The Planning Inspectorate

Appeal Decision

Site visit made on 28 February 2019

by Sandra Prail MBA, LLB (Hons), Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 25 March 2019

Appeal Ref : APP/Q1445/C/18/3198449
Land at 55 Hartington Road, Brighton, BN2 3LJ.

- 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 Mr Andrew Marchant against an enforcement notice issued by Brighton & Hove City Council.
- The notice was issued on 5 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 2no front rooflights to facilitate unauthorised change of use from HMO (C4) to HMO (Sui Generis).
- The requirements of the notice are to remove the single storey extension from the rear outrigger, remove the rear dormer, remove the 2no front rooflights.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: the appeal is allowed and the enforcement notice is quashed.

Ground (b) appeal

1. This ground of appeal is that the alleged breach of planning control has not occurred as a matter of fact. The burden of proof rests upon the Appellant and the test of evidence is the balance of probabilities.

2. The Appellant says that there have never been 2 rooflights on the front elevation. He says that there has always been one single rooflight within the front roofslope. The Council makes no comment on this ground of appeal.

3. The Appellant's evidence does not need to be independently corroborated in order to be relied on and in this case there is no contradictory evidence before me to cast doubt upon it. It is also consistent with the site as I observed it at my site visit.

4. I conclude as a matter of fact that the alleged breach of planning control comprising 2 no front rooflights has not occurred as a matter of fact and to this extent this ground of appeal succeeds.

5. It is open to me to correct the notice if doing so would not cause injustice to either party. I am satisfied that no injustice would be caused and therefore I shall exercise my power of correction and consider the deemed planning application in the ground (a) appeal which will now relate to the corrected allegation, if appropriate.

Ground (c) appeal

6. This ground of appeal is that the matters alleged do not constitute a breach of planning control. A breach of planning control comprises the carrying out of development without planning permission. The meaning of development in section 55 of the 1990 Act is the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land. In this case the notice alleges specific operational works to facilitate an unauthorised change of use from HMO(C4) to HMO (sui generis) and its requirements concern removal of the operational works.

7. The onus rests upon the Appellant to show that on the date of issue of the notice either there was a planning permission in place for the development the subject of the notice or that it benefits from permitted development rights. He argues that the property is in its lawful C4 use and that therefore the works do not facilitate an unlawful change of use, that the works benefit from planning permission by virtue of previous underenforcement and that the rear dormer and rooflight benefit from permitted development rights.

Change of use

8. The Council argue that the development sequence in this case indicates that the physical works cited in the notice were necessary to facilitate a change of use to a large HMO. It follows they argue that as the physical works were part and parcel of a change of use permitted development rights within the GPDO do not apply and planning permission is required for the development as a whole. They draw to my attention a body of case law including Murfitt[1], Somak Travel[2], Bowring[3] and Kestrel Hydro[4]. But these cases concern the power to remedy a breach of planning control and do not support an argument that permitted development rights do not apply in this case. They also draw attention to a number of appeal decisions but I do not know the particular circumstances of these sites and none appears to be on all fours with the facts in the appeal.

9. I have considered the evidence before me as to the sequence of events. It shows that the use of the site as a large HMO has ceased. The works are therefore not currently facilitating an HMO sui generis use and I am not satisfied that the works were part of parcel of the previous HMO use. I note that Building Control records indicate that works involving the dormer, rear extension and internal works were undertaken together but I do not have the detail before me and this is not conclusive as to whether the works were integral to a large HMO use. On the evidence before me I cannot be certain that the operational works were carried out solely to facilitate a change of use to a large HMO.

Rear extension and roof alterations

10. An enforcement notice was issued in 2017 (the 2017 Notice) requiring the use of the appeal site as a sui generis large HMO to cease. It did not require the removal of any operational works including the works the subject of this notice.

[1] Murfitt v Secretary of State and East Cambridgeshire DC (1980)
[2] Somak Travel Ltd v SoS (1988)
[3] Bowring v SoS (2016)
[4] Kestrel Hydro v SoS (2016)

11. Section 173(11) of the 1990 Act provides that where an enforcement notice in respect of any breach of planning control could have required any works to be removed but does not do so and all the requirements of the notice have been complied with then so far as the notice did not so require planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities. In this case the 2017 Notice did not require the removal of the rear extension which was in place at that time and there is no dispute that the 2017 notice has been complied with. It therefore follows that planning permission shall be treated as having been granted for the works the subject of the under enforcement. The Council puts no counter argument before me on this point.

Rear dormer and rooflight

12. The Appellant argues that the rear dormer and rooflight benefit from permitted development rights by virtue of Schedule 2 Part 1 Class B and Class C respectively of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO). There is no evidence before me from the Council to suggest that the conditions and limitations of Class B and C are not met and I have no reason to conclude otherwise. I conclude that the rear dormer and rooflight benefit from permitted development rights and therefore do not comprise a breach of planning control.

13. For the reasons given I conclude that the appeal should succeed on ground (c). Accordingly the enforcement notice will be quashed and there is no need for me to correct it in accordance with my conclusions on appeal (b) before doing so. In these circumstances the appeal under grounds (a), (f) and (g) including the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decision

14. The appeal is allowed and the enforcement notice is quashed.

S.Prail

Inspector