



Appeal Decision

Site visit made on 10 October 2022

by Robin Buchanan BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 October 2022

Appeal Ref: APP/Q1445/W/21/3284770

46 Boundary Road, Hove BN3 4EF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3(1) and Schedule 2, Part 3, Class MA of the Town Country Planning (General Permitted Development) Order 2015, as amended (GPDO).
 - The appeal is made by Downsview Developments Ltd against the decision of Brighton & Hove City Council.
 - The application Ref BH2021/02824, dated 29 July 2021, was refused by notice dated 23 September 2021.
 - The development proposed is described as 'the conversion of the basement level and ground floor of 46 Boundary Road from (A1) shops to 1no (C3) residential dwelling. The conversion would create a one-bedroom flat with kitchen, living room and shower room with WC to ground floor and utility room/gym and storage to basement level'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The proposed change of use from a shop to a dwelling relates only to the front half of the basement and front of the ground floor (the site) of No 46 Boundary Road. Building operations reasonably necessary to convert this part of No 46 to a dwelling include some works to other parts of this building.
3. On 1 September 2020, the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force. Various classes, including A1, were replaced by Class E in Part A of Schedule 2. Ordinarily, the proposal therefore falls to be considered under Class MA of the Order.
4. However, paragraph 4 of the Schedule (the transitional and saving provision) to the Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No 2) Order 2021 states that where development would be subject to a new condition, and the application for prior approval was made before 1 August 2021, it may proceed subject to the conditions imposed by the previous provision.
5. Class MA of Schedule 2 of the GPDO introduces a new condition by requiring that the application for prior approval under this class be made on or after 1 August 2021. This is not substantially the same as a condition to which an approval under previous Class M was subject. It is therefore necessary for me to assess the proposal against the conditions imposed on development under previous Class M. This class includes a change of use of a building from a use falling within Class A1 (shops) to a use falling within Class C3 (dwellinghouses).

6. The Council's reason for refusal 1 (RfR1) lists condition M.2(1)(d)(i) which relates to the adequate provision of services. The Council's officer report, appeal statement and the substantive wording of RfR1 refer to the impact of the proposal on the vitality and sustainability of a district shopping centre, a matter under condition M.2(1)(d)(ii). The appellant has addressed both conditions and so have I.
7. By virtue of condition M2(1), paragraphs W(10)(a) and (b) require the Council to take into account any representations made to them as a result of consultation and to have regard to the National Planning Policy Framework (Framework), so far as relevant to the subject matter of the prior approval, as if the application were a planning application. I have determined the appeal on the same basis.

Main Issues

8. The main issues are whether prior approval should be granted, with particular regard to:
 - the adequacy of services and the sustainability of a key shopping area;
 - the design or external appearance of the building; and
 - the provision of adequate natural light in all habitable rooms.

Reasons

Services and shopping area

9. Under Class M the proposal would have been subject to condition M.2(1)(d). It requires consideration of whether it is undesirable for a building in Class A1 shop use to change to Class C3 dwellinghouse because of the impact on (i) the adequate provision of services, or (ii) the sustainability of a key shopping area.
10. The site was last in continuing use as a shop. It is within a long parade of mainly shops and other commercial uses, including some financial and professional services or the sale of food or drink, with residential use above. There is a similar parade along the other side of Boundary Road. The proposal would result in the permanent loss of a shop unit. Considering the relatively large number and variety of retail and other commercial uses near the appeal site, the loss of a shop would not lead to inadequate provision of services in Boundary Road. However, that is not the same as, nor does it mean, that a shop could not contribute to the diversity of retail and commercial activity in Boundary Road.
11. The reason why the site has not been used as a shop for over 3 years has not been provided. Even if the site has given a neglected local impression, dormancy does not mean that the site is not capable of being used as a shop. There is no objective evidence that the vacant status and appearance of the site has had a significant adverse impact on the local economy or caused a detrimental domino effect on the integrity of the shopping parade. Nor is there any evidence of formal marketing of the site as a shop since it closed — such as the method(s) used, how long advertised, the asking price for sale or rent, the level of interest and reasons why any interest did not proceed any further. While no potential occupier of the site has enquired about taking a shop lease, this does not establish that there is no need or demand to retain the site as a

- shop. No such future occupier (or owner) has been actively sought for reasons that have not been explained.
12. There is no definition in the GPDO of a 'key shopping area'. There is agreement that the site is within a defined secondary frontage in the Council's designated Boundary Road district shopping centre. Albeit a snap-shot, I saw few vacant retail or commercial premises along either side of Boundary Road between the railway line to the north and Kingsway to the south. Although some of these were located near the site, they were few in number compared to the significant quantity that were occupied and in active use. There is no evidence that vacant units will not re-open in the future or that their number and location, including near the appeal site, is indicative of any sustained retail or commercial decline in the secondary frontage. Some fluctuation in this respect likely reflects the operation of the local commercial property market and would not be unusual or unexpected in any district shopping centre.
 13. Albeit not in a primary frontage, the site forms part of a bustling corridor of commercial activity along Boundary Road with significant footfall. This includes premises that meet daily and weekly living needs as well as artisan and specialist shops, some roadside tables and seating areas with wide pavements, controlled crossing points, bus stops, a nearby train station and some on-street parking. It is a convenient, conducive and cosmopolitan shopping experience for local people and the location of the site is an intrinsic and notable part of this activity. Although it is a relatively small, single shop unit its permanent loss would nonetheless have an undesirable impact on the stock of shop units in Boundary Road and its residential use would be an unwarranted incremental erosion of this shopping parade.
 14. The occupiers of the dwelling would likely add to the footfall of potential customers in support of the other shops and services. However, there is no evidence that any such 'spend' would outweigh the loss of the site as a shop in economic terms.
 15. Taking all of the above into account, I am not satisfied it has been demonstrated that there is no reasonable prospect of the site being used as a shop or that a shop would not contribute positively to the sustainability of a key shopping area. The proposed loss of a shop has not been justified and in these circumstances, it would have an unwarranted negative impact on the sustainability of a key shopping area. Consequently, I find that it would not be appropriate or desirable for the site to change use from a shop to a dwelling. Accordingly, the proposal would not comply with conditions M.2(1)(d)(i) or M.2(1)(d)(ii).
 16. A single dwelling would be aligned with objectives of the Framework to meet housing needs. However, it also sets out that significant weight should be placed on the need to support economic growth, taking into account local business needs and locational requirements, and support the role that town (or in this case, district) centres play at the heart of local communities with a suitable mix of uses that reflect their distinctive characters.

Design and external appearance

17. Under Class M the proposal would have been subject to condition M.2(1)(e). It requires consideration of the design or external appearance of the building.

18. The shopfront includes modern plate glass display windows either side of a glazed entrance door with metal frames. It runs straight across most of the narrow single storey projection at the front of No 46, along the back edge of the pavement, rising from floor level to a horizontal advertising fascia. Next to it on one side is a recessed external domestic front door giving access to the dwelling above. The other shopfronts in Boundary Road vary in size, detailed design and external appearance. However, at the site the shopfront is broadly typical of many of these including, in particular, those next to and near it. The retail purpose of the site and the commercial uses near it, together with the pattern and sequence of these uses and built-form along both sides of the road is clearly evident and locally distinctive.
19. The shopfront would be removed and a new ground floor cavity wall front elevation re-built in its place. It would be rendered and incorporate a centrally placed three pane metal frame casement window vertically aligned with the width of the bay window above. Access to the dwelling would be via the existing external door.
20. The relatively narrow window aperture, its horizontal emphasis and casement style would have wide bands of rendered elevation above, below and either side. Even if it were intended to retain a fascia or eave level detail above, it would function as a domestic window and not retain a shopfront. In terms of dimensions, proportion or opening style it would not match the appearance of the bay and sash windows in the first floor above. Nor would it match glazing or the overall appearance of the shopfronts either side of it. The external alterations would not be high quality in design but appear bland and result in an overly box like front elevation to this part of No 46, lacking visual coherence and overtly residential features. These works would be incompatible with the front elevation of No 46 taken as a whole and with the adjoining shopfronts.
21. There are some dwellings in Boundary Road with ground floor residential façades flanked by retail or commercial premises. However, these buildings have been constructed as dwellings from the outset and with, for example, private front gardens and matching ground floor bays and windows. As such, they have a legible residential design integrity and most are arranged in discrete short terraces, including some gaps to retail or commercial buildings, and mainly further towards the southern end of Boundary Road. Moreover, establishing one additional dwelling would have no meaningful effect on the relative proportion of residential buildings in Boundary Road and it would, anyway, be manifestly out of keeping with the prevailing design and appearance of other dwellings in this road.
22. As a result, this part of No 46 would be conspicuous and jar in the streetscene, plainly at odds visually with its immediate context in the parade. It would significantly undermine the positive visual contribution that the shopfront makes to the homogeneity of the streetscene and unduly erode the perception of this part of Boundary Road as a focus for shopping and other commercial or service uses. This would have a significant adverse effect on the character and appearance of the area.
23. Considering all of the above, I find that the proposal would not be acceptable in design or appearance. Consequently, it would not comply with condition M.2(1)(e).

24. It would also conflict with the Framework which seeks to ensure that development adds to the overall quality of the area, is visually attractive as a result of good architecture and sympathetic to local character, including the surrounding built environment, and maintains a strong sense of place.

Natural light

25. Under Class M the proposal would have been subject to condition M.2(1)(f). It requires consideration of the provision of adequate natural light in all habitable rooms of the dwelling. As defined in the GPDO these are 'any rooms used or intended to be used for sleeping or living which are not solely used for cooking purposes, but does not include bath or toilet facilities, service rooms, corridors, laundry rooms, hallways or utility rooms'.
26. The proposal includes a ground floor kitchen/lounge, a bathroom and a bedroom. A basement would be used as a gym, a utility space and storage.
27. As a combined living space, the kitchen/lounge would be a habitable room, as would the bedroom. Both of these rooms would have a window of sufficient size and suitable orientation to receive adequate daylight and sunlight for their intended use. However, the basement room would have no window. While some very limited indirect light spill down the staircase might seep into one side of this room, it would receive no direct daylight or sunlight and no meaningful natural light at all. It would include a utility space and storage but would not be a 'utility room' or a 'store room' or be used solely for both of these ancillary domestic work purposes. The main useable part of this room and most of the floor area would be a home gym and a use not excluded from the GPDO habitable room definition. It would instead clearly be part of the living accommodation in much the same way as a study or a play room.
28. Consequently, irrespective of the total overall floor area of the dwelling, future occupiers would be overly reliant on artificial lighting to use the basement room, including during daytime. No matter how bright such lighting might be, it would nonetheless be artificial and would not replicate natural daylight or sunlight. Although not a main habitable room, such as a lounge or bedroom, these circumstances would nevertheless not be conducive to use of this room as a gym or for any other living accommodation and be at odds with normal domestic living standards and expectations.
29. Though not suggested to me, I have considered whether a condition could restrict occupation of the basement so that it was not used as a habitable room, such as a second bedroom or a separate lounge (given the relatively restricted space in the kitchen/lounge and no apparent separate dining room).
30. However, the site would be in residential use so the Council would need to give 24 hours prior notice of an intended visit to inspect the basement room. It would also need to have reasonable grounds to do so. While it would not therefore be impossible for the Council to detect a breach of such a condition, the use of the basement as a habitable room could be concealed and it would, in any event, be unduly onerous for the Council to monitor compliance. Such a condition would not be reasonable, precise or enforceable and consequently would not meet all of the tests in the Framework and Planning Practice Guidance. In any event, such a condition would not be material to my findings on the first and second main issues above. It would not therefore be a

determinative factor in my consideration of the appeal or, therefore, alter my decision.

31. Considering the above, I find that the basement room would not be provided with adequate natural light. Accordingly, the proposal would not comply with condition M.2(1)(f) and it would have an unacceptable adverse effect on the living conditions of future occupiers.
32. It would also conflict with the Framework which seeks to create places with a high standard of amenity for future users.

Conclusion

33. The change of use sought would not comply with the relevant conditions required for conversion of Class E to C3, under the previous provision of the GPDO relating to Class M. Accordingly, prior approval should not be granted.
34. For the reasons given above, I therefore conclude that the appeal should not succeed.

Robin Buchanan

INSPECTOR