The Planning Inspectorate

Appeal Decisions

Hearing held on 11 March 2014

Site visit made on 11 March 2014

by Mr Keri Williams BA MA MRTPI

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

Decision date: 17 April 2014

Appeal A: APP/Q1445/X/13/2208165
No.1 De Montfort Road, Brighton, BN2 3AW

- 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 K Keehan against the decision of Brighton & Hove City Council.
- The application Ref.BH2013/02539, dated 25 June 2013, was refused by notice dated 2 October 2013.
- 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 a class C3 residential use.

Summary of Decision: The appeal is dismissed and an LDC is not issued.

Appeal B: APP/Q1445/C/13/2204338
Land at no.1 De Montfort Road, Brighton, BN2 3AW

- 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 K Keehan against an enforcement notice issued by Brighton & Hove City Council.
- The Council's reference is 2012/0602.
- The notice was issued on 25 July 2013.
- The breach of planning control as alleged in the notice is a change of use from chapel (D1) to house in multiple occupation, use class sui generis, (more than 6 people).
- The requirements of the notice are to:
  1. Cease the use of the property for residential purposes.
  2. Remove all showers and baths.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (d) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed. The enforcement notice is corrected, varied and upheld.

Appeal C: APP/Q1445/A/13/2205364
No.1 De Montfort Road, Brighton, BN2 3AW

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr K Keehan against the decision of Brighton & Hove City Council.
- The application Ref.BH2013/00853, dated 18 March 2013, was refused by notice dated 24 June 2013.

- The development proposed is described as the "change of use of vacant building (former chapel) to HMO (sui generis).

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. In Appeal C the description of the proposal refers, in error, to a change of use to a *sui-generis* House in Multiple Occupation (HMO). The application was retrospective and was, in fact, for the current use of the building as an HMO for 6 people. The supporting statement with the application was on that basis, the submitted plans show a layout with 6 bedrooms and the HMO licence is for 6 people. I have therefore considered the appeal on the basis of a proposed use within class C4 of the Town and Country Planning (Use Classes) Order 1987 (UCO). That is the use of a dwellinghouse by not more than 6 residents as an HMO, rather than a *sui-generis* HMO use for a number exceeding 6. The main parties agreed with this approach at the Hearing.

Background

2. The site is in a predominantly residential area close to the junction of De Montfort Street and Elm Grove. It is occupied by a two-storey building which was formerly used as a chapel. The building occupies much of the plot, with a small area between the front entrance door and the footway.

Appeal A: The Lawful Development Certificate (LDC) Appeal

Main Issue

3. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. For the appeal to succeed the appellant must show, on the balance of probability, that use of the building as a dwellinghouse (class C3) was lawful when the LDC application was made.

Relevant Planning History and Legal Background

4. In January 1995 planning permission was granted for the change of use of the building from a church to a single domestic dwelling (94/1102/FP). It is not disputed that the use as an HMO for 6 residents began in September 2012 and continues. On 5 April 2013 the Council made a Direction under Article 4(1) of the Town and Country Planning (General Permitted Development) Order, 1995. It has the effect of bringing within planning control a change of use of a building from a use in class C3 to a class C4 HMO use. The area covered by the Direction includes the appeal site but the Direction was not in force when the Class C4 HMO use of the building began.

5. If it was not implemented, the 1995 planning permission would have lapsed in 2000. However, if the planning permission was implemented by the use of the building as a dwellinghouse before that date, and there was no subsequent material change of use, the class C3 use would be lawful. If the class C3 use was lawful, the change to a class C4 HMO use in September 2012 would have been permitted development.

Evidence on the Implementation of the 1995 Permission

6. In 1995 the property was owned by Mrs Janet Farrow. A document entitled "Affidavit by Janet Farrow" is unsigned and there are various annotations to it.

It refers to obtaining planning permission in 1995, to Mrs Farrow living elsewhere at that time and to an application for building regulations approval for works including re-arranging a door and wall to a toilet and installation of a shower. It goes on to say that neither business nor domestic rates were paid from 7 October 1993 as the building was vacant and classed as a chapel. It says that Mrs Farrow used the property for the storage of some personal effects including furniture and clothing. It also says that she moved into the property on 10 November 2011 and was then told by the Council that as it was then her residence she would need to pay Council Tax on it. Lastly, the document says that between 10 November 2011 and the sale of the property on 30 July 2012 she lived in it as if it were a residential dwelling.

7. Mr Burtenshaw has been the landlord of The Wellington public house since 1994. It is adjacent to the site. In a sworn statement he says that, as far as he is aware, the building was not used as a chapel in that time or for any other use. He believes the previous owner lived there on and off from at least August 1994 to when the current owners bought it in July 2012 and it has been lived in since then as a domestic dwellinghouse. Ms Petrova has lived near to the appeal site in De Montfort Street since 1999. Her letter says that as far as she is aware the building has not been used as a chapel. She says that she knows that Mrs Farrow owned the property from before 1999, has lived in it and used it as a domestic dwellinghouse since 1999 at least. Mr Irvine has lived in Elm Grove, close to the appeal site, since 1976. In his letter he says that at that time it was a chapel and, when that closed, an elderly couple moved in and lived there for at least 10 years before the students moved in.

8. The property was deleted from the Valuation Office's non-domestic register in 1995. Southern Water supplies water to the property. In an email of 14 November 2012 it says that it has been "charging as domestic since 10 years". A Fenestration Self-Assessment Scheme (FENSA) document is also submitted. It concerns the installation of a window at the property on 2 August 2011. It sets out categories which are not within the FENSA remit, including commercial uses.

Assessment

9. The appellant's evidence for the use of the building as a dwelling following the grant of planning permission in 1995 is sparse. I can give limited weight to the unsigned affidavit of Mrs Farrow. In any case, it refers to her living elsewhere and to storing belongings in the building. It does not refer to her living in the property at any time before November 2011, when it says she left another address and moved in. By that time the 1995 permission would have lapsed if it had not been implemented earlier. It also refers to an application for Building Regulations approval for works to a toilet and bathroom but not to the implementation of those works. No documentary evidence is submitted of that application or of the works being carried out and approved. The appellant suggests reasons for Mrs Farrow not providing a signed statement but in the absence of direct evidence from her they are speculative.

10. The evidence of Mr Burkenshaw, Ms Petrova and Mr Irvine is very brief. They did not attend the Hearing and their evidence is, I assume, largely based on observed activity outside the building. While they live near the building, they do not refer to having been into it or to gaining information from Mrs Farrow. Their version of events is not consistent with that in the unsigned Mrs Farrow

document with regard to when she is said to have moved in. There is a dearth of documentation relating to residential occupation of the building, for example with regard to utility bills or correspondence. The FENSA certificate lends some support to the appellant's case. However, the date of the FENSA certificate is about 3 months before the unsigned Mrs Farrow affidavit refers to her moving in. The certificate may reflect works in preparation for that move if it took place at that time. It does not support residential occupation before then. Nor has it been shown to be likely that Southern Water would have carried out any inspection to verify that the building was being used as a dwelling.

11. There is some evidence to support the view that the 1995 planning permission was not implemented. Council Tax was not paid on the building as a dwelling until November 2011. This is not conclusive but would be consistent with a change in circumstances at that time. A 2012 "Rightmove" website document describes the building as an "older style property at present listed as a disused chapel." It makes no reference to the building's use as a dwelling. The document sought offers in excess of £100,000. I appreciate that the building required modernisation at that time. Nevertheless, if it was a dwelling, that figure appears very low when compared with prices for a range of houses at different dates in the same area, of which the Council has submitted details. Property details from Wilkinsons Estate Agents are undated but are said to be from around November 2011. They do not refer to a bathroom in the building, a facility which is commonly provided in a dwelling. They do refer to two hand basins with cold water supply only.

Overall conclusion on Appeal A

12. The evidence is not sufficient to show, on the balance of probabilities, that the 1995 permission was implemented. It is more likely that occupation for residential purposes did not begin until 2011, by which time the 1995 permission had lapsed. Nor, if use as a dwelling began in 2011, had sufficient time elapsed for the use to become immune from enforcement. On that basis the use of the building as a dwelling was not lawful when the LDC application was made on 26 June 2013. The Council's decision not to issue an LDC was well-founded and Appeal A should not succeed.

Appeal B: The Enforcement Appeal

The Enforcement Notice

13. The allegation repeats the error in planning application BH2013/00853 with regard to the description of the development. The Council does not dispute that the use is a class C4 HMO use, for no more than 6 people. That is also the basis of the appellant's case. It was agreed by the main parties at the Hearing that a correction of the notice's allegation to refer to a class C4 HMO use would not result in injustice. I concur and I shall correct the notice accordingly and consider the grounds of appeal on that basis.

14. Section 171B (3) provides that the relevant period for immunity from enforcement is 10 years from the date of the breach. The notice refers, in error, to a period of 4 years and I shall correct it accordingly.

The Appeal on Ground (d)

15. I have concluded in respect of Appeal A that the 1995 planning permission was not implemented and the use of the building as a dwelling was not lawful on 26

June 2013. On that basis the class C4 use was not immune from enforcement when the notice was served and there should not be success on ground (d).

The Appeal on Ground (g)

16. The property is occupied by 6 students with tenancies expiring at the end of August 2014. In that context the 3 month period for compliance with the requirements of the notice is unreasonably short and I shall vary the notice to extend it to 5 months.

Overall conclusion on Appeal B

17. Other than in respect of ground (g) the appeal should not succeed. The notice should be corrected, varied and upheld.

Appeal C: The Appeal against Refusal of Planning Permission

Main Issues

18. The first main issue is the effect of the change of use to a class C4 HMO use on the mix and balance of the community. Other main issues are the effect on the provision of community facilities, the adequacy of living conditions for the occupiers of the building and the effect of overlooking on neighbours.

The Effect on the Mix and Balance of the Community

19. The Brighton and Hove Local Plan, 2005 (LP) does not directly address this issue. Policy CP21 of the Brighton and Hove Submission City Plan Part One, 2013 (SCP) deals with student accommodation and is divided into two parts. Part 1 addresses purpose built accommodation and makes strategic allocations. The second deals with HMO. It supports mixed and balanced communities and ensuring that a range of housing needs is accommodated. Amongst other things it does not permit a change of use to a class C4 HMO use where more than 10% of dwellings within a radius of 50 metres of a site are already in use as class C4, mixed class C3/C4 or other types of HMO in a *sui-generis* use.

20. The SCP is at reasonably advanced stage. An examination into its soundness has taken place but may be reconvened to address outstanding issues. At the Hearing the Council explained that, while some objections had been made to policy CP21, they concerned Part 1 of the policy. No objections had been made to Part 2, which addresses HMO.

21. The National Planning Policy Framework (The Framework) is a material consideration. Framework paragraph 216 provides criteria for the weight to be given to relevant policies in emerging plans. They include the stage of plan preparation reached, the extent of unresolved objections and consistency with the Framework's own policies. Its policies support sustainable development. That includes providing more high quality homes and planning to provide a mix of housing to meet the needs of different groups. It seems to me that policy CP21 is broadly consistent with the thrust of Framework policies and, having regard to the above, I give it moderate weight. I appreciate that in appeal decision APP/Q1445/A/13/2197646 the Inspector gave limited weight to the emerging SCP. However, that appeal concerned a different form of development. My conclusion on this matter is based on the circumstances of the relevant policy in the context of this appeal and the approach set out in the Framework.

22. The SCP refers to the high level of HMO in the city and the significant conversion of family housing to student occupied HMO in many neighbourhoods. The Council is concerned that an excessive concentration of student HMO in some parts of the city will adversely affect community cohesion and result in other problems, such as under-use of schools, noise and anti-social behaviour. The *Student Housing and Houses in Multiple Occupation Concentration Assessment* document is dated December 2011. Hanover and Elm Grove ward, which includes the appeal site, was one of 5 wards studied. It was found to have a consistently high concentration of students and HMO, with several clusters of streets where concentrations exceed 10%.

23. Having regard to policy CP21, the Council has assessed the proportion of dwellings within 50 metres of the appeal site which are HMO. The assessment is based, firstly, on Valuation Office Council Tax information and, secondly, on its register of HMO, which is regularly updated. At the Hearing it provided a revised assessment. It was intended to exclude non-residential properties and to eliminate properties which had become HMO since the Article 4 Direction came into force and which were therefore unauthorised. On that basis, 14% of properties are HMO based on the Valuation Office information, or 13.2% based on the HMO register information.

24. Prior to the Hearing the appellant had carried out his own assessment, which was not based on the same information sources as the Council's and produced a considerably lower percentage of HMO. At the Hearing, the appellant considered that the gap between the two assessments had narrowed. Nevertheless, he suggests that some of the properties identified by the Council are not currently used as HMO, including a flat above the public house and another at no.68 Elm Grove. Sales particulars are also provided showing that one of the properties is on the market.

25. The Council's approach combines assessments based on two information sources and it revised its assessment takes into account updated information from its HMO register. On balance I consider it to provide a reasonable indicator that the concentration of HMO near the site is likely to be above 10%. On that basis the development would not be consistent with policy CP21. This weighs against the appellant. However, policy CP21 does not yet carry the full weight of a development plan policy and the proposal is not of a large scale. While there is a degree of material harm to the mix and balance of the community that effect would not be sufficient, of itself alone, for the development to be unacceptable.

The Effect on the Provision of Community Facilities

26. Amongst other things LP policy HO20 provides that planning permission will not be given for a change of use involving the loss of a place of worship. Exceptions to this approach may include where the use is relocated such that accessibility for users is improved, nearby facilities are improved to accommodate the loss or it is demonstrated that the site is not needed for use as a community facility. In this case, an email from Reverend Emerson explains that that the building was sold in the early 1990's and that the proceeds were used to begin another church, which meets in a church hall in Kemptown. That location was preferred by the church at the time.

27. Planning application BH2013/00853, which led to this appeal, was for the change of use of a vacant former chapel and I approach this issue on that

basis. Notwithstanding Reverend Emerson's email it has not been shown that the requirements of policy HO20 with regard to improved accessibility or improvement of nearby facilities are met. Not has it been shown conclusively that the building could not be sold for a community use, for example through marketing over an extended period. On the other hand, it was marketed in 2012 and the appellant's evidence is that, although there were a number of enquiries, none revealed any interest in use for community purposes. There is no evidence of the site having been in active community use since at least the early 1990's. The building's internal space is not extensive or cohesive and its layout would not easily facilitate community use or requirements in respect of safe and convenient access. Nor is evidence submitted of a pressing need in the area for community facilities which a building of this type might accommodate. I conclude on this issue that the proposal conflicts with policy HO20. However, for the reasons set out above I consider it acceptable with regard to its effect on community facilities.

Living Conditions

28. LP policy QD 27 deals with the protection of amenity. Amongst other things it says that planning permission should not be granted for development causing material nuisance and loss of amenity to proposed, existing or adjacent users, residents and occupiers. The Framework's policy is to deliver a wide choice of high quality homes. Paragraph 17 also sets out as a core planning principle that high quality design and a good standard of amenity for all existing and future occupiers of buildings should always be sought.

29. The sitting room is spacious but has only one window. It is set at a high level facing the public house and its yard at close quarters. The room provides a poor living environment with regard to light and outlook. 5 of the 6 bedrooms are at first floor level. One of the first floor bedrooms has a limited floorspace and no window on an external wall. There is a rooflight but it is set at a high level in the ceiling. I appreciate that an HMO licence has been issued for the property. Nevertheless, in my view the combination of limited space and lack of outlook provides a cramped and poor living environment for the occupier of this room. First floor windows facing west overlook the rear of nearby properties on Elm Grove. However, one of the rooms involved is a bathroom and the other is a bedroom which has a second window facing north. A degree of overlooking between neighbouring dwellings is to be expected and, subject to a planning condition on obscure glazing, the extent of overlooking would be acceptable.

30. I conclude on this issue that subject to appropriate conditions the effect on the living conditions of neighbours would be acceptable. However, the proposal would fail to provide adequate living conditions for the occupiers of the building with regard to light and outlook. It would conflict with policy HO20 in that respect. It would also conflict with the Framework's core principle and with Framework policies to deliver a wide choice of high quality homes.

Other Matters

31. The site is in a sustainable location with regard to accessibility to services and facilities. Framework paragraph 51 encourages Councils to identify and bring back into residential use empty houses and buildings in line with local empty homes strategies. However, I have concluded above that there is not a lawful use of this building as a dwelling so the proposal would not restore that use. Nor has it been shown that dismissal of this appeal would necessarily lead to a

deterioration of the building. The Article 4 Direction is now in place and enables a change of use to a class C4 use to be resisted where it would be materially harmful. In that context I give limited weight to the view that this proposal would prevent the loss of a family dwelling to HMO use. The Council acknowledged at the Hearing that there is not a 5-year supply of deliverable housing sites in the area. However, as I set out above I have found that the proposal conflicts with aspects of Framework policy. I conclude that these other matters do not outweigh my conclusions on the main issues.

Overall Conclusion on Appeal C

32. Notwithstanding my favourable conclusions with regard to the effect on the provision on community facilities and on neighbours, my overall conclusion having regard to my conclusions on the other main issues and to all other matters raised is that the appeal should not succeed and planning permission should not be granted.

Formal Decisions
Appeal A: APP/Q1445/X/13/2208165

33. I dismiss the appeal and refuse to issue a Lawful Development Certificate.

Appeal B: APP/Q1445/C/13/2204338

34. I direct that the enforcement notice be corrected as follows:

    i) At paragraph 3 by the replacement of "use class sui generis, (more than 6 people)" with "use class C4 (not more than 6 residents)."

    ii) At paragraph 4(1) by the replacement of "four years" with "10 years".

35. I further direct that the enforcement notice be varied in paragraph 6 by the replacement of "3 months" with "5 months".

36. I dismiss the appeal and uphold the enforcement notice subject to the above corrections and variation.

Appeal C: APP/Q1445/A/13/2205364

37. I dismiss the appeal.

K Williams

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ms C Grant	Lindene GB Promotions Ltd.
Mr K Keehan	The appellant.

FOR THE LOCAL PLANNING AUTHORITY:

Mr A Smith	Senior Planning Officer, Brighton & Hove City Council.
Ms E Clarke	Senior Enforcement Officer, Brighton & Hove City Council.
Ms L Hobden	Local Development Team Leader.

DOCUMENTS SUBMITTED AT THE HEARING:

1. Council's letter of notification of the Hearing
2. Price details of various properties marketed in De Montfort Road.
3. Updated version of Council's HMO licensing map, as of 10 March 2014.
4. Further updated version of Council's HMO licensing map, as of 10 March 2014.
5. Student Housing and Houses in Multiple Occupation Concentration Assessment.
6. Property marketing details for a house in De Montfort Road.

DOCUMENTS SUBMITTED AFTER THE HEARING:

7. Council's suggested conditions.
8. Appellant's email of 12 March 2014 concerning suggested conditions.