The Planning Inspectorate

Appeal Decision

Site Inspection on 15 January 2014

by Graham Self MA MSc FRTPI

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

Decision date: 24 January 2014

Appeal Reference: APP/Q1445/C/13/2204521

Site at: 179 Old Shoreham Road, Hove BN3 7EA

- The appeal is made by Mr V O'Rourke under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by Brighton and Hove City Council.
- The notice was dated 24 July 2013.
- The breach of planning control alleged in the notice is: "Without planning permission, the change of use of the Land by the subdivision of the house on the Land ("the Property") to form two maisonettes".
- The requirements of the notice are:
  1. Cease the use of the Property as two self contained residential units.
  2. Remove the kitchen facilities from one of the self contained residential units.
  3. Restore the use of the Property to one residential unit.
- The period for compliance is six months.
- The appeal was made on grounds (a) and (d) as set out in Section 174(2) of the 1990 Act.

Summary of Decision: The appeal fails; the enforcement notice is varied and upheld; planning permission is refused.

Appeal Reference: APP/Q1445/C/13/2204522

- This appeal is made by Mrs S M O'Rourke. All other details are the same as those summarised above.

Summary of Decision: The appeal fails; the enforcement notice is varied and upheld; planning permission is refused.

Procedural Matters

1. The appeals are argued with ground (a) first, and ground (d) as a "fall back position". It is more logical to consider ground (d) first, so that is the sequence I adopt below.

Ground (d)

2. The basis of the appellants' case is that the appeal property has been used as two flats for at least four years prior to the enforcement notice being issued and therefore the use has become "immune" and lawful. Various documents are

submitted in support of this claim, including copies of tenancy agreements, insurance documents, bank statements, correspondence, an arrest warrant and other papers relating to a debt (showing the address of a tenant, Mr Matthew Findlay, as 179 Old Shoreham Road), and affidavits by Mr Vincent O'Rourke and Mr Jonathan O'Rourke.

3. Both the affidavits state that Mr O'Rourke and his wife purchased the appeal property in 2006 and that the property has been used as two self-contained units since their purchase. The affidavits refer to various tenants having occupied the upstairs flat and the downstairs flat over various periods from 2006.

4. The appellants' description of the history of the property, together with the supporting documents, provides on the face of it fairly substantial evidence. Against that, I have to weigh contrary evidence. Mr O'Rourke and his then agent evidently stated in June 2012 that a single-storey rear extension had been built in 2011 under "permitted development" rights. Such rights would only have applied if the property was at that time used as a single dwellinghouse. In June 2012 an application was made to the council's building control department for "proposed change of use from dwelling house to two flats". In August 2012 the appellants' then agent stated in writing to the council that "the house is still a single dwelling", and on 6 September 2012 the agent confirmed in writing that: "The house has always been, since purchase in 2006 and is currently being occupied as a single dwelling". In August 2013 Mr Vincent O'Rourke stated in a letter to the council: "The house remains in single occupancy".

5. The agent mentioned above (Mr Noel Boswijk) is or was at the relevant time a professionally qualified architect, and it is reasonable to assume that he would have made true statements to the best of his knowledge and belief on behalf of his client. His letter dated 6 September 2012 is of particular note since he states that it is written "further to my meeting with my client" (which for that purpose was New City Trust, of which members of the O'Rourke family were trustees).

6. In my judgement somebody, somewhere is not telling the truth. Conflicting information has been supplied by and on behalf of the appellants. This is so even within the affidavits, and it is reasonable to expect care to have been taken in the accuracy of such documents. For example, the affidavits refer to "the downstairs flat" and "the upstairs flat", and Mr Jonathan O'Rourke states that he has continued to live in "the downstairs flat" since 2006. But there is no such dwelling, since the house is divided into two maisonettes and the dwelling entered at ground floor level has part of its accommodation on the first floor.

7. The appeal statement mentions past use "informally" as non self-contained units. This introduces an element of vagueness into the appellants' claims and is inconsistent with the affidavit evidence. The reference to informal non self-contained units also suggests that the way the property has been used has changed over time, such that any possible use as two self-contained dwellings may not been sufficiently continuous.

8. As the appeals are being decided by the written representations procedure (for which the appellants opted when lodging the appeals) I cannot test the evidence by oral questioning. I also have to bear in mind that most of the supporting documentary evidence appears to be in the form of photocopies. The onus is on the appellants to prove their case, on the balance of probability. Taking into account the inconsistent evidence, that onus has not been discharged.

9. I conclude that ground (d) of the appeals does not succeed.

Ground (a)

10. The main issue raised by this part of the appeals is whether the development enforced against has caused an undesirable loss of the type of smaller dwelling suitable for family accommodation, having regard to relevant planning policy.

11. The law requires that the decision be made in accordance with the development plan for the area unless "material considerations" indicate otherwise. The most relevant part of the development plan is Policy HO9 of the Brighton & Hove Local Plan. This policy provides that planning permission will be granted for converting dwellings into smaller units of self-contained accommodation when various criteria are met. One criterion relates to floor area; it provides that for planning permission to be granted under this policy the original floor area (that is, the floor area of the original dwelling excluding additions such as extensions and garages) has to be greater than 115 square metres.

12. The 115 square metre figure appears to be typical of local terraced houses or smaller semi-detached houses. The basic aim of this policy is apparently to limit the scope for these types of family-sized houses to be lost to the housing stock by being converted into even smaller dwellings. The supporting text in the Local Plan states that there remains a high demand for smaller dwellings suitable for family accommodation and retaining the existing stock of these dwellings will continue to be important. Amenity issues are also mentioned in the plan.

13. The type of development subject to this appeal is not specifically prevented by Policy HO9, since the policy states when planning permission will be granted, not when it will be refused. Nevertheless, the development does not meet the floor area criterion mentioned above - the original house was evidently a three-bedroomed dwelling with a floor area of less than 115 square metres (the council state that the area was about 98 square metres, the appellants state that it was 109 square metres). Quite apart from the area figures, the development clearly conflicts with the aim of the policy, since what was a small house capable of housing a family has been converted into two awkwardly-arranged maisonettes which, despite what is argued for the appellants about possible further alteration and potential use of two-bedroomed units, would be much less suitable for family occupation.

14. I note the comments for the appellants about the affordability of flats, compared with many of the houses nearby which have been extended. Some of the nearby properties have evidently been converted into flats. I also note the statement that the appellants are not aware of any complaints about noise, although the letter from a neighbour referring to "a living hell" caused by noise suggests that the unauthorised development may have had a harmful impact on residential amenity. Be that as it may, I do not see any material considerations indicating that a decision should be made other than in accordance with development plan policy.

15. In reaching my decision I have had regard to all the other points raised in evidence on which I have not specifically commented; they do not outweigh the factors discussed above. I conclude that planning permission should not be granted. Therefore the appeal on ground (a) fails.

The Requirements of the Notice

16. Ground (f) of Section 174(2), which relates to the requirements of an enforcement notice, was not pleaded. Nevertheless it would be wrong for me to ignore the fact that the third requirement as specified by the council (to "restore the use of the property to one residential unit") is excessive. It is unreasonable

to require a property owner to use the property for any purpose, as opposed to leaving it unused (although normal market forces would usually work against leaving a property vacant). I shall therefore vary this requirement so that it requires the property to be restored into a state where it is capable of being used as a single dwelling.

Formal Decisions

17. The enforcement notice is varied by deleting the words "Restore the use of the property to one residential unit" from Step No 3 of the requirements, and substituting: "Restore the property into a state where it is capable of being used as a single dwelling". Subject to that variation, the appeals are dismissed, the notice as varied is upheld, and planning permission is refused on the applications deemed to have been made under Section 177(5) of the 1990 Act.

G F Self

Inspector