The Planning Inspectorate

Appeal Decisions

Site visit made on 12 March 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 08 April 2019

Appeal Refs: APP/Q1445/C/18/3199550 & APP/Q1445/C/18/3200674
Land at 8 Roedean Terrace, Brighton BN2 5RN

- The appeals are 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 and Mrs Laura and Jonathan Dubiner against an enforcement notice issued by Brighton & Hove City Council.
- The enforcement notice was issued on 5 March 2018.
- The breach of planning control as alleged in the notice is, without planning permission, the change of use of an outbuilding in the front garden from use ancillary to the dwelling to use as self-contained residential house (C3).
- The requirements of the notice are:
  - cease use of the outbuilding as a self-contained residential (C3) use
  - reinstate a garage door to the southern elevation of the outbuilding in accordance with drawing 103(G), dated 7th September 2016, of planning consent BH2016/05524.
- The period for compliance with the requirements is three (3) months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decisions: the appeals are dismissed and the enforcement notice is upheld with corrections and a variation

Procedural Matters

1. The breach of planning control alleged in the notice is, without planning permission, the change of use of an outbuilding in the front garden from use ancillary to the dwelling to use as self-contained residential house (C3). However, Section 55(1) of the Town and Country Planning Act 1990 (the 1990 Act) defines development as including the making of any *material* change in the use of any buildings or other land (my emphasis). It follows that a simple change of use, as described in the notice, would not constitute development and accordingly would not require planning permission.

2. It is, nevertheless, evident that the Council intended to allege a material change of use of the outbuilding to use as a self-contained residential house. It is also apparent that the appellants have understood this to be the case and have sought to test that through appeals under ground (b) and ground (c) under section 174(2) of the 1990 Act. I am therefore satisfied that I can correct the notice to refer to a material change of use without causing injustice.

3. In addition to various internal works, the conversion of the outbuilding includes an alteration to the outbuilding comprising the construction of a largely glazed front elevation. It is a matter for the local planning authority to determine whether the construction of the glazed front elevation constitutes development

for the purposes of Section 55(1) of the 1990 Act but I note that the notice confines itself to alleging that a (material) change of use has occurred. There is no reference in the allegation at paragraph 3 of the notice to any operational development as defined in Section 55(1) of the 1990 Act.

4. The reasons for issuing the notice set out in paragraph 4 of the notice include, at paragraph 4(3), the effect of the glazed frontage on the character of the outbuilding and its effect on the street scene. However, the reasons for issuing the notice can only relate to the breach of planning control that is alleged. Consequently, because the notice does not allege any operational development, the reason at paragraph 4(3) of the notice is neither appropriate nor necessary. The notice is therefore invalid in that respect.

5. Deleting the reason at paragraph 4(3) would completely correct that defect in the notice. It is settled case law that development which facilitates the unauthorised use of a building can be removed through an enforcement notice even if those works are not specifically referred to in the alleged breach of planning control and do not in themselves constitute development for the purposes of section 55(1) of the 1990 Act. This would not be affected by deleting paragraph 4(3) and the Council would therefore not be caused injustice. Clearly, insofar as it would remove one of the obstacles to securing planning permission under ground (a), deleting paragraph 4(3) would not cause the appellant injustice. I am therefore satisfied that I can correct the notice by deleting the reason for issuing the notice set out in paragraph 4(3).

The appeal on ground (b)

6. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters have not occurred. It may be noted that this ground of appeal is worded in the past tense: that is to say, an appeal on this ground cannot succeed if the breach of planning control alleged had occurred before the notice was issued, even if that breach of planning control was not continuing at the time the notice was issued or has ceased subsequently.

7. The appellants explain that the property is currently let out to students, and provides a copy of the Assured Shorthold Tenancy Agreement (AST). The AST is explicit in stating that the outbuilding is to be treated and occupied by the tenants as accommodation ancillary to the main house and not as a separate unit of accommodation. The AST goes on to state in terms that assigning or subletting the outbuilding is expressly forbidden by that agreement. The intentions of the appellant are therefore abundantly clear, and the AST confirms that the outbuilding is intended to remain ancillary to the main dwelling.

8. The terms of the current AST do not, however, necessarily mean that the outbuilding has not been used as a self-contained residential house at some point in the past. In that context, I noted at my site visit that the outbuilding provides a fully equipped kitchen and bathroom that comprises a shower and a toilet (shower room). There is also a living space in which the occupiers can relax, with seating and a television. At the time of my site visit, there was no bed in the outbuilding but the room at the rear contained a wardrobe. It therefore appeared to me that this room was set up for use as a bedroom, and I cannot discount the possibility that it had been so used at some point in the past.

9. I have been provided with a copy of the Planning Officer's report which recommended that enforcement action be initiated. The report records that the accommodation within the outbuilding included a bedroom at the rear. The date on which the officer visited the premises is recorded as being 2 October 2017. It would appear, therefore, that the facilities within the accommodation at the time of the officer's site visit were different to those at the time of my site visit, and did include a bedroom. The corollary is that, in October 2017, the outbuilding did provide all the facilities require for day-to-day living.

10. The Planning Officer's report also reveals that the Council received a total of seven complaints about the alleged use. That number of complaints, which I note were from separate complainants, is a strong indication that there was some force behind the allegation made therein that the outbuilding was being used as a self-contained residential house.

11. Furthermore, I note that the appellants supplied an AST to the Council at the time of its investigation but that the AST supplied at that time appears to be a different agreement to that provided with the appellant's evidence for this appeal. The latter is dated 14 July 2018, and therefore post-dates the issuing of the enforcement notice. That AST lists four tenants individually by name.

12. Although I have not been provided with a copy of it, the AST provided to the Council at the time of the investigation of the complaints is recorded in the Planning Officer's report as showing a total of five occupiers, only two of which are identified by name. The agreement provided to the Council is therefore more consistent with the outbuilding potentially being occupied as a separate residential unit by the fifth occupier listed on the AST. Moreover, whilst I cannot be certain that the AST provided to the Council during its investigation was that in force at the time the enforcement was issued, I can be certain that the AST provided with the appellant's evidence was not. This reduces the reliance that I can place on the current AST and the wording of it.

13. Finally, the Planning Officer's report indicates that the outbuilding has been listed separately from the main house for Council Tax purposes since September 2017, this under the address of 'Annexe at 8 Roedean Terrace, Brighton BN2 5RN'. Although not in itself determinative, the separate listing for Council Tax is a further indication of separate residential use. I am also mindful that the date of the Council Tax listing is consistent with the receipt of the first complaint in August 2017.

14. Whilst not substantiated with evidence, the commentary in the Planning Officer's report is sufficient to cast doubt on the version of events put forward by the appellants. An appeal is ground (b) is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice have not occurred. When read against the details set out in the Planning Officer's report, I am not persuaded that the appellants have discharged that burden.

15. Accordingly, the appeal on ground (b) fails.

The appeal on ground (c)

16. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. This is another of the 'legal' grounds of

appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.

17. In considering whether a material change of use has occurred in this case, it is necessary to consider whether a new planning unit has been created. The leading authority in this respect is *Burdle v SSE* [1992] 1 WLR 1207. The test established in *Burdle* may be expressed as being whether, physically and functionally, separate areas have been created which amount to a separate planning unit. In order to ascertain whether a separate planning unit has been created in this case, I must apply the tests in *Burdle* to the facts.

18. The appellant points out that planning permission was granted in November 2016 for the conversion of the existing garage into ancillary accommodation with external alterations and rear extension (Council Ref: BH2016/05224). The approved plans show an internal configuration comprising two rooms: the larger room is annotated as being a study, with the smaller room at the rear of the building described as being a garden store. The front elevation is shown as a conventional garage door. In the event, the development as constructed substituted a glazed frontage for the garage door.

19. Section 55(2) (a)(i) of the 1990 Act provides that the maintenance, improvement or other alteration of any building which affect only affect the interior of the building shall not be taken to involve development of the land. However, in this case, the internal works carried out to the outbuilding divide the space into separate rooms which in turn facilitate the use of those rooms for sleeping, living and bathing. In other words, without those works, the use alleged in the notice and which I have found to have occurred as a matter of fact could not have occurred.

20. I have already found then that, on the balance of probability, the use of the outbuilding as self-contained residential house has occurred. Although there is no physical boundary separating the outbuilding from the main dwelling, the outbuilding is physically self-contained. It provides, or has provided, all the facilities necessary for day-to-day living within its four walls. It can be accessed from Roedean Terrace without having to gain access to the main dwelling, and I have been provided with no evidence that the occupiers of the outbuilding are or would be in any way dependent upon the main dwelling.

21. Applying the tests in *Burdle* to these facts, I consider that the outbuilding is both physically and functionally separate from the main dwelling. I therefore conclude, as a matter of fact and degree, that a new planning unit has been created.

22. I note that the Council has granted planning permission for an outbuilding at a property known as 'The Outlook' and the layout proposed included a kitchen and a toilet (Council Ref: BH2010/01264). The floor plans for that permission with which I have been provided show the remaining space as being a hobby room and a play/party room and not, as the appellant contends, a separate bedroom and combined lounge/dining room. Moreover, the permission was subject to a condition that the accommodation shall only be used as ancillary accommodation in connection with the main property as a single private dwellinghouse.

23. The salient point, however, is that unlike the appeal property, there is no indication that the outbuilding at 'The Outlook' has been used for anything other than ancillary accommodation to the main dwelling. It follows that there is no reason for me to believe, and the Council does not assert, that a separate planning unit has been created in that case. Consequently, although there are similarities in terms of the accommodation provided, the situation in relation to 'The Outlook' can be distinguished from the outbuilding in this case on the basis of the use to which that accommodation has been put.

24. Similarly, the judgement in *Uttlesford District Council v Secretary of State for the Environment and another* [1992] JPL 171 can be distinguished on its facts from the situation in this case. In *Uttlesford*, although the accommodation in question included a bedroom, a bathroom and a kitchen, it was found as a matter of fact and degree that the accommodation was being used for purposes incidental to the main dwelling. As a consequence, it was found, again as a matter of fact and degree, that the accommodation in question and the main dwelling formed a single planning unit.

25. I have also been referred to an appeal decision relating to a property in Chichester, West Sussex, in which the Inspector quashed an enforcement notice alleging the change of use of a building to a single dwellinghouse (APP/L3815/C/16/3159037 & 3161113). In that case, the Inspector found as a matter of fact that a physically and functionally separate dwellinghouse had not been created. This led the Inspector to the conclusion that the alleged change of use to a single dwellinghouse had not occurred, and the appeal succeeded on ground (b). Again, the Inspector's decision in that case can be distinguished from the situation in this case on its facts.

26. I conclude that the use of the outbuilding alleged in the notice has resulted in the creation a separate planning unit which is physically and functionally separate from the main dwelling, and as such requires planning permission. The use does not constitute development permitted by the Town and Country Planning (General Permitted Development) (England) Order 2015, and express planning permission has not been granted for that use. I therefore conclude that the breach of planning control stated in the notice does constitute a breach of planning control.

27. Accordingly, the appeal on ground (c) fails.

The appeal on ground (a) and the deemed planning application

28. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. There is one remaining substantive reason for issuing the enforcement notice from which the main issue raised is whether the outbuilding provides an adequate standard of living accommodation for the occupiers.

29. The Council does not operate its own minimum space standards but instead relies upon the Technical Housing Standards – National Described Space Standards (NDST) published by the Department for Communities and Local Government in March 2015. The minimum floorspace for a one bedroom, one person dwelling is 37m² where, as in this case, the dwelling has a shower room instead of a bathroom. The Council calculates that the outbuilding as converted has a floor area of 27m², and therefore some 10m² below the minimum for a dwelling set out in the NDST. The appellant does not dispute

that figure. I consider that this significant shortfall against the minimum standard set out in the NDST results in cramped accommodation for the occupiers, particularly in the bedroom and the shower room.

30. The glazed frontage has the benefit of providing good levels of natural daylight to the main living space within the outbuilding, as well as providing a good outlook from that space. The difficulty is that, when the blinds to the glazed frontage are open, views into the living space may be obtained from public land and by occupiers of main dwelling when gaining access to that property, such that the space has little privacy. Conversely, when the blinds are drawn closed, the natural light into outbuilding is significantly eroded and the outlook from that main space is lost. As a consequence, whether the blinds are open or closed, the quality of the living accommodation in terms of light, outlook and privacy is unacceptably compromised.

31. In addition to providing only limited space, the bedroom to the rear is not well served in terms of light or outlook. This compounds the poor quality of the living space at the front of the outbuilding.

32. The outbuilding faces onto Roedean Terrace and, beyond the road surface, onto an area used for car parking. To the side of the outbuilding is the path leading to the main dwelling. The outbuilding is therefore in a position in which it is affected by the activity generated by the surrounding residential properties, including movements by vehicles visiting and delivering to those properties. In view of the proximity of that activity, I consider that the living conditions of the occupiers of the outbuilding suffer from an unacceptable level of noise disturbance.

33. I conclude that the material change of use of the outbuilding to use as self-contained residential house results in an unacceptable standard of living accommodation for the occupiers in terms of living space, light, privacy and outlook. I therefore conclude that the breach of planning control is contrary to Policies HO5, QD27 and SU10 of the Brighton and Hove Local Plan. These policies indicate, amongst other things, that planning permission will not be granted for a change of use where it would cause material nuisance and loss of amenity to the proposed occupiers, or where the occupiers would be adversely affected by noise from existing uses.

Other considerations

34. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that use of the outbuilding as a self-contained residential house fails to accord with the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.

35. As the appellants point out, there is an acceptance within Policy CP1 of the Brighton & Hove City Plan Part One (City Plan) the city's housing delivery target does not match the objectively assessed housing requirement. Furthermore, there is an acknowledgment in the City Plan that there are very significant constraints on the capacity of the city to physically accommodate the quantum

of development required to meet the city's objectively assessed housing need. Part of the strategy for addressing the city's housing need envisages maximising development opportunities on previously developed land.

36. One of the objectives set out in the National Planning Policy Framework (Framework) is to significantly boost the supply of homes. In order to achieve that objective, the Framework promotes the effective use of land and indicates that substantial weight should be given to the value of sustainable brownfield land. In these respects, the Framework is therefore a material consideration that weighs in favour of the development.

37. However, I must balance that support for the development against other indicators of sustainable development set out in the Framework. These include that development should create places with a high standard of amenity for existing and future users. In that context, I have already found that the outbuilding provides an unacceptable standard of living accommodation for the occupiers.

38. Balancing these considerations, I consider that the poor quality of the accommodation provided by the outbuilding offsets the benefit in terms of providing a single additional residential unit towards meeting city's objectively assessed housing need. Consequently, I attach only limited weight to the benefit arising from the development in that respect.

Conclusion on the ground (a) appeal and the deemed planning application

39. For the reasons set out above, the breach of planning control alleged in the notice is contrary to the development plan. I have not been advised of any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.

40. Accordingly, I conclude that planning permission ought not be granted.

The appeal on ground (g)

41. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is three months.

42. The appellant points out that the current AST expires in August 2019 and requests that the period of compliance be extended to that date to allow for appropriate notice and rehousing of tenants. However, the AST is explicit in stating that the outbuilding is to be treated and occupied by the tenants as accommodation ancillary to the main house and not as a separate unit of accommodation. It follows that the reasons for extending the period for compliance put forward by the appellant do not apply, or at least should not apply if the terms of the AST are being adhered to.

43. Nevertheless, I can see some administrative merit in extending the period for compliance to correlate with the expiring of the current AST. I shall therefore vary the notice to specify a date for compliance of no later than 31 August 2019.

44. Accordingly, the appeal on ground (g) succeeds to that extent.

Conclusion

For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with corrections and a variation, and refuse to grant planning permission on the deemed applications.

Formal Decision

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

- inserting the word 'material' between the words 'Without planning permission the' and 'change of use' in paragraph 3 of the notice.
- deleting the reason for issuing the notice at paragraph 4(3) of the notice in its entirety.

46. It is directed that the enforcement notice be varied by:

- deleting the words 'Three (3) months after this notice takes effect' and substituting the words 'No later than 31 August 2019'.

47. Subject to those corrections and variation, the appeals are 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 Act as amended for the development already carried out, namely the material change of use of an outbuilding in the front garden from use ancillary to the dwelling to use as self-contained residential house (C3) at Land at 8 Roedean Terrace, Brighton BN2 5RN.

Paul Freer
INSPECTOR