The Planning Inspectorate

Appeal Decision

Site visit made on 22 December 2020

by Nick Fagan BSc (Hons) DipTP MRTPI

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

Decision date: 02 February 2021

Appeal Ref: APP/Q1445/X/20/3255152
51 Ditchling Rise, Brighton BN1 4QN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Jeremy Barrett against the decision of Brighton & Hove City Council.
- The application Ref BH2019/00999, dated 2 April 2019, was refused by notice dated 31 December 2019.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is described by the appellant as a sui generis large HMO (up to 10 occupants).

Decision

1. The appeal is dismissed.

Preliminary Matter

2. The appellant raises the point that neither the original decision notice nor the Council report on the application contained any reason for refusal. The Council has explained at appeal that this was a technical error and that its senior officer who reviewed the report and signed off the refusal did in fact see the reason for refusal. Although unfortunate, it is clear that the appellant has been able to address the reason for refusal as contained in Appendices 1 and 2 (the amended report and decision respectively, as seen by the signing-off officer) attached to its appeal statement. No injustice has therefore been caused to the appellant. Hopefully the Council has now rectified this technical error so that it does not reoccur again in other cases.

Main Issue

3. The main issue is whether the Council's refusal to issue a certificate of lawfulness for the sui generis large house in multiple occupation (HMO) use was well founded.

4. Under s191(1)(a) of the 1990 Act, any person who wishes to ascertain whether any existing use of buildings or other land is lawful may make an application for the purpose to the local planning authority specifying the land and describing the use. S191(2)(a) of the 1990 Act specifies that for the purposes of the Act, uses and operations are lawful at any time if no enforcement action may then be taken in respect of them (whether because they did not involve

development or require planning permission or because the time for enforcement action has expired or for any other reason).

5. The time limit relevant for taking enforcement action under s171B(3) of the 1990 Act regarding the use of buildings or other land is the end of ten years beginning with the date of the breach.

6. The ground under which the appellant applied for the LDC was that the use began more than ten years before the date of the application, albeit that he only considers that a four-year time limit applies because the property *"retains the character of a dwellinghouse"*. That is a nonsensical suggestion since he has made an LDC application for a sui generis large HMO, which is clearly not a Class C3[1] dwellinghouse use because that is limited to not more than 6 residents living together as a single household. A sui generis HMO comprises more than 6 residents not living together as a household, as proposed here. The lawful use of the property is therefore either as a dwellinghouse or as an HMO – it cannot be both – since both parties agree that the permission granted in 2003 to convert it into a ground floor flat and maisonette on the first and second floors was not implemented and is now expired.

7. The appellant therefore needs to show, on the balance of probability, that the use for which the appellant applied had existed on a substantially uninterrupted basis for at least ten years by the date of the application for the LDC, which was 2 April 2019. Consequently, the evidence to support that claim needs to date back to at least 2 April 2009. The burden to make out the case rests with the appellant.

8. The banner heading above lists the appellant's description of the use to which he sought the LDC. But caselaw has held and Planning Practice Guidance makes clear that applications for LDCs must relate to a specific use, operation or development, so as to define it unambiguously and with precision. This is particularly for uses which do not fall within any 'use class', as in this appeal. A sui generis HMO, by definition, does not fall within a specified use class. 'Sui generis' means unique, of its own kind, outside any classification. That means each such sui generis HMO use is entirely unique and the assessment of any application must address its particular nature, including numbers of occupants.

9. It is therefore necessary to specify in the description exactly how many people the LDC seeks to establish as the lawful existing use; 'up to 10 occupants' is not precise enough. It is necessary to specify exactly how many people – 'up to 10 occupants' means 10 unrelated people in this case – the lawful use is seeking to establish.

10. The Council changed the description to 'use of property as a 10no. bedroom large house in multiple occupation', as reflected in its decision notice refusing the application. As the appellant has argued, that is also unclear because it does not make clear that a lawful existing use is actually being sought for 10 people living in the property, notwithstanding that the property has 10 bedrooms and there is an HMO License for 10 people.

11. For the avoidance of doubt, I am assessing this appeal on the basis that the appellant is clearly seeking a lawful use of the property as a 10-person, 10-

[1] of The Town and Country Planning (Use Classes) Order 1987 as amended

bedroom sui generis HMO. If he subsequently decides to seek a lawful use for a 7-person HMO in the future, he can apply for another LDC.

Reasons

12. The Council does not dispute that the property has been used as a large sui generis HMO for at least 10 years. But it argues that the evidence presented by the appellant only shows it has been occupied by 7 to 10 people during this time. In particular, it says only 7 or 8 unrelated people occupied it from 2008 to 2014 and that it has only been continuously occupied by 10 people since 2015. These facts are confirmed in the appellant's submissions at application stage, summarised succinctly in paragraph 2.4 of the Supporting Statement dated March 2019 and repeated in his appeal statement.

13. Consequently, it has not been demonstrated that the residential use of the property in the manner of a large HMO (sui generis) occupied by 10 unrelated people has been demonstrated for a continuous period from 2 April 2009, ten years prior to the date the application was submitted.

14. The appellant also essentially argues that there is no material difference between the property's occupation by 7 or 10 people because the building has still been occupied as a house with a single shared lounge, kitchen/dining and bathroom facilities over the last 18 years. He states that fluctuations in occupancy inevitably occur over the years but that does not materially alter the character of the HMO.

15. However, just because the shared rooms in the property have been there for 18 years does not mean that an increase in the number of residents has had no material change on the use of the property. Such an increase in numbers is likely, for example, to have led to an intensification of the use of such internal facilities, which may well have impacted on the overall living conditions of all the residents. It may also have had external impacts on the street and wider character of the area, for instance by possibly increasing the parking pressure on the road from the vehicles of increased numbers of residents. There may well have been other impacts of an increase in the numbers of residents.

16. As set out above, a sui generis HMO is not a generic use. It is necessary to be specific in terms of the numbers of residents the LDC is seeking to establish. This application seeks an LDC for 10 residents. The appellant has given no explanation as to why he considers the property's occupation by 10 people to be immaterially different to 7 people.

17. For the above reasons, I conclude that the Council's refusal to grant a certificate of lawful use or development was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in Section 195(3) of the Act as amended.

Nick Fagan

INSPECTOR