



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	:	CHI/00MR/HPO/2019/0003
Property	:	54D Arundel Street Portsmouth PO1 1NL
Applicant	:	Mr Colin Reeder
Representative	:	Mr J Nixon, David Isaacs solicitors
Respondents	:	Portsmouth City Council
Representatives	:	Ms C Tanner (Housing Standards Officer) Mrs C Hardwick (Head of Private Sector Housing) Mrs L Bellamy Empty Property Officer
Type of Application	:	Appeal of Prohibition Order
Tribunal Member(s)	:	Mr. B. H. R. Simms FRICS (chairman) Mr. P. D. Turner-Powell FRICS (surveyor member)
Date of inspection	:	22 August 2019
Date & Venue of Hearing	:	22 August 2019 at Havant Justice Centre
Date of Decision	:	19 September 2019

DECISION

SUMMARY of DECISION

The Tribunal upholds the appeal and quashes the Prohibition Order issued by the Council.

The Tribunal has not Determined the validity, or otherwise, of the Prohibition Order.

The question of Rule 13 costs is reserved to a separate application by either party.

APPLICATION

1. Mr C D Reeder, the Applicant, is the leasehold owner of 54D, Arundel Street, Portsmouth, PO1 1NL (“the Property”). The Property falls within the area of Portsmouth City Council (“the Council”).
2. The Council gave notice and made a Prohibition Order dated 22 March 2019 (“the Order”) to prohibit the use of the entire Property for sleeping or living accommodation.
3. Mr Reeder applied to appeal the making of the Order essentially on the ground that the Category 1 hazard giving rise to the issue of the Order is not based within the guidelines set out in the Housing Health and Safety Rating System¹ (“the HHSRS”) and the Order is inappropriate.
4. Initially it was proposed in the Tribunal Directions dated 17 April 2019 that the case would be determined upon the papers without a hearing and a bundle was prepared by the Council. Subsequently the solicitor for the Applicant took issue with the contents of the bundle and a procedural judge issued Further Directions dated 17 June 2019 allocating the matter to an oral hearing. Subsequently some additional documents were requested and added to the bundle.

INSPECTION

5. The tribunal members inspected the Property on the morning of 22 August 2019 in the presence of Mr Reeder, his solicitor Mr Nixon, The Council representatives and Mr Blythe of Flat 54E.
6. The Property is described by the Council as “... a 1 Bedroom self-contained flat configured as a two-storey maisonette ... “. The Tribunal saw a duplex flat formed and converted in 2016 from office space above retail premises. The main entrance at ground level is to the common way with staircases to the first floor and then up to the flat above.

¹ The Housing Health and Safety Rating System (England) Regulations 2005 (SI 2005 No. 3208). Operating & Enforcement Guidance.

7. The front door to the Property leads from the common landing to an entrance vestibule with a staircase to the upper floor of the duplex and access to the kitchen. The kitchen has a sink with worktops cupboards and drawers. Off the kitchen is the shower room which has a shower cubicle, low-level W.C. and a small washbasin. The upper floor to the duplex is a single room with a high level window and a balustrade surrounding the stair access. We were not advised of any outside amenity space.
8. The Tribunal, with the Council's agreement, also inspected the flat above, 54E which has a similar layout.

THE ORDER

9. The Tribunal is provided with a full copy of the Order dated 22 March 2019. It describes Category 1 and Category 2 hazards and prohibits the use of the flat for any purpose not agreed by the Council and in particular prohibits its use for sleeping or living accommodation. The Category 1 hazard is: Crowding & Space on the ground that the entire premises measure 11.92m² comprising room measurements of: Kitchen – 4.1m², Shower room – 1.54m², and Bed/Living room – 6.28m². The Category 2 hazards are: 1) Fire and 2) Collision & Entrapment. Secondary hazards arise under: a) Damp & Mould, b) Excess heat, c) Lighting, and d) Position and Operability of Amenities.
10. The Order states that when considering remedial action for both Categories of hazard there is no feasible scope for alteration or extension as the available habitable space measures 13.08m² below '*Private Sector Housing's*' [sic] adopted standard for self-contained flats (25m²). Any internal re-configuration will not reduce or remove the additional hazards identified. The Council did not consider alternative courses of action as the only course of action is prohibiting the use of the flat for sleeping or living accommodation.

11. HEARING

12. The hearing was attended by those persons who attended the inspection
13. Mr Nixon outlined his client's case and initially asked for Mr Blythe to be entered as a party to the proceedings and challenged the validity of the Order itself on the grounds of incorrect service of the required notices. The Respondent was not legally represented at the hearing and with the parties consent the Tribunal adjourned to allow the Respondent to take legal advice. On resumption and having heard the Respondents reply, Mr Nixon consulted his client and agreed not to pursue his request to add Mr Blythe as an applicant.
14. Neither the Tribunal nor the Respondent had had notice of the issue regarding the possible invalidity of the Order. It was suggested that one way to proceed would be to adjourn proceedings and resume when the parties had had an opportunity to prepare their case. Neither of the parties wanted to delay the hearing and both of them agreed that it should proceed. The Tribunal does not make any Determination on the validity of the Order.

15. Mr Reeder is adamant that the HHSRS has been improperly applied in order to create a Category 1 hazard (crowding & space). The facts complained of do not fall within the guidelines. The decision to make the Order appears to be based on a policy of the Respondent's housing department regarding room sizes which has no statutory force.
16. Plans for the conversion were approved by the Council's own planning department so Mr Reeder considers that the size and layout of the flat has already been approved by the Council. The Council did not present any witness to deal with the planning or building regulation issues.
17. Mr Reeder challenges the Council's assessment of Category 2 hazards (Fire and Collision & Entrapment) in a similar way.
18. The Council made a written Statement of Case supported by Witness Statements from Ms Hardwick & Ms Bellamy. Ms Tanner, the case officer, presented the case on behalf of the Council. There was no Witness Statement from Ms Tanner and Mr Nixon objected to her giving evidence as well. The Tribunal was anxious to hear Ms Tanner as she had been responsible for preparing the HHSRS calculations and Mr Nixon agreed to allow her to give evidence to deal solely with HHSRS and she was questioned by Mr Nixon and the Tribunal members.
19. The Council believes that the HHSRS assessment was carried out in accordance with the Operating Guidance on Crowding & Space. Measurements were taken initially and then revised. There are various national recognised space standards which were considered, and in addition S.326 of the Housing Act 1995 sets out the space standard for rooms used for sleeping purposes. Mr Reeder had offered to install additional storage to mitigate any size constraints. The habitable space in the flat measures 13.08m² below Council's adopted standard for self-contained flats (25m²).
20. When considering the question of fire the Council had regard to the lack of doors to the kitchen, staircase and stairs particularly as the escape route is past the kitchen. The external windows are too narrow to serve as an alternative escape route. Mr Reeder offered to install a 'watermist' type of sprinkler system such as that installed in flat 54E.
21. Regarding Collision & Entrapment this is primarily related to the low ceiling height in the shower room located beneath the staircase. The Council was concerned that this would cause an increased likelihood of collision.
22. The Council also raised various other secondary hazards described in the order but the emphasis is on the Category 1 hazard. If the Order is removed Mr Reeder believes that there would be an opportunity to undertake remedial works which with the co-operation of the Council would make the flat safe and habitable as allowed by the Planning Authority.
23. In relation to both Category 1 and Category 2 hazards the Council does not offer any allowable remedial action as the size and configuration of the flat means that there is no scope for alteration or extension.

CONSIDERATION

24. Mr Reeder demonstrates that the only statutory guidance available to the Council, regarding property or room sizes, does not relate expressly to a property of this type or layout, neither is it mandatory in its application.
25. The guidance adopted by the Council when making the judgements of size needed to assess a Category 1 hazard similarly are flawed and do not have any statutory force. The Council was unable to demonstrate that sufficient care had been taken in interpreting the numerous conflicting space standards when applying them to the subject premises. Under questioning the Council did not demonstrate that it approached the application of HHSRS calculations with a sufficient open mind other than to produce the result of a Category 1 hazard. There were no checks by using alternative results, there were no subsidiary assessment to account for the fact that the premises were not occupied.
26. When considering the question of Crowding Mr Reeder refers to para. 4.30 of the Operating Guidance which states that when assessing overcrowding this can only occur when the property is occupied. A supplemental stage may be required if the property is not occupied to consider the severity of the hazard and what enforcement action, if any, is required. Mr Reeder was clearly not resident at the property now or when the Order was made.
27. Mr Chris Flint an architect gave evidence by statement, he was responsible for preparing the application for change of use from office to studio apartments. He disputes the measurements and Mr Reeder asserts that the Council should not override planning law.
28. The Council, when acting as a Planning Authority was satisfied that the flat met its requirements and the developer of the building was granted permission for the scheme. As stated in Mr Reeder's grounds the decision to make this Order is not sustainable on "Wednesbury Principles"² [A public authority's decision is so unreasonable or irrational that no reasonable person acting reasonably could have made it].
29. The Council's assessment needs to be coloured by the particular circumstances at the Property and the effect it has on the owner or occupier. In this case a flat which satisfies the appropriate planning requirements would be rendered uninhabitable and worthless by the actions of the same Council authority. Mr Reeder has no doubt that the housing standards adopted by the Council are well researched but to apply them rigidly to every situation without adjustment is wrong. The Council did not provide a published standard for a duplex one bedroom flat with separate kitchen, shower room and lobby.

² See: Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223

30. The Council has been inconsistent in its approach and when Ms Tanner gave evidence and, under questioning from Mr Nixon and the Tribunal, she failed to demonstrate certainty and consistency in approach.
31. Ms Tanner was referred to the calculation algorithm set out at page 95 of the bundle. She was unable to clearly explain, to the satisfaction of the Tribunal, her methodology or the assumptions she made and how these produced the published result. The bundle did not contain a clear, worked-up illustration or annotation to demonstrate the projected outcome. Ms Tanner could not show that when making an assessment of a Category 1 hazard she considered alternative outcomes to the ones she used. There was no reference to other cases where she had made similar judgements or tested these against other circumstances.
32. Ms Tanner couldn't convince the Tribunal, particularly with regard to overcrowding, that she had carried out a supplemental stage of assessment to allow for the Property being unoccupied as required by para. 4.30.

DETERMINATION

33. In reaching its determination the tribunal had regard to all of the documents, witness statements, and reference material supplied within the hearing bundle and subsequently which were all read carefully. The tribunal also had the benefit of its own inspection and the oral arguments and submissions made at the hearing.
34. The relevant law and procedure for appeals is contained within Part 3 of Schedule 2 to the Act. Paragraph 8-(1) sets out a specific ground on which an appeal may be made without limiting the right of appeal. *An appeal may be made...on the ground that one of the courses of action mentioned in sub-paragraph (2) is the best course of action in relation to the hazard in respect of which the Order was made.* The courses of action in sub-paragraph (2) are: ... (a) *servicing an improvement notice ... (b) serving a hazard awareness notice...and (c) making a demolition order.* In his appeal Mr Reeder doesn't offer an alternative solution but it is clear to the Tribunal that if the Order is quashed there may be an opportunity for improvements to be made to the flat to deal with some of the other alleged hazards. A substitution of another type of order is not available as a determination of the Tribunal.
35. The Applicant appeals under clause 7 (1) Schedule 2 Part 3 of the Housing Act 2004. Clause 11 (2) (a) states that *the appeal is to be by way of re-hearing* and clause 11 (3) *the tribunal may confirm, quash or vary the prohibition order.*
36. The Tribunal considered each hazard in turn. Firstly the Category 1 hazard Crowding & Space. From its own inspection the Tribunal found a small, yet well fitted one room duplex flat. From the pictures supplied it would seem that at the time of the inspection the owner was in the process of installing shelves and arranging the property ready for occupation. The flat was not occupied.

37. The Tribunal reminds itself that it is the premises that are the subject of the Order and not the owner or occupier. The flat has a lobby at the entrance and there is extra accommodation provided in the kitchen which would not be the case with a bed-sitting room with a kitchen area. The shower room is small but access to the full-height shower is adequate and the sloping ceiling area is excluded from the floor area calculation and is available for storage.
38. The Tribunal is satisfied that the space standards adopted by the local authority in '*Private Sector Housing*' (2 the Standards") were reasonable but incorrectly applied.
39. The Standards were not properly tested to take account of the specific circumstances and layout of Flat 54D. The Tribunal is satisfied that if other space standards are adopted and applied to the HHSRS calculation may result in a hazard category lower than Category 1. This possibility was accepted by Ms. Tanner under cross-examination but neither she nor the Tribunal has carried out the calculation. Doing the best it can on the balance of probabilities the Tribunal believes that the Council's assessment of a Category 1 hazard is unsound.
40. The Council does not consider that there is any remedial action that could be used to enable it to revoke the Order. As the Council's assessment of Crowding and Space is solely based on size, there is no way that the flat can be increased in size so this, on the face of it, is a reasonable conclusion for it to reach. There are however other remedial actions which Mr Reeder suggests might mitigate any perceived problem with Crowding and Space.
41. Secondly the Tribunal considered the Category 2 hazards principally: Fire and Collision & Entrapment. These were dealt with on a more superficial basis by the Council presumably on the assumption that prohibition would prevent any of the hazards being relevant. On the question of Fire Mr Reeder proposed a 'residential Watermist sprinkler system', which the developer had offered to install. The Tribunal had no technical information to consider but this system might mitigate the fire risk. The Tribunal was shown an example of the installation of this system during its inspection of flat 54E. The Council was concerned that there was no protection to the escape route to the front door because of the opening to the kitchen. Presumably a fire protected door would help. The Council refers to the fire detection system in the common ways and the evacuation procedure being 'full evacuation'. The Tribunal had some evidence produced by Mr Reeder exhibiting a letter from the managing agents dated 24 May 2019 but the Tribunal has no expert interpretation to assess the requirements following the improvements to fire safety carried out. The Council could no doubt obtain specialist advice on how to consider the fire safety under the new circumstances.
42. Dealing with collision and entrapment the Order is concerned with the space in the Shower room and the low headroom. The Tribunal believes that the risk is lower than that used by the Council in its HHSRS calculation. No evidence was put forward by the Council in support of its view.

43. Surprisingly the Order repeats the remedial action proposed for the Category 2 hazards namely prohibition whereas in the Tribunal's view there could be numerous remedial actions to be proposed for these hazards, some of which are explored above. There would be other remedial actions if prohibition was not pursued.

DECISION

44. Having regard to all the circumstances the Tribunal is not satisfied that the Council has made its case for a Category 1 hazard of Crowding & Space accordingly a Prohibition Order is not the appropriate action for the Council to take.

45. **The Prohibition Order dated 22 March 2019 Ref: 19/00003/HNL is quashed.**

46. The Council may wish to consider another course of action but this is not a matter for this Tribunal.

47. COSTS

48. At the close of proceedings, Mr Nixon raised the question of Rule 13 costs. By letter dated 06 June 2019, David Isaacs Solicitors, applied for an order for costs and fees under Rule 13 and quantified those costs to be determined following the determination of the Tribunal.

49. The Further Directions indicated that these costs would be dealt with at the hearing but neither party had submitted written statements. As the Tribunal reserved its Determination and considering the time of day the Tribunal, with the agreement of the parties, reserved this matter to a separate application by either party at which time Directions will be issued for the conduct of the costs case.

BH R Simms (Chairman)
19 September 2019

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking