



Enforcement of Planning Control

Report by the Executive Head of Planning, Regeneration and Wellbeing

Lancing: 134 Brighton Road: Unauthorised change of use from dwelling house into 3 flats (including a flat on the ground floor) instead of 2 flats as permitted under ADC/0555/07

1.0 Report Summary

1.1 To report a breach of planning control which has not been resolved by negotiation and to consider the expediency of enforcement action.

2.0 Background to Enforcement Considerations

2.1 The Committee, when considering whether or not to take enforcement action, should consider the following matters:-

- (a) Has there been a breach of planning control?
- (b) Is it expedient to issue an enforcement notice?

2.2 PPG18 'Enforcing Planning Control' gives the following guidance:-

"5. Nothing in this Note should be taken as condoning a wilful breach of planning law. LPAs have a general discretion to take enforcement action, when they regard it as expedient. They should be guided by the following considerations:-

- (ii) Parliament has given LPAs the primary responsibility for taking whatever action may be necessary, in the public interest, in their administrative area (a private citizen cannot initiate planning enforcement action);
- (iii) the Commissioner for Local Administration (the Local Ombudsman) has held, in a number of investigated cases, that there is "maladministration" if the authority failed to take effective enforcement action which was plainly necessary and has occasionally recommended a compensatory payment to the complainant for the consequent injustice;
- (iii) in considering any enforcement action, the decisive issue for the LPA should be whether the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest;
- (iv) enforcement action should always be commensurate with the breach of planning control to which it relates (for example, it is usually inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality of the site);
- (iv) where the LPA's initial attempt to persuade the owner or occupier of the site voluntarily to remedy the harmful effects of unauthorised development fails,

negotiations should not be allowed to hamper or delay whatever formal enforcement action may be required to make the development acceptable on planning grounds, or to compel it to stop. (LPAs should bear in mind the statutory time limits for taking enforcement action)".

3.0 Description of the site, development and relevant history

- 3.1 The property at No.134 Brighton Road is an altered/extended detached house on 3 floors situated on the south side of the A259, backing onto the Widewater. The plot measures 23m deep and 11m wide.
- 3.2 It became apparent in June 2007 that an unauthorised flat had been created on the ground floor which previously had been a non-habitable ancillary garaging and storage area.
- 3.3 The earliest planning records are applications for planning permission and Building Regulations approval in 1986 for extensions and alterations at the rear and side (L/36/86/TP). Only partial floor plans were submitted but there is nothing to indicate that it was not a single house at that time.
- 3.4 In July 2000, a Building Regulations notice (L/147/00/BN) was submitted for 'Internal Changes' to ground floor. The works were inspected by the building control officer (BCO) and a Completion notice issued 10 November 2000. The submitted plan shows the groundfloor as consisting of 2 garages with a games room/lounge behind and the proposed works as "Brick up garage door and put in window – change of usage to living space" and adding a window to the east side and a door to the west side of the games room/lounge. The application form states present use as "Garage & games room".
- 3.5 In October 2006, for reasons unknown, a letter was received from solicitors querying details given on telephone by Council staff to their client (now the previous owner) that the above notice was only for alterations and change of use of the garage to a games room when their client was under the impression the application had the intention of converting the groundfloor to a self-contained flat, with a kitchen and bathroom installed. The BCO replied stating that the above B.Reggs notice was only for alterations (with use of one garage as a games room as stated on the application form) and no mention of a self-contained flat.
- 3.6 In June 2007, a potential purchaser of the whole property which was then for sale saw a planning officer about converting it to 3 flats. A site inspection was carried out by the planning enforcement officer with the BCO. They identified that the ground floor was rented out and occupied as a separate flat by tenants. Officers called on the then owner who lived above and he pointed out that the flat was still linked internally (by a hatch and very narrow/steep stairs). He stated that he had tried to sell the house as 2 flats (after his solicitor had told him that the flat was established because it had existed for 6 years) but had encountered problems and had had to advertise it as a single house.
- 3.7 In July 2007, a planning application ADC/0441/07 was submitted on behalf of the new owners, a development company, for 'Change of use of dwelling to 3 self-contained flats with dormer roof extension'. It was subsequently withdrawn. In reply to the question on the application form as to the present use of the whole premises at No.134 their agent wrote 'Dwelling' and in his Design & Access Statement he

states "The proposal is for the erection of flat-roofed dormers to the existing roof and the conversion of the existing dwelling to three self-contained flats".

- 3.8 In September 2007, a revised application ADC/0555/07 was submitted for 'Change of use of dwelling to two self-contained flats and dormers'. It was subsequently approved on 14 November 2007 but the permission states 'Change of use and conversion of first and second floors to 2 self-contained residential units, including roof extension with front and rear dormers'. The submitted plans show the groundfloor as a garage, gym, shower-room and utility area/storage. In reply to the question on the application form as to the present use of the whole premises at No.134 the agent again wrote 'Dwelling' and in his Design & Access Statement he states "The conversion of the existing dwelling to two self-contained flats". The Flood Risk Assessment submitted by the applicant states the site is a "single residential dwelling on 3 levels".
- 3.9 In September 2007 the ground-floor flat was made liable to Council Tax.
- 3.10 In July 2008, a letter was sent by the Council's BCO to the developer seeking a regularisation application for the conversion of the groundfloor to living accommodation. Their letter of reply stated that the groundfloor was already being used as separate living accommodation when they purchased it in 2007 and as far as they are aware it had been used as rental accommodation since it was converted in 2001. The BCO replied stating that at no time was conversion to a flat applied for or inspected and he referred to the previous letter of 3 November 2006.
- 3.11 In September 2008, as a result of the Council's enforcement officer's investigations, a 'without prejudice' letter was received from the developer (who had retained ownership of the freehold interest) stating that their agent had misunderstood his firm's intentions for the building and that the proposals should not have included conversion of the groundfloor to a flat as shown on the first application ADC/0441/07 because such conversion works had already been undertaken prior to their acquiring the site. He stated that he understood the ground floor had been converted to a flat in 2001 by the previous owner.
- 3.12 In October 2008, a letter was received from solicitors on behalf of the new leasehold owners of the groundfloor flat (acquired on 23 May 2008). It states that at the time of purchase, the solicitors acting for their clients did not check whether planning permission existed for the groundfloor flat. They asked whether a Certificate of Lawfulness could be obtained and, if not, what action the Council would take. They referred to possibly having to claim against the solicitors insurance policy, with a refund of the total purchase price plus costs. The planning officer replied, referring to previous applications (which did not include any refusal, but withdrawal following the EA's objection on flood risk grounds) and need for evidence/statutory declarations for a successful certificate of lawfulness application. He asked them how long the groundfloor flat had existed. They replied stating they were pursuing a claim against the solicitors and asked for enforcement action to be delayed in the interim.
- 3.13 On 26 March 2009, a Planning Contravention Notice was issued. The leaseholder's solicitor replied stating they were happy to vacate once they have received compensation from the insurance company to enable them to repay the mortgage but again asked for enforcement action to be postponed or they will be homeless. The freeholders replied reiterating their previous replies that as far as they are

aware the flat was created in 2001 and that they inherited a tenant when they acquired the property in 2007 and paid Council tax on their behalf for a short period.

4.0 Whether there is a Breach of Planning Control

- 4.1 The change of use of a dwelling into more units by means of subdivision is 'development' under section 55 of the Town and Country Planning Act 1990 and consequently requires planning permission. In the present case, permission was obtained under reference ADC/0551/07 to convert the house into only 2 flats (on the first and second floors respectively), leaving the ground floor as non-habitable garaging and storage. Thus, there is a breach of planning control.
- 4.2 However, there is a degree of uncertainty as to whether the change of use took place too long ago for enforcement action now to be taken.
- 4.3 Section 171B of the Act itself is unclear regarding whether residential subdivisions fall into the same category as the change of use of a building to a single dwelling. However, the most recent Court ruling is that they do and consequently *enforcement action can only be taken within 4 years (not 10 years)* from the date that the breach occurred.
- 4.4 The date that the house at No.134 actually underwent a change of use resulting in the ground floor being used as a separate flat is disputed, as evidenced from section 3 above. From inspections by Council officers, it is clear that it was not being used as a flat in 2000 but it was by June 2007. When the change took place, is not known. The freeholders claim it was already being used as a separate flat on the groundfloor when they acquired the site in 2007 and state they understood that it had been since 2001 (but have produced no evidence of this). The 2003 electoral roll does not support No.134 being more than just a single house. Moreover, the groundfloor flat was not assessed separately under Council Tax until September 2007. In addition, the two applications made by the developer's agent in 2007 refer to conversion from "dwelling" to 3 flats and 2 flats respectively and contain no reference to an existing groundfloor flat. The plan that was permitted under ADC/0551/07 only shows the ground floor as a garage, gym, shower-room and utility area/storage. The freeholders, Lightwater Devs Ltd, dispute the accuracy of these applications made on their behalf but their own flood risk report in 2007 (prepared jointly by them and a consultant) refers to the property being a single dwelling and states that the lower floor is designated as non-habitable/storage use.
- 4.5 Overall, it is considered that there is justification for concluding that, on the balance of probability, the use of the groundfloor as a flat commenced less than 4 years ago and is within the scope of enforcement action.

5.0 Planning Assessment

Policies

- 5.1 The relevant housing policies are AH9 of the Adur District Local Plan and H2 and H5 of the South East Plan. Policy AH9 of the Local Plan states that the conversion of dwellinghouses into smaller self-contained units will be permitted providing that: access and car parking provision is acceptable; the proposal would not have an unacceptable adverse effect on neighbouring properties in terms of overlooking or noise transmission through party walls and the type of property concerned and the

standard of accommodation to be provided accord to the adopted standards, in this case, Development Control Standard No. 4 'Flat Conversion' . This states that conversion of small family houses (less than 100sqm internal floor area or 3 or less bedrooms) will not normally be permitted and includes minimum floor areas for bedsittingroom, one, two and three-bedroom flats of 30sqm, 45sqm, 57sqm and 70sqm respectively.

- 5.2 PPS3 contains no specific guidance on flat conversions except for the general statement that 'Conversions of existing housing can provide an important source of new housing'. It advises LPAs to 'take account of the need to deliver low cost market housing as part of the housing mix'.

Flood Risk

- 5.3 The site is in the high risk zone 3 flood area. Policy NRM4 of the South East Plan states that, as set out in PPS25, inappropriate development should not be permitted within it and the sequential approach must be followed.
- 5.4 The Environment Agency has been consulted and has replied (by e-mail of 23 March 2009) that the Council needs to take enforcement action. The floor level of the flat (2.37m AODN) is well below the safe height (5.5m AODN) to protect against flooding to the requirements of PPS25. The EA objected to the original application for 3 flats at this property (referring to there being no Flood Risk Assessment and, in other recent cases along this stretch of road, although accepting that the secondary sea defence embankment provides a safe route of escape, have required all habitable accommodation to be at firstfloor level or above.

Residential amenity

- 5.5 There is no policy objection to the principle of the use of the property as 3 flats; the housing policies favour the provision of small units.
- 5.6 The main concern is the standard of amenity. The floor area of the flat is 41sqm. This is slightly less than the Council's minimum of 45sqm. The worst feature is that the narrow livingroom/kitchen (2.8m by 7.4m), although of adequate size, only has a small (1.1m by 1m) west side-facing window. This provides a poor level of daylighting and outlook. The EHO considered it unacceptable.
- 5.7 There is also an issue of road noise identified by the EHO and he considers that the bedroom facing the road is unacceptably exposed to noise (previous calculations indicating the site is in NEC 'C' where development should not normally be allowed unless better sites are unavailable). However, other proposals have been permitted subject to acoustic treatment of windows.

Access and parking

- 5.8 The site is in a sustainable location on a frequent bus route giving good access to facilities. When consulted on the application for 3 flats, WSCC were satisfied that the single garage serving just the larger unit was acceptable, with any parking associated with the other 2 flats being on-street. However, a sustainable transport contribution was required under the adopted Transport Methodology.

Conclusions

5.9 The taking of enforcement action in a case such as this is a serious matter as the consequences are likely to mean that the occupiers (the leasehold owners of the flat) are made homeless. Their solicitor stated as long ago as October 2008 that they were pursuing an action against the solicitors who acted for them at the time when they purchased the flat (in May 2008) for failing to identify that it was in breach of planning control. He appeared confident of their case and stated that they were happy to vacate once they had received compensation from the insurance company to enable them to repay the mortgage but asked for enforcement action to be postponed or they would be homeless. Despite the elapse of many months, however, they are still in occupation and it is considered that formal enforcement action needs to be considered. As recommended below, it is concluded that the location of the flat in the flood risk area (with its floor level 3m below the recommended minimum) and the poor level of daylighting and outlook for its living room render enforcement action expedient.

5.10 **Recommendation**

That the Council is not prepared to grant planning permission for the unauthorised change of use, whether subject to conditions or not, and that an Enforcement Notice be issued as follows:-

Matters constituting the breach of planning control:- The change of use from a dwellinghouse into 3 flats (including a flat on the ground floor) instead of 2 flats as permitted under ADC/0555/07

Requirements to comply:- To permanently cease the use of the groundfloor as a separate flat to and restore it to storage or other non-habitable use ancillary to the flats above.

Reason:- It appears to the Council that the breach of planning control has occurred within the last 4 years. The building lies within a flood risk area (zone 3) and the use of the ground floor as a separate dwelling poses unacceptable risk to the safety of the occupants and conflicts with PPS25 and policy NRM4 of the South East Plan. The residential amenities of the flat also fall below an acceptable standard on account of the poor level of daylight to and outlook from the livingroom.

Time for Compliance:- 12 months

.....

Schedule of other matters

1.0 Council Priority

1.1 To support and contribute to the health, safety and well-being of the area

2.0 Specific Action Plans

2.1 Matter considered and no issues identified.

3.0 Sustainability Issues

3.1 The location at this level in a flood zone is unsustainable.

4.0 Equality Issues

4.1 Matter considered and no issues identified.

5.0 Community Safety Issues (Section 17)

5.1 None in this context.

6.0 Human Rights Issues

6.1 Article 8 of the European Convention safeguards respect for family life and home, whilst Article 1 of the First Protocol concerns non-interference with peaceful enjoyment of private property. Both rights are not absolute and interference may be permitted if the need to do so is proportionate, having regard to public interests. The interests of those affected by proposed developments and the relevant considerations which may justify interference with human rights have been considered in the planning assessment.

7.0 Reputation

7.1 Decisions are required to be made in accordance with the Town & Country Planning Act 1990 and associated legislation and subordinate legislation taking into account Government policy and guidance (and see 6.1 above and 14.1 below).

8.0 Consultations

8.1 As referred to in the above report.

9.0 Risk Assessment

9.1 As referred to in the above report.

10.0 Health & Safety Issues

10.1 As referred to in the above report.

11.0 Procurement Strategy

11.1 Matter considered and no issues identified.

12.0 Partnership Working

12.1 Matter considered and no issues identified.

13.0 Legal

13.1 Powers and duties contained in the Town and Country Planning Act 1990 (as amended) and associated legislation and statutory instruments.

14.0 Financial implications

14.1 Decisions made which cannot be substantiated or which are otherwise unreasonable having regard to valid planning considerations can result in an award of costs against the Council if the land owner is aggrieved and lodges an appeal. Decisions made which fail to take into account relevant planning considerations or which are partly based on irrelevant considerations can be subject to judicial review in the High Court with resultant costs implications.