family homes and over-concentration of HMOs that the policy seeks to stem.
38. The appellant claims that reversion back to use as a large HMO would have no real impact on the balance of housing uses in the area. Policy CP21 seeks to restrict the number of HMOs, not number of HMO occupiers, and the change of use would cause no loss of family homes in the area – as other Inspectors found in different appeal decisions listed in the footnote below⁶. However, those cases concerned a change of use from C4 when that is the existing but not lawful use here.
39. Policy CP21 restricts any change of use to an HMO regardless of what the change is from – and neither the policy nor the Council's reasons for taking enforcement action indicates that concern is limited to effect on the mix or range of house types. The Council's objection is rather that intensified occupation of the appeal HMO would result in a further imbalance of uses to the detriment of a mixed and balanced community and local amenity.
40. The Council argues that since HMOs are occupied by definition by unrelated adults, they generate more activity (such as more frequent comings and goings) compared to 'typical family' homes, even if there is a similar number of

⁵ 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.

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

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 cause acute cumulative impacts such as disturbance.

41. As discussed below, some local residents share the Council's concerns. I also note that 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 community. It is not also unusual for young adults to have highly active and/or late lifestyles; in refuting objections on parking grounds, the appellant himself said that students do not regularly operate on 9am to 5pm schedules.
42. The proportion of HMOs in this area has resulted in a disproportionate number of student residents, in my view, with the imbalance manifest in dissonance between the activities and needs of students with those of other occupiers. In this situation, allowing the alleged sui generis HMO use would not have a neutral or indiscernible effect but exacerbate an imbalance of housing uses within the community.
43. I do not doubt that the area is popular with students because it is close to the city centre and there is good access to public transport, shops and services as well as academic institutions. But the appellant has not shown that the neighbourhood is not equally popular with persons who require family homes; he has rightly characterised the area as including a mix of residential uses.
44. 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 properly 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.
45. I conclude that the alleged change of use would exacerbate an imbalance of housing uses within the community contrary to CP Policy CP21. The supporting text to Saved Policy HO14 of the *Brighton and Hove Local Plan 2005* (LP) seeks to ensure an adequate supply of HMO accommodation but not by permitting new uses in conflict with Policy CP21. The considerations raised in support of the case would not, individually or collectively, justify a grant of permission contrary to the development plan.

Living Conditions: Nearby Occupiers

46. The Council suggests that allowing the appeal change of use would harm the living conditions of the neighbouring occupiers at 25 and 29 Hollingbury Road. However, the Council has provided little detailed evidence of any 'direct impacts' that have arisen – even though the appeal building is attached to nos. 25 and 29 and the sui generis HMO use probably subsisted September 2012 until 2017. It seems that just one complaint was made about noise at the site to Environmental Health during that period, and that was back in 2013.
47. That said, I am not aware of the percentage of dwellings in HMO use within a 50m radius of the site in previous years. Local residents objected to this appeal and the 2016 application on the basis not only of general noise, parking and refuse storage problems arising from the number and size of HMOs within Hollingbury Road – but also of disturbance from the appeal HMO.

48. The representations do not show that the allowing the alleged use would create unacceptable parking pressures, not least because this is a controlled parking zone. I do not have enough evidence to say whether or not the refuse storage facilities for the property would be adequate for a seven person HMO. I have no reason to find that its occupiers would engage in anti-social behaviour.
49. However, I am persuaded that existing HMOs are generating activities with such frequency and at such times as to cause nearby occupiers, particularly children, unacceptable cumulative disturbance. In this context, and since the appellant has not shown otherwise, I find that allowing the appeal would be likely to increase occurrences of noise and disturbance so as to cause unacceptable harm to the living conditions of adjacent occupiers.
50. A grant of permission would thereby conflict with Saved LP Policies QD27 and SU10, which resist any change of use that would cause loss of amenity to existing or adjacent residents and require developments to minimise the impact of noise. It would conflict with the Framework, which seeks to ensure that development provides a high standard of amenity and avoids noise giving rise to significant adverse impacts on quality of life.

Living Conditions: Occupiers of the HMO

51. The rear-facing second floor bedroom provides some 7.5m² floorspace, which is the minimum size for a single person bedroom as set out in the Government's nationally described space standards (NDSS). I saw that, as the Council suggests, there is less than 7.5m² *usable* floorspace due, for example, to an inward-opening door. The configuration is not unusual, however, and I consider that the room is not unacceptably small for a single occupier.
52. The front-facing second floor bedroom, which was furnished but not in use on the date of my visit, has just over 10m² floorspace – but some of that is under the roof slope. There are facilities for private study but even with no personal belongings in the room, I saw little usable space for relaxation.
53. 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 my observation is that it would be unacceptably cramped.
54. I also agree with the Council that such harm would be exacerbated by a lack of room elsewhere for occupiers to relax. The living/dining/kitchen area in the building has a long galley shape and would feel crowded or be noisy if many occupiers are there at the same time. Other Inspectors found similarly sized or smaller communal areas sufficient to serve HMOs with eight occupiers, but their decisions predated the revisions to the Framework, and I do not know the size of the bedrooms in those cases⁷.
55. The appellant claims that both second floor bedrooms have always functioned effectively for occupiers, who can request single beds if they need more room. However, the appellant has also referred, as set out below, to there being a

⁷ Appeal refs: APP/Q1445/A14/2214317 and APP/Q1445/W/15/3006221

housing shortage; that it may be lived in cannot be sufficient reason to permit substandard accommodation, the argument could be repeated too often.

56. 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 licensing standards cannot be taken as compliance with planning policy.
57. The NDSS are to be applied to ‘new homes’ but that is what the HMO subject to the DPA would be. 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 front-facing second floor bedroom would be unacceptably cramped, I attach significant weight to the NDSS as a material consideration.
58. I conclude that allowing the alleged HMO use would result in occupiers of the front-facing second floor bedroom having unacceptably poor living conditions, in conflict with Saved LP Policy QD27 and the Framework.

Character and Appearance

59. The Council objects that the appeal dormer is visually dominant due to its excessive scale. The dormer is indeed large; it covers almost the whole of the rear roof slope, and its size is emphasised by its box shape. I can understand why the Council describes the dormer as looking like a complete extra storey on the building; it is a bulky and incongruous addition which diminishes the character and appearance of the appeal building.
60. However, the adjacent and other nearby properties have dormers that are almost identical in size and form. I do not know whether any of those are lawful; it is possible that many are not, but the Council has not indicated that any close to the site are liable to be removed. I saw that the dormer will only be visible from dwellinghouses to the rear that are well separated from the appeal terrace. The dormer will be seen at a distance and as surrounded by similar structures; it will not appear as unduly obtrusive or incongruous.
61. I conclude that the appeal dormer does not cause unacceptable harm to the character and appearance of the area. It does not conflict with Saved LP Policy QD14 which expects development to be well-designed and sited in relation to the host and adjoining properties and surrounding area. Other appeal decisions cited by the Council do not alter my assessment of the dormer on its merits⁸.

Other Matters and Conclusion

62. I conclude that allowing the alleged HMO use would exacerbate an imbalance of housing uses within the community and be liable to cause unacceptable harm to the living conditions of both nearby occupiers and the occupiers of the front-facing second floor bedroom in the building.
63. 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

⁸ Appeal refs: APP/Q1445/W/17/3166975, /3180711, /3184922, /3183594, /3184207, and /3189350

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.

64. I have found that the alleged use does not accord with CP Policy CP21 or Saved LP Policies QD27 and SU10. 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 use, and nor would CP Policy SS1, which seeks to secure development that improves social as well as economic and environmental conditions.
65. However, I have found that the alleged dormer causes no unacceptable harm to the character and appearance of the area and does not conflict with Saved LP Policy QD14. It follows that planning permission ought to be granted for this structure as well as the alleged rear extension – and I do not need to address whether a refusal of permission for the dormer would have violated the appellant's right to peaceful enjoyment of his property under Article 1 of the First Protocol (A1FP) of the Human Rights Act 1998 (HRA98).
66. A refusal of permission for the use would interfere with the appellant's rights under A1FP but they are qualified; interference may be justified in accordance with the law and the public interest. 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 for the alleged use would be proportionate and necessary. It would not unacceptably violate the appellant's human rights; the protection of the public interest cannot be achieved by means that are less interfering with those rights.
67. Refusing permission for the use would not violate the rights of the occupiers of the appeal building under Article 8 of the HRA98 to a private and family life, home and correspondence. From my findings on ground (f) below, the notice will not require cessation of the existing C4 use and it follows that no occupier should lose their home.
68. For the reasons given above, I conclude that the appeal should fail on ground (a) and the DPA should be refused in relation to the alleged use – but the appeal should succeed, and permission should be granted in respect of the dormer and rear extension. Both structures are completed and acceptable in their current form, so there is no need to impose any planning conditions.

THE APPEAL ON GROUND (F)

69. As set out under s174(2)(f) of the TCPA90, this ground of appeal is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
70. In this case, the notice alleges that there has been a change of use and requires the unauthorised use to cease. The notice does not 'under-enforce' and so its purpose is to remedy the breach rather than injury to amenity. That being the case, and since I have considered 'amenity' questions through

ground (a), the appellant must show that the requirements of the notice are excessive to remedy the breach and lesser steps would achieve the same end.

71. Although he has not shown that the building has a lawful C4 use, I agree with the appellant that it is excessive for the notice to require cessation of 'any' HMO use. The requirements should be square with the allegation, and it would not prejudice any party for me to vary the notice so that it only requires the cessation of the unauthorised 'sui generis' HMO use which is alleged⁹.
72. I have decided to grant planning permission for the dormer, but it does not follow that the requirement to remove that structure should be deleted from the notice. The appellant can rely instead on the effect of s180 of the TCPA90, which provides that where permission is granted after the service of a notice for development already carried out, the notice shall cease to have effect so far as inconsistent with the permission.
73. I conclude that ground (f) should succeed in part. I shall vary the notice simply to clarify that it is the sui generis HMO use which must cease.

THE APPEAL ON GROUND (G)

74. Ground (g) is that the period for compliance with the notice falls short of what is reasonable. The appellant asks that the time to cease the use is extended from three to six months, so neither he nor the occupiers are disadvantaged by enforced early termination of tenancy agreements. But the building is not currently being used as a sui generis HMO, so three months to cease that use does not fall short of what is reasonable. The appeal on ground (g) fails.

CONCLUSION

75. For the reasons given above, and with regard to all other matters raised, I conclude that the appeal should succeed in part. I will grant planning permission for the dormer and rear extension but uphold the notice with variations and refuse to grant planning permission in respect of the alleged use. The requirements of the notice will cease to have effect so far as inconsistent with the permission granted by virtue of s180 of the TPCA90.

FORMAL DECISION

76. It is directed that the enforcement notice is varied by inserting the text '(Sui Generis)' at the end of the requirement to 'Cease the use of the property as a House in Multiple Occupation' in paragraph 5.
77. Subject to the variation, the appeal is allowed insofar as it relates to the construction of a dormer to the rear roof slope and a single storey rear extension. Planning permission is granted on the application deemed to have been made under s177(5) of the TCPA90, for the construction of a dormer to the rear roof slope and a single storey rear extension at land at 27 Hollingbury Road, Brighton, BN1 7JB.
78. The appeal is dismissed, and the enforcement notice is upheld as varied in relation to the material change of use from a dwellinghouse (C3) to a 7 bedroom House in Multiple Occupation (HMO) (Sui Generis). Planning

⁹ The appellant is also correct that the notice cannot require resumption of the lawful use – but it does not do so. It simply requires that the unauthorised use is ceased, and I shall uphold that step with the clarification described.

permission is refused in respect of the material change of use from a dwellinghouse (C3) to a 7 bedroom House in Multiple Occupation (HMO) (Sui Generis) at land at 27 Hollingbury Road, Brighton, BN1 7JB on the application deemed to have been made under s177(5) of the TCPA90.

Jean Russell

INSPECTOR