
Appeal Decision

Site visit made on 15 November 2016

by Alwyn B Nixon BSc MRTPI

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

Decision date: 16 February 2017

Appeal Ref: APP/G1250/C/16/3153013

236 Old Christchurch Road, Bournemouth BH1 1PE

- 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 Dimitri Eikosipentarchos against an enforcement notice issued by Bournemouth Borough Council.
 - The enforcement notice was issued on 25 May 2016.
 - The breach of planning control as alleged in the notice is *without planning permission:- change of use of first and second floors to a House in Multiple Occupation sharing communal facilities.*
 - The requirements of the notice are *cease the use of the property as a House in Multiple Occupation and return the use of the first and second floors to that of a single dwelling (Class C3).*
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f), (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The enforcement notice is corrected by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice. Subject to this correction the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the change of use of first and second floors at 236 Old Christchurch Road, Bournemouth BH1 1PE, shown edged and hatched black on the plan annexed to this decision, to a House in Multiple Occupation sharing communal facilities, subject to the following conditions:

- 1) The use as a House in Multiple Occupation hereby permitted shall be restricted to a maximum of 6 persons.
- 2) Unless within 2 months of the date of this decision a scheme for (i) refuse bin storage and (ii) secure and covered cycle storage is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within 1 month of the local planning authority's approval, the use of the site as a House in Multiple Occupation sharing communal facilities shall cease until such time as a scheme is approved and implemented.

If no scheme in accordance with this condition is approved within 6 months of the date of this decision, the use of the site as a House in Multiple Occupation sharing communal facilities shall cease until such

time as a scheme approved by the local planning authority is implemented.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be retained for the duration of the permitted use.

In the event of a legal challenge to this decision or to a decision made pursuant to the procedure set out in this condition, or an appeal against the local planning authority's refusal or failure within the relevant time limit to approve details submitted for approval pursuant to this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge or appeal has been finally determined.

Procedural matters

2. At the site visit it was apparent that the plan attached to the enforcement notice incorrectly identifies the precise boundaries of the land to which the enforcement notice relates. Some of the land identified on the plan is not within the same ownership or control as the principal area to which the notice relates, being external passageways over which the owner of the enforcement notice property only has rights to pass and for bin storage.
3. I have a duty to get the enforcement notice in order where this can be done without causing injustice. I shall correct the plan to properly reflect the extent of No 236 Old Christchurch Road. I consider that no-one would be prejudiced by this correction.
4. Although no appeal on ground (b) was formally noted on the submitted appeal form, it is contended as part of the grounds of appeal that the premises previously were in the same use as that stated as the breach of planning control in the enforcement notice. I have therefore also considered this argument, which amounts to an argument on ground (b) that the breach alleged in the notice has not occurred.
5. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Background

6. The appeal relates to the upper floors of 236 Old Christchurch Road, a three storey building with ground floor commercial use on a main thoroughfare on the eastern edge of Bournemouth town centre. The appellant acquired 236 Old Christchurch Road in March 2015, at which time the upper floors were vacant and in a derelict condition. Upon taking possession he immediately undertook comprehensive refurbishment of the whole building.
7. After refurbishment the premises were initially occupied by 7 tenants. Following an HMO licence application and licensing inspection in July 2015, and a letter from the Council's Planning Enforcement Officer setting out options for resolving the situation, an application for change of use of 1st and 2nd floor flat into 7 bedroom house in multiple occupation (sui generis) was made in September 2015. Planning permission was refused for the development on 10 February 2016. Following advice from Housing Officers that one of the bedrooms was of substandard size the number of tenants and rooms used as

bedrooms was reduced from 7 to 6. An HMO licence reflecting the change to 6 households and 6 occupants was issued on 5 July 2016.

8. The premises currently operate in accordance with an HMO licence for a maximum of 6 households and 6 persons.

Ground (b) matters – whether the breach alleged by the notice has occurred

9. The Council believes that the lawful use of the upper floors is as a Class C3 dwellinghouse, on the basis that the previous use was as a single flat occupying the first and second floors of the property.
10. The appellant claims that the change of use alleged in the notice has not occurred, on the basis that the upper floors of 236 Old Christchurch Road were previously used for multiple occupancy. However, the onus of demonstrating this rests with the appellant; the standard required is on the balance of probability. No documentary evidence has been produced to show that the upper floors were used as a house in multiple occupation prior to the present use. The submissions for the appellant indicate that when he acquired the building in 2015 it had been vacant since 2011 but that he believed the residential part to have comprised a large 4 bedroom maisonette at first and second floor level. Whilst anecdotal information provided suggests that the previous tenant consistently let rooms to lodgers, there is no evidence showing the extent of such activity or the resulting characteristics of occupation and use of the premises. The observations based on external Streetview images of the building concerning the possible use of the upper floors are speculative and conjectural, and unsupported by any proper evidence.
11. The appellant agrees that there is no firm evidence to show that the premises were in a form of residential use other than Class C3 prior to the current use. Whilst he asserts that the Council has assumed that the lawful use is Class C3 as a fall-back, the Council tax record for the property shows the first and second floor use as "maisonette" and there is no substantive evidence which indicates prior HMO use. A homeowner or occupier living with a lodger could fall within Class C3. I conclude that it has not been demonstrated, on the balance of probability, that the premises were previously in HMO use and that such use was lawful before the appellant acquired the property and carried out the changes that have occurred.
12. The appellant also appears to argue in part that the current use of the premises may fall within Class C3, claiming that "the manner of occupation straddles the definitions of Class C3 and C4 dwellinghouses"¹. However, the Use Classes Order states that for the purposes of Class C4 a "house in multiple occupation" has the same meaning as in section 254 of the Housing Act 2004 (except in specified circumstances which do not apply here). The appellant has not provided any evidence that the relevant circumstances set out in section 254 are not met in this case. There is no persuasive evidence that the occupants of the property are living together as a single household. Moreover, the appellant has applied for an HMO licence and the Council has granted the same. Taking all of this with the evident nature of occupancy of the property and what I saw at my site inspection, I find no force in the argument that the

¹ Appellant's final comments

premises are now in use as a dwellinghouse within the terms of Class C3 and are not in use as a house in multiple occupation.

13. The ground (b) arguments therefore fail.

Ground (c)

14. On ground (c) the appellant says that if the previous lawful use of the first and second floors was within Class C3 (dwellinghouses), then a change of use to Class C4 (houses in multiple occupation) is development permitted by Class L of Schedule 2 Part 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the 2015 GPDO").
15. The Council says that the Class L provisions of the 2015 GPDO do not apply here, because in December 2010 the Council made a Direction under Article 4(1) of the Town and Country Planning (General Permitted Development) Order as amended, removing the permitted development rights for change of use to use falling within Class C4 from use falling within Class C3. The Article 4 Direction applies to the whole of the Council's administrative area. It was confirmed in May 2011 and came into effect on 16 December 2011.
16. The appellant contends that the Article 4 Direction made by the Council no longer has any force, since it refers and relates only to the provisions of the Town and Country Planning (General Permitted Development) Order 1995. The appellant says that there is no legal basis that enables the Council to apply its withdrawal of rights formerly granted by Class I(b) of Schedule 2 Part 3 of the 1995 GPDO to the rights now granted by Class L of Schedule 2 Part 3 of the 2015 GPDO.
17. I do not accept this argument. The Article 4 Direction is clear on its face. Its effect is to bring within the local planning authority's control development consisting of a change of use of a building from use as a Class C3 dwellinghouse to use as an HMO by not more than six residents. Whilst the wording in the Article 4 Direction goes on to identify such changes of use as "being development comprised within Class I(b) of Part 3 of Schedule 2 to the said Order and not being development comprised within any other Class", this simply confirms the part of the GPDO in force at that time in relation to which the Direction was intended to act.
18. The absence of additional wording in the Direction such as ", or any Order replacing or amending that Order" does not mean that the Article 4 Direction no longer has any effect. In reaching this view I rely on section 17(2) of the Interpretation Act 1978, which provides as follows; *Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, -*
- (a) *any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;*
 - (b) *in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision.*

There is nothing to suggest any such contrary intention in this case.

19. I do not accept that the wording of the Article 4 Direction is specific to the singular right to change the use of a building under the 1995 GPDO alone. The substantive matter at which the Article 4 Direction is directed is changes of use from Class C3 to Class C4 of the Use Classes Order. The replacement of Class I(b) of Schedule 2 Part 3 of the 1995 GPDO by Class L of Schedule 2 Part 3 of the 2015 GPDO does not alter the substance of the additional planning control exerted by the Article 4 Direction.
20. Whilst I note the analogy drawn with the wording of conditions imposed by a local planning authority to withdraw permitted development rights, this does not persuade me that the provisions of section 17 of the Interpretation Act 1978 do not hold good in this case.
21. The appellant also raises the argument that, taking the uses of the whole of the building together, the change of use which has occurred is permitted by Classes G and H of Schedule 2 Part 3 of the 2015 GPDO. In relation to this it is said that what has taken place is a change of use from a mixed use of 236 Old Christchurch Road as a retail shop with one flat above to a mixed use comprising an employment agency with one flat above. However, having considered all of the evidence, I consider that it has not been shown, as a matter of fact and degree and on the balance of probability, that the resulting use of the upper floors is as "up to 2 flats"; rather, the use is as a 6 person HMO within Class C4 of the Use Classes Order. This argument therefore falls.
22. In the light of the foregoing the appeal on ground (c) does not succeed.

Ground (a) and the deemed application for planning permission

23. On this ground the appellant seeks planning permission to use the upper floors as a 6 person, 6 bedroom HMO, which falls within Class C4 (houses in multiple occupation) of the Use Classes Order. The main issues are whether or not the use accords with development plan policies concerning HMO uses in the Council's area; and, if not, whether material considerations nonetheless point to a determination other than in accordance with the plan.
24. Policy CS24 of the Bournemouth Local Plan: Core Strategy aims to promote mixed and balanced communities by regulating changes of use from C3 dwellinghouse to HMO. It stipulates that such changes of use will only be permitted where no more than 10% of dwellings in the area adjacent to the application property are within a Class C4 or sui generis HMO use. The area adjacent to the application property is defined in the policy as within 100 metres; how this is to be calculated is also set out in the policy.
25. The Council's evidence indicates that the current level of concentration of HMOs in the area adjacent to the appeal property stands at 10.4%, and that the appeal proposal, if allowed, would increase this to 10.9%. The appellant challenges the accuracy of the information on which this calculation is based, pointing to various discrepancies between the Council's evidence and the situation apparent on the ground. The Council has responded to these points, largely rebutting the appellant's contentions. Whilst it accepts that in one or two instances there are minor errors in the data presented, overall it maintains its position that the 10% threshold is exceeded in this case and that the proposal therefore conflicts with policy CS24.

26. There clearly are practical difficulties in assessing individual development proposals against the requirements of policy CS24. Any analysis can only be as good as the documentary data on which it relies. This part of Old Christchurch Road, close to the town centre, is a locality seeing considerable development activity. However, the Council plainly needs to adopt a consistent approach to the way it monitors the balance between Class C3 and HMO uses in its area and determines whether or not individual proposals comply with policy CS24. In the light of this, I consider it reasonable that the Council should rely primarily on Council tax, electoral roll and HMO licence records for this purpose. In terms of its application of policy CS24 to the appeal site, I am satisfied that the Council has not made any significant error in the way it has defined the geographical limits of the relevant area for calculating the proportion of residential properties in HMO use.
27. Dealing briefly with the particular properties over which there is dispute as to their current use, I note what is said about the data transposition error in relation to Nos 246 and 244 Old Christchurch Road. I note also the Council's view, not contested by the appellant, that No 244 should be regarded as a 5 person HMO rather than a flat within Class C3. In relation to 185-187 Old Christchurch Road I accept that there is currently no flat available for occupation, although it is evident that development to create 5 self-contained Class C3 flats is underway. As regards 205 Old Christchurch Road, I accept the Council's position that no residential property available for occupation currently exists here; however, planning permission has been granted for conversion to 14 flats and the permission appears to be being implemented. A similar position prevails in respect of Woodland Point (31 flats within Class C3).
28. Current records indicate that 217 Old Christchurch Road remains available for HMO use. Given the redevelopment of the former 225a Old Christchurch Road as flats fronting Lansdowne Lane I agree with the Council that these properties do not fall within the 100m zone as defined in policy CS24. I accept the Council's analysis in respect of Wootton Court, Wootton House and 37 Lorne Park Road; I consider that the uncorroborated anecdotal evidence for the appellant concerning occupancy of Wootton House and 37 Lorne Park Road should be treated with caution and accorded little weight.
29. Drawing all of this together, I find that the Council's conclusion that HMO use of the upper floors of 236 Old Christchurch Road development would conflict with policy CS24, based on analysis of numbers of properties available for occupation within Class C3 residential and as HMOs respectively, is correct. As such, the proposal does not accord with the development plan; and bearing in mind the statutory requirement concerning the determination of development proposals in accordance with the plan unless material consideration indicate otherwise, this is a matter which carries considerable force.
30. However, in balancing the conflict with the development plan against other material considerations in this particular case, I find a number of matters that are relevant. First, the extent to which the proposal conflicts with policy CS24 is marginal. On the Council's own figures in its statement of case the proportion of HMO properties within the relevant area, excluding the appeal property, stands at 10.4%. Given the wording of the policy, if this figure had been 10.0% (i.e. one less property in HMO use), then the proposal would have complied with the terms of policy CS24.

31. Of course, this alone is not a good argument to override the policy. However, in this case there is also clear evidence of developments underway (185-187 Old Christchurch Road; 205 Old Christchurch Road; Woodland Point) which will in due course result in around 50 additional units in C3 residential use within the relevant environs of the appeal site. I regard the evidence of these other on-going developments as providing strong reassurance that the balance and character of the local community would not be disturbed by the single small HMO use that is the subject of this appeal. My finding on this is not disturbed by the minor adjustments made by the Council during the course of the appeal to its assessment of precisely which properties are or are not in HMO use at the present time.
32. Moreover, whilst I recognise that policy CS24 applies equally to all parts of the Council's administrative area, it is self-evident that some parts of Bournemouth will be better able to assimilate an additional HMO use without harm to community character than others. This section of Old Christchurch Road is a lively mixed use area close to the town centre and hosting a wide range of commercial, entertainment and residential uses. In my judgement the proposal is consistent with the area's character and ambience and would cause no harm to the same. The location and disposition of the property to my mind lends itself to Class C4 HMO use, at the level for which it is currently licensed, rather than as a single Class C3 unit of accommodation.
33. I have considered all other matters raised. Whilst I have had regard to saved policy 6.17 of the Bournemouth District Wide Local Plan, its provisions appear directed at sui generis HMOs containing 7 or more bedrooms. On the facts of this case it is plain that the current (and licensed) use of the appeal premises is as a 6 person small HMO falling within Class C4. I have also had regard to the content of policy U2 of the Town Centre Action Plan. There is no evidence which suggests that the development would harm the living conditions of neighbouring occupiers. There is scope to provide facilities for bin and cycle storage, and this can be secured by means of a condition. I do not regard the situation as regards outdoor amenity space as seriously undermining the acceptability of the proposal, given the likely demographic of its occupants and the dense urban centre character of the location.
34. I note that the Council is currently able to demonstrate an adequate situation as regards the supply of housing. I have no reason to doubt that paragraph 47 of the NPPF is achieved and that paragraph 49 is satisfied in this regard. Nonetheless, I am also satisfied that the proposal is overall consistent with principles of sustainable development.
35. I have considered the conditions put forward by the Council in the event that the appeal is allowed and planning permission granted. I consider that a condition requiring a management plan for the premises would be unnecessary and unduly onerous given the small scale nature of the HMO. However, I shall impose conditions restricting the HMO use to not more than 6 persons, in order to limit its scale, and relating to the provision of adequate bin and cycle storage facilities, in the interests of amenity.
36. Taking all of the foregoing together, I conclude that material considerations exist which are sufficient to outweigh the conflict with the development plan that I have identified. The appeal on ground (a) therefore succeeds.

Grounds (f) and (g)

37. In the light of my decision on ground (a) above, it is unnecessary for me to go on to consider the matters put forward on grounds (f) and (g).

Overall conclusion

38. For the reasons given, and having regard to all matters raised, I allow the appeal on ground (a) and grant planning permission subject to conditions, as set out in the Decision above.

Alwyn B Nixon

Inspector

Plan

This is the plan referred to in my decision dated: **16 February 2017**

by **Alwyn B Nixon BSc MRTPI**

Land at: 236 Old Christchurch Road, Bournemouth BH1 1PE

Reference: APP/G1250/C/16/3153013

Scale:

