The Planning Inspectorate

Appeal Decisions

Site visit made on 28 January 2019

by Diane Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 March 2019

Appeal A, Ref: APP/Q1445/C/18/3195789
1 Bristol Street, Brighton BN2 5JT

- 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 D B Sussex Investments Ltd against an enforcement notice issued by Brighton & Hove City Council.
- The enforcement notice (Notice A) was issued on 9 January 2018.
- The breach of planning control as alleged in the notice is without planning permission, a material change of use from a dwelling house (C3)/House in Multiple Occupation (C4) to a 7 bedroom large House in Multiple Occupation (Sui Generis).
- The requirements of the notice are to cease the use of the property as a House in Multiple Occupation (Sui Generis).
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) of the Town and Country Planning Act 1990 as amended.

Appeal B, Ref: APP/Q1445/C/18/3199883
1 Bristol Street, Brighton BN2 5JT

- 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 Ms Laura Dwyer-Smith against an enforcement notice issued by Brighton & Hove City Council.
- The enforcement notice (Notice B) was issued on 19 February 2018.
- The breach of planning control as alleged in the notice is without planning permission, erected a single storey rear extension, rear dormer and 2 No front roof lights to facilitate unauthorised change of use from HMO (C4) to HMO (Sui Generis).
- The requirements of the notice are to remove the rear dormer.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decisions

Appeal A

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B

2. It is directed that the enforcement notice be corrected by:

   - The deletion of the words "material change of use" in the title to the notice;

- The deletion of the words in the allegation and the substitution with "Without planning permission, the erection of a single storey rear extension, a rear dormer extension and one front roof light";
- The deletion of ten years and the substitution of four years within paragraph 4.1 of the notice; and
- The deletion of paragraphs 4.3 and 4.4.

Subject to these corrections the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the erection of a single storey rear extension, a rear dormer extension and one front roof light.

Preliminary Matters

3. No 1 Bristol Street is an end of terrace property. It adjoins No 3 Bristol Street where the Council have also issued a notice alleging a material change of use to a large HMO. An appeal[1] has been made in respect of this notice which is the subject of a separate decision.

4. At the site visit I saw that there were seven bedrooms within the building, all of which appeared to be occupied, although I was only able to access six of them. There were also two bathrooms and an extension to the open plan kitchen area that included two sofas, a fridge freezer and a coffee table.

Notice B

5. A notice must enable every person who receives a copy to know exactly what in the Council's view constitutes the breach of planning control. It is not clear in this instance as the notice is headed "Material Change of Use" but the allegation refers primarily to operational development, which facilitates a material change of use to a large HMO. Also, the reasons for issuing the notice state that the breach has occurred within the last ten years, rather than four years, and refer to harm from the operational development as well as the material change of use. In addition, the only requirement is to remove one aspect of the alleged operational development. This suggests the Council would be under enforcing in respect of the material change of use as well as in respect of the single storey extension and the roof light.

6. I do not believe under enforcing in respect of the use was the Council's intention as Notice B was the second notice issued in respect of this property. Notice A, issued the previous month, dealt with the alleged material change of use to a large HMO. It is clear from the appellants' submissions for both appeals that they understand there are two breaches of planning control, namely a material change of use and operational development. The latter is stated by the Council to have taken place less than four years before Notice B was issued and this is not disputed by the appellants.

7. As such, I find that Notice B could be corrected and varied to deal explicitly with the alleged operational development, which would bring clarity to the notice overall and would not cause injustice to either party. In particular, it is necessary to clarify the terms of the deemed application under section 177(5)

[1] Ref APP/Q1445/C/18/3195793

of the 1990 Act as amended. I will deal with Appeal B on the basis of the corrected notice.

Appeal B, ground (c)

8. This ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. In this case the appeal is limited to the rear dormer extension. A breach of planning control comprises the carrying out of development without the required planning permission. Under a ground c) appeal the onus of proof is on the appellant to show that there has not been a breach of planning control.

9. There is no dispute that the rear dormer extension comprises development within the meaning of section 55 of the Act for which section 57 says planning permission is required. The appellant submits that the extension benefits from the permission granted by Article 3 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO). Article 3 grants planning permission for classes of development in Schedule 2 to the GPDO and Part 1 to Schedule 2 addresses development within the curtilage of a dwelling house. In addition, the appellant refers to advice issued to Inspectors by The Planning Inspectorate in 2014 that states HMOs, both those that fall within Use Class C4[2], known as small HMOs, and large sui generis HMO uses, benefit from permitted development (PD) rights provided the use of the property is considered to be as a dwelling house. Moreover, the Council's website confirms that it has adopted this approach.

10. The works for the extension began in January 2016, according to Building Control records, and a completion certificate was issued in July 2016. The layout and use of the property as a large HMO was first noted by the Council in May when an officer saw there were seven bedrooms of which five were occupied. A tenant told the officer that the rooms were available through the Brighton Accommodation Agency and that two were available to rent. Then in June 2017 Council Tax records show occupation by seven persons. The appellant does not take issue with this evidence from the Council but claims that the property was in use as a C4 HMO when the extension was built. As the use of the property had the character of a dwelling house the extension therefore benefits from PD.

11. The Council's position is that the extension was built to facilitate a material change of use to a large HMO and was part and parcel of a single operation to convert the property. As such, it does not benefit from PD. Their timeline of events provides support for this position. After work began on the extension an application was submitted on 5 February 2016 for a new HMO licence for seven people and in June 2016 the HMO licence was issued with a commencement date of 23 June 2016.

Assessment

12. In the first instance, the advice issued to Inspectors is to help Inspectors determine appeals effectively and with consistency. It does not constitute Government policy or guidance and it does not seek to interpret Government policy or legislation.

[2] Town and Country Planning (Use Classes) Order 1987 C4 Houses in Multiple Occupation

13. Secondly, it is not a condition of qualifying for Part 1 PD rights that a dwelling house is of a particular type or used in accordance with Use Class C3 Dwellinghouses. The advice states that it is *likely* (my emphasis) that a dwelling house in use as a small HMO would fit within the GPDO definition and benefit from PD rights. With regard to larger HMOs, it is a matter of fact and degree as to whether they meet the definition of a dwelling house for Part 1 purposes. The distinctive characteristic of a dwelling house is its ability to afford to those who use it the facilities required for day to day private domestic existence. Provided that the premises are in use as a dwelling house, PD rights would *normally* apply to large HMOs.

14. However, it is my view that the extension would only benefit from PD if it was solely to enlarge the dwelling house. From the timeline of events, and the three sets of plans[3] enclosed with the Council's statement, this would not appear to be the case; rather the extension formed part of a project, which included physical works, in order to achieve a material change of use to a large HMO.

15. Prior to the works taking place the layout of the property is shown as a lounge, dining room and kitchen on the ground floor with three bedrooms and a bathroom on the first floor. The annotation on this drawing is "AS surveyed…October 2015".

16. The first HMO licence for the property was given in 2008 and permitted a maximum of five people. This appears to be consistent with the 2015 layout of the property as the lounge could have been used as a bedroom and the first floor front bedroom was large enough to be occupied by two people. It is unlikely that the dining room was used as a bedroom as this provided access to the kitchen. Whilst there may have been subsequent HMO licences it is unlikely that the maximum number of occupiers would have exceeded five given the constraints of the building at the time.

17. The next set of plans, entitled "Pre-existing plans" and dated November 2016, show the layout of the property to have changed. A corridor has been created from the front door to the kitchen and the ground floor is now laid out as two bedrooms with a new bathroom between them and the kitchen has been extended to accommodate a dining area. On the first floor there are still three bedrooms but the main bedroom has been reduced in size to accommodate the re-located bathroom and there is *one* bedroom shown within the loft area. However, this appears to be inconsistent with the application submitted for Building Regulation approval in 2015 which describes the development as "Proposed conversion of loft space to form habitable *rooms* with dormer to rear and roof light to the front roof slope".

18. Whilst according to Council Tax records, occupation by six persons occurred between 26 September 2016 and 31 May 2017, the building and conversion works resulted in a large HMO that was available to let through the letting agency. The rooms were seen by a Council officer in May 2016, when there were only five occupiers. A Building Control completion certificate was issued in July and this confirms that the application as applied for has been completed in accordance with the Regulations.

[3] Submitted with the application made in November 2016 described on the decision notice as the material change of use of the property from 6 bedroom house in multiple occupation to 7 bedroom house in multiple occupation, retrospective, ref BH2016/06114.

19. It has been held in case law that in assessing when a material change of use has taken place, the physical layout of premises is important but it is not decisive. The actual, intended or attempted use is also important but again is not decisive as these matters have to be looked at in the round. This is because a material change of use can take place before the premises are used in the ordinary and accepted sense of the word. In some cases operations are undertaken to convert premises to residential use and they are then put on the market as being available to rent. Nobody is using these premises in the ordinary connotation of the term because they are empty but there has plainly, on those facts, been a change of use. I consider this is what has happened at the appeal site.

20. With regard to the physical state of the premises, Building Regulation approval was sought and given for the works. I have not been advised by either party that there was any other Building Regulation application for a single room within the loft or that the approved application was amended to a single room. The intention of the appellant appears to have been to create two bedrooms within the loft from the outset. I find that this intention is reinforced by the HMO licence application submitted in February, when presumably the building works were on-going. In addition, intent is evident from the tenant's remarks to the Council officer, that the building was a large HMO available to rent. Whilst the appellant submits that the "property benefits from having a HMO licence", on close inspection the licence states there are seven sleeping rooms but limits the maximum number of people permitted to occupy the HMO to six persons.

21. For these reasons it is my overall conclusion that insufficient evidence has been produced by the appellant to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. On the basis of all the submissions I find the extension does not benefit from PD as the act of constructing it was, in fact, the necessary operational development to convert the property into a larger HMO. The appeal on ground (c) therefore fails.

Appeals A and B, the ground (a) appeals and the deemed planning applications

22. From the wording within Notice B it is clear that the Council do not object to the single storey rear extension or the insertion of one front roof light. These elements of the allegation are not in contention between the parties and I find them to be acceptable as they accord with Policy QD14 of the Council's local plan (LP)[4].

Main issues

23. The main issues for Appeal A are the effects of the use on i) the living conditions of existing and future occupiers, having regard to the standard of accommodation; and ii) the living conditions of neighbouring occupiers, having regard to noise and disturbance.

24. The main issue for Appeal B is the effect of the rear dormer extension on the character and appearance of the host property and the surrounding area.

[4] Brighton & Hove Local Plan 2005, saved.

Living conditions – standard of accommodation

25. The appellant submits that the size of the rooms is sufficient. There are no planning standards published by the Council for either the size of communal living space in HMOs or space standards for any other residential use. Five of the bedrooms offer accommodation in excess of 7.5sqm which is the minimum size for a single bedroom as set by the Technical housing standards – nationally described space standard (NDSS). This matter has been dealt with by two previous Inspectors[5] in respect of similar properties in Brighton and the appellant relies on their conclusions. These are that the property is aimed at the short term rental market rather than longer term occupiers where higher standards might be necessary and the issue of a HMO licence indicates that the accommodation is suitable, albeit that is in respect of the Housing Act 2004.

26. The Council submit that the NDSS can be used for comparative purposes in the absence of any other planning standards for HMO use. However, standards for HMO licences serve a different purpose, namely ensuring accommodation meets a minimum standard for human habitation whereas planning space standards for dwellings were created to ensure that new homes are of a high quality, accessible and sustainable. These aspirations accord with the National Planning Policy Framework (the Framework) requirement for a high standard of amenity for existing and future occupiers.

27. The principal points at issue in respect of the layout of the large HMO are the size of the front bedroom within the loft and the size of the kitchen/dining area. In the absence of any specific minimum planning space standards for large HMO uses, a starting point could be the standards for HMO licensing. However, this would be to ignore the requirements of the new Framework and as such, the NDSS are more appropriate, even though they have been drawn up for new dwellings.

28. These specify a minimum floor area of at least 7.5 sqm for a single bedroom. Any area with a headroom of less than 1.5m is not counted within the gross internal area (GIA) unless used solely for storage and the minimum floor to ceiling height should be 2.3m for at least 75% of the GIA. The appellant's plans show that the loft front bedroom has a minimum GIA of 6.5 sqm over 1.5m in height. Whilst this is 1 sqm less than the standard, it is noted these are minimum standards and as such, the shortfall is significant. Furthermore, at the site visit I found this room to be very cramped and oppressive, mainly due to the large expanse of sloping ceiling which led me to conclude that 75% of the floor area was most likely not over 2.3m in height. The room is furnished with a double bed, a sink, a wardrobe and a narrow desk and other than standing directly in front of the sink or the wardrobe there was little space to stand up straight. For these reasons it is concluded that this room does not provide an acceptable standard of accommodation, as required by Policy QD27 of the LP.

29. The kitchen and dining area are shown on the plans to be 17.2 sqm in total with the kitchen having a galley layout. At the site visit though I saw that the dining area provides access to the garden and is furnished with 2 No two seater sofas, a coffee table and a large fridge freezer, with very little space to move around them. As the bedroom above the kitchen is shown on the plans to be 9 sqm in area, I estimate the sitting area to be 8 sqm. There is no minimum

[5] Appeal references: APP/Q1445/W/16/3150798 and APP/Q1445/W/15/3140528

space standard for kitchens within the NDSS but the minimum space required for a HMO licence for seven occupiers is 9 sqm for a kitchen without dining facilities and an additional 10 sqm for a separate dining area. There are no requirements for a lounge.

30. The Council are concerned that the available space would not be sufficient for seven residents to cook, consume food and to relax. However it is unlikely that seven residents would carry out these activities at the same time. Nevertheless, whilst the kitchen appeared to be large enough for all the necessary fittings, including a hob, oven, washing machine, dishwasher, units and worktops, there is insufficient space for the required second fridge freezer as this has been sited in the dining/lounge area.

31. The previous appeal decisions relied upon by the appellant to support his case can be distinguished from the current appeal in that they were made before the current version of the Framework. In addition, in each HMO in those cases, for seven and eight persons each was provided with a kitchen and dining area amounting to 20 sqm. It is my view that the communal space at the appeal site falls below minimum standards as set out in the HMO licensing requirements and the expectations in the Framework. This results in a poor standard of accommodation and is therefore harmful to existing and future occupiers.

32. The appellant relies on the fact that the property is aimed at the short term student market rather than longer term occupiers. Whilst there is no guarantee that the manner of the HMO use would remain as a student let, the appellant's position fails to take into account the latest guidance in the Framework. This is that decisions should ensure developments will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development. For these reasons it is concluded that overall the development causes harm to the living conditions of existing and future occupiers, having regard to the standard of accommodation and is therefore contrary to Policy QD27.

Living conditions – noise and disturbance

33. It appears that the property has been occupied as a small HMO for a number of years and from the planning history and an earlier HMO licence, occupation was limited to a maximum of five people. Use as a large HMO began in 2016. The appellant submits that the additional two occupiers have not resulted in an unacceptable increase in noise and disturbance and relies on five appeal decisions[6] to support his case.

34. Two of these five appeal properties lie within the City's Article 4 Direction Area, where the Council seeks to exercise more control over developments for HMO use as the residential balance of the neighbourhoods has changed. It is not known whether the other three appeal properties are within the Article 4 Area but what is clear from all these decisions is that the number of HMOs within a 50m radius of each appeal site varied between 26% and 37%. This is significantly higher than the 3.7% found near the current appeal[7] and I consider that this indicates a material difference in the character of these areas

[6] References: APP/Q1445/W/16/3150798, APP/Q1445/W/15/3140528, APP/Q1445/W/16/3142291, APP/!1445/W/16/3162725 and APP/Q1445/W/6/3165693

[7] The Council's mapping exercise found 108 properties within a 50m radius of the appeal site of which 3.7% were in use as either a small or large HMO.

compared to the current appeal. As such, these decisions can be distinguished from the current appeal, where there are still a significant number of family houses in the immediate area, and which is described by neighbours as being quiet, at some distance from the busy main road.

35. The initial change to a small HMO would have altered the character of this area with more comings and goings from the property and patterns of behaviour different from typical occupants of a family dwelling. That change may have been minimal in terms of its impact or more significant but over time, this change to the character of the area has been absorbed. However, it is my view that use by an additional two occupiers, whilst on paper appears insignificant, in reality has had an unduly harmful effect on the living conditions of neighbouring occupiers, having regard to noise and disturbance. This is because, in part, the predominant character of the area in the vicinity of the appeal site remains as family housing and the terraced layout of the buildings with small front gardens means that activities associated with the large HMO use are more noticeable. This is evident from the details submitted by third parties. These include at all hours the comings and goings by taxi, frequent food deliveries, doors slamming and anti-social behaviour. I consider these activities arising at day and night time from two additional occupiers over and above the existing small HMO use to be more than significant.

36. Third parties have raised other objections to the use including the presence of rats, excessive rubbish and the loss of family housing. However the first two matters are dealt with through other means and there is no loss of family housing as the property was already in use as a small HMO.

37. The appellant submits that the property could be occupied by up to six unrelated individuals as a small HMO and therefore what should be taken into account is the effect of just one additional occupier. However, I give only limited weight to this submission as it could be repeated in respect of a number of HMOs, as indeed it has been in relation to the appeal at No3 Bristol Street. This creeping and incremental change would result in harm to the living conditions of neighbouring occupiers.

38. In conclusion, detailed evidence has been put forward to demonstrate the harmful effects of a large HMO use on the living conditions of third parties who all live in close proximity to the site. Whilst it is not known whether all the evidence is directly attributable to the change of use that has occurred at the appeal site, as opposed to No 3 Bristol Street, it is my view that it warrants considerable weight given the location of the third parties, the particular details of the evidence and the character of this residential area. For these reasons I find the development results in harm and is therefore contrary to Policy QD27 of the LP. The appeal on ground (a), Appeal A, fails.

Character and appearance

39. The character of the area is largely residential and the appearance is that of attractive Victorian housing interspersed with later post war housing sited on rising ground. The dormer extension at the appeal site is visible from a housing estate to the rear from where it is possible to see not only the appeal site but the majority of the terrace comprising 13 houses and a pair of semi-detached houses that make up this side of Bristol Street. There are four other extensions similar to the appeal site. Each property has a half width, two storey addition and the dormer extensions appear as third storeys, extending

as they do generally from the ridge to the eaves and to each side wall. Some appear to have been built a while ago and others may have been built as permitted development (PD).

40. Nevertheless, where express planning permission is required, Policy QD14 from the LP requires them to be well-designed in relation to the property to be extended, adjoining properties and the wider area. In addition, the Council's Supplementary Planning Document stipulates that they should be a subordinate extension to the roof and not substantially larger than the dormer window itself.

41. The extension at the appeal site is an extremely large addition to the roof due to its height, depth and width. It appears top heavy on this end of terrace property and is a significant alteration to both the roof and the overall appearance of the rear elevation. Any semblance of the original roof is now lost. It is visible in long distant views from the estate to the rear and is a dominant feature overlooking the narrow light well between it and No 3. For these reasons the dormer extension is not well-designed in relation to either the host building or the surrounding area due to its scale, style and form.

42. The appellant submits that large dormer windows are now characteristic of the area around the appeal site. As such, the dormer at the appeal is appropriate. However, whilst I saw similar dormer extensions to houses in the vicinity, their low number means that they have not become a characteristic feature of the area which would result in a finding that the dormer at the appeal site was acceptable.

43. It is therefore concluded that the dormer extension has an adverse effect on the character and appearance of the host building and the surrounding area. It therefore does not accord with Policy QD14.

Fall back

44. The appellant submits that if the dormer extension were found to be unacceptable, he has a fall back position of being able to exercise his PD rights to replace it. This is on the basis that he ceases the use of the property as a large HMO and resumes the small HMO use. He would then re-build the dormer to the same size and design to provide a sixth bedroom. This would be PD as the sixth bedroom would benefit the property as up to six unrelated individuals may occupy a small HMO. It would not be erected to enable a material change of use. I consider there is a real prospect that the fall back position would be implemented given the planning history of the property and my conclusion on the ground (a) appeal in respect of the material change of use to a large HMO. It is therefore a material consideration in the determination of this ground (a) appeal to which I attach substantial weight.

45. The fall back dormer extension would have the same effect on the character and appearance of the area as the unauthorised development. In the circumstances of this appeal I consider the fall back position is a strong justification for making a decision in respect of the unauthorised dormer extension, which is not in accordance with the development plan, and for the ground (a) appeal to succeed. No conditions have been suggested by the Council in the event of planning permission being granted for the dormer extension. As it was substantially complete when the notice was issued, none are necessary.

46. Given my findings on Appeal B, ground (a), the appeals on grounds (f) and (g) do not fall to be considered.

Appeal A, ground (g)

47. The ground (g) appeal is that the time given to comply with the requirements of the notice is too short and the appellant requests that the three month period be increased to allow for the expiration of the tenancy agreement. At the time the appeal was submitted the three month compliance period appeared to be too short and the appellant was concerned that complying with the notice would not allow for the appropriate notice period and rehousing of the tenants. However, most higher education institutions will have finished their summer terms by the time this decision is issued and the three month compliance period expires. I therefore consider three months is a reasonable time to comply with the notice. The appeal on ground (g) therefore fails.

Conclusions

Appeal A

48. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Appeal B

49. For the reasons given above I conclude that the appeal should succeed on ground (a) and I will grant planning permission in accordance with the application deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation.

D Fleming

INSPECTOR