
Appeal Decision

Site visit made on 28 March 2017

by Paul Freer BA (Hons) LLM MRTPI

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

Decision date: 11 April 2017

Appeal Ref: APP/P1750/C/16/3157569

Land at Grasmere House, 33 Cargate Avenue, Aldershot, Hampshire GU11 3EW

- 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 J M Mandozai against an enforcement notice issued by Rushmoor Borough Council.
- The enforcement notice was issued on 27 July 2016.
- The breach of planning control as alleged in the notice is, without planning permission, the change of use from a care home with an ancillary garage and store to a 14 bedroom House in Multiple Occupation and a one-bedroom house.
- The requirements of the notice are:

Cease using the property as a 14-bedroom House in Multiple Occupation and a one-bedroom house.

Remove the fence and gate that facilitate the creation of a separate house from the rear parking area.

Remove the false door and any kitchen and sanitary ware from the outbuilding at the rear.

Reinstate the garage for parking purposes in accordance with the details shown on drawing number 0275/2, as approved under planning permission 95/00266/FUL.

- The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: The appeal is dismissed and the enforcement notice is upheld

Procedural Matter

1. In the appellant's Appeal Statement, it is suggested that the previous use of the outbuilding in the rear garden as a caretakers house was a longstanding use and may have become lawful. The implication is therefore that the use as a one-bedroom house stated in the enforcement notice may be lawful. This amounts to an appeal on ground (d) as set out in section 174(2): that, at the date when the notice was issued, no enforcement action could be taken.
 2. The appellant's position is, however, clarified in his Final Comments. In this document, it is accepted that the evidence submitted in relation to previous use of the buildings on the site relates only to the main building and the use of
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the outbuilding as a caretakers house is not purported to have become lawful. I am therefore satisfied that the appellant is not pursuing an appeal on ground (d) and I have not considered this matter further.

The appeal on ground (a) and the deemed planning application

3. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The Council has stated two substantive reasons for issuing the enforcement notice, from which the following main issues are raised:
- the effect of the parking arrangement on highway safety in Cargate Avenue and nearby roads, and on the convenience of other highway users
 - whether the parking arrangement would preserve or enhance the character or appearance of the Cargate Avenue Conservation Area
 - the effect on the living conditions of the occupiers of neighbouring residential properties, and
 - whether a financial contribution is required to make provision for appropriate Special Protection Area Mitigation and Avoidance measures.

Highway safety and the convenience of other highway users

4. The appeal property, known as Grasmere House, was previously used as a care home with a capacity for 10 residents. The care home employed six staff, of which two were resident at the property. The appellant indicates that two car parking spaces were available on site when this use was taking place. The Council has not disputed that figure.
5. The breach of planning control alleged in the notice is the change of use from a care home with an ancillary garage and store to a 14 bedroom House in Multiple Occupation (HMO) and a one-bedroom house. The latter can accommodate two people. The HMO is licensed to accommodate up to 23 occupiers at any one time, compared with a maximum total of 16 residents and staff with the previous care home use.
6. The Council has not adopted a specific car parking standard for HMO's. The appellant has therefore sought to apply the general residential car parking standard to the development that has taken place. I accept that this would be relevant to the one-bedroom house element of the breach of planning control. However, because of the likely differences between typical occupiers of HMO's and occupiers of standard residential properties in terms of car ownership, I do not consider the application of general residential car parking standards to be appropriate or helpful in this case.
7. Similarly, I do not consider reference to examples where the Council has accepted use as a HMO at other locations to be relevant or helpful. It is a fundamental planning principle that each case should be determined on its own merits. There may have been particular circumstances relating to these other sites that justified planning permission being granted notwithstanding a limited number of on-site parking spaces being available, but of which I am not aware. I therefore cannot be certain that these other sites provide a reliable precedent on which base a decision in this case.

8. Consequently, it seems to me that the most appropriate approach to this main issue is to apply the facts of the case to the particular circumstances that prevail in terms of the parking situation in Cargate Avenue and surrounding roads. This is the approach that I shall adopt.
9. Neither the appellant nor the Council has provided a car parking survey. Parking in Cargate Avenue is generally unrestricted, although there are double yellow lines around the junctions with side road. At the time of my site visit, there were several parking spaces available in Cargate Avenue and surrounding roads. I accept that this is only a snapshot and that there may be more demand for on-street parking during the evening and at weekends. However, in the absence of a car parking survey conducted during those periods, I have no evidence to demonstrate that this is the case.
10. The appellant indicates that 10 of the 14 rooms in the HMO are occupied by ex-army Gurkha Nepalese, and that as a population group they do not tend to own cars. There is of course no guarantee that the accommodation would always be occupied by people from this population group, but it is nevertheless informative that a survey of the existing occupiers of the HMO reveals that only residents of 2 of the 14 rooms own a car. This is consistent with a general expectation that occupiers of a HMO are less likely to own a private car.
11. I am also mindful that there is a parking area at the rear of the property, with access onto a service road that runs parallel with Cargate Avenue and links Lansdowne Road with Church Lane West. This car parking area measures some 5.8 metres by 8.8 metres and is enclosed by a wire fence. The parking spaces are accessed from the service road by an inward-opening gate. Whilst this arrangement may limit the number of cars that can be parked in this space, it is evident that even in its current configuration at least two cars could be accommodated within this space.
12. The appellant has suggested that this parking area could be the subject of a planning condition requiring the submission of a parking layout and the subsequent retention of that parking layout in accordance with the details approved. I consider that such a condition would be necessary to maintain at least the existing car parking provision on-site. Given that its retention could be secured through such a condition, I have taken the presence of that car parking area at the rear into account in my consideration of this issue.
13. I am aware of the concerns expressed in representations from local residents in terms of highway safety resulting from inconsiderate car parking. The occupier of a property in Cargate Grove, which is directly opposite the appeal property, refers to parking on the double yellow lines and the blocking of entrances. The occupier of the adjoining property at No 35 Cargate Avenue similarly refers to cars being parked dangerously on the double yellow lines at the junction with Cargate Grove, especially at weekends.
14. However, whilst I do not dismiss these concerns lightly, I have been provided with no documentary or photographic evidence of this inconsiderate parking to substantiate the concerns expressed. Moreover, there is no evidence that the inconsiderate parking referred to is actually caused by the occupiers of Grasmere House. I am in particular mindful that the problem is described as being especially evident at weekends, and I have difficulty in reconciling this with the population profile of the current occupiers of Grasmere House and the evidence that these occupiers collectively only own two cars.

15. In summary, I have no evidence to show that the use of the appeal property as a 14 bedroom HMO and a one-bedroom house has resulted in indiscriminate, dangerous or obstructive parking, such that it is prejudicial to conditions of highway safety or results in inconvenience to other highway users. Furthermore, given the evidence of low car ownership amongst current occupiers of the HMO, I am not persuaded that car parking conditions in Cargate Avenue are now materially different to when the property was previously used as a care home with a capacity for 10 residents with six staff.
16. I therefore conclude that the use as a 14 bedroom HMO and a one-bedroom house does not have an unacceptable effect on highway safety in Cargate Avenue and nearby roads, or on the convenience of other highway users. I therefore conclude that this use complies with Policies CP1 and CP16 of the Rushmoor Core Strategy. These policies require, amongst other things, that development will be permitted subject to maintaining the safe operation of the highway network. Policy CP16 does specifically require that development provides appropriate parking in accordance with the Council's standards but, since the Council has not adopted a car parking standard in relation to HMO's, there is no conflict with that policy in this case.

Character and appearance of the Cargate Avenue Conservation Area

17. The character of the Cargate Avenue Conservation Area is derived, in part, from the substantial detached and semi-detached houses that line both sides of the roads. These houses are typically constructed of brick, with brick detailing and the consistent use of architectural features such as bay windows. The houses are typically sited close to the highway with shallow front gardens.
18. The shallow front gardens to the properties in Cargate Avenue mean that few of them have on-curtilage car parking. As a result, on-street car parking already forms an intrinsic part of the character and appearance of the Cargate Avenue Conservation Area. I have found that the use of the appeal property as a 14 bedroom HMO and a one-bedroom house has not demonstratively resulted in a significant increase in on-street car parking but, even if it did result in all the available on-street parking spaces being occupied, it would not adversely affect the character or appearance of the conservation area given the existing level of on-street car parking.
19. The appeal property is a substantial detached building of brick construction and is designated as a Building of Local Importance. Despite exhibiting some architectural features not commonly found on other buildings in the conservation area, it nevertheless sits comfortably in the street scene and in my view makes a positive contribution to the character and appearance of the Cargate Avenue Conservation Area. The use of this building as a HMO has not affected the external appearance of this building and does not detract from the contribution that it makes to the character and appearance of the conservation area.
20. I therefore conclude that the use as a 14 bedroom HMO and a one-bedroom house preserves the character and appearance of the Cargate Avenue Conservation Area. I therefore conclude that this use complies with Policies CP1 and CP2 of the Rushmoor Core Strategy. These policies require, amongst other things, that development will protect and enhance the Borough's heritage assets.

Living conditions

21. Although specifically referred to in the reasons for issuing for enforcement notice, the Council has not expanded upon its concerns in relation to noise disturbance in its evidence. There is reference to this issue in the Delegated Report recommending that enforcement action be authorised, but this is a generalised comment about increased intensity in the use of the property.
22. The building adjoining the appeal site to the north, Brangwyn Mews, is atypically sited at the rear of the plot. I noted that this building features a number of windows in the rear elevation that face onto the service road onto which the parking area for the appeal property opens. I accept that the occupiers of Brangwyn Mews could be affected by noise disturbance from vehicles entering and exiting this parking area, as well as passing the rear elevation of the property. However, the number of vehicles doing so would be limited by the size of the parking area and I have been provided with no technical evidence that these movements would cause noise disturbance to the occupiers of Brangwyn Mews. I also note that none of the occupiers of Brangwyn Mews have objected to the use of the appeal property as a HMO.
23. There is reference to noise disturbance in the representations from the occupier of the property in Cargate Grove, but this is neither quantified nor positively linked with evidence to the occupiers from the HMO at the appeal property. The occupier of the adjoining property at No 35 Cargate Avenue also refers to lights being left on in the one-bedroom house, but on my reading this is expressed more as an observation rather than a specific objection.
24. It follows that there is no evidence before me to substantiate the reason for issuing the enforcement notice insofar as it relates to noise disturbance. I therefore conclude that the use as a 14 bedroom HMO and a one-bedroom house does not unacceptably affect the living conditions of the occupiers of neighbouring residential properties. I therefore conclude that this use complies with Policies CP1 and CP2 of the Rushmoor Core Strategy in this respect also. These policies indicate, amongst other things, that development will be permitted provided it does not result in any demonstrable harm to amenity.

Whether a financial contribution is required to make provision for appropriate Special Protection Area Mitigation and Avoidance measures

25. The appeal site is located within 5km of the Thames Basin Heaths Special Protection Area (TBHSPA). The Council has adopted the Rushmoor Thames Basin Heaths Special Protection Area Avoidance and Mitigation Strategy, to which there are two elements. The first element is the provision of Suitable Alternative Natural Greenspace (SANG) in order to divert additional recreation pressure away from the TBHSPA. The second element is the provision of a range of Strategic Access Management and Monitoring Measures (SAMM) to avoid displacing visitors from one part of the TBHSPA to another, as well as to minimize the impact of visitors on the TBHSPA.
26. The Council considers that the use as a 14 bedroom HMO and a one-bedroom house has resulted in a net increase of 23 residents living permanently at the premises. Accordingly, the Council calculates that a financial contribution of £60,190 is required towards SANG and that a contribution of £6576.12 is required towards SAMM in order to mitigate the impact of these additional permanent residents on the TBHSPA.

27. The Council indicates in its Appeal Statement that, due to the limited capacity within the SANG, access to the TBHSPA is not automatic. This is on the basis that the Council wishes to ensure that the available capacity is awarded to support development that is compliant with Local Plan Policy and that is likely to come forward in the near future. The Council go onto explain that an allocation for capacity is at the discretion of the Head of Planning but that, because the development is considered by the Council to be contrary to policies in the development plan, no allocation has been made to support the development at this time. The Council then concede that if I find that the development is acceptable in all other respects, it will make an allocation of capacity to support a follow-up planning application subject to the caveat that sufficient capacity is available at that time. For reasons to which I return below, that caveat is an important one.
28. Although the appellant has indicated that he would be prepared to enter into a planning obligation under section 106 of the 1990 Act to provide the contribution sought by the Council, it is incumbent upon me to consider whether such a planning obligation would meet the tests set out in paragraph 204 of the National Planning Policy Framework (Framework). I am satisfied that the contribution sought would be directly related to the development subject to the deemed planning application, but I must also consider whether the contribution is necessary as well as being fairly and reasonably related in scale and kind to the development.
29. I have been provided with a copy of the Avoidance and Mitigation Strategy (AMS) for the TBHSPA. This document sets out the reasons for the TBHSPA and the justification for contributions towards the SANG and SAMM. This document also sets out the methodology and the calculations used to arrive at the contributions requested towards SANG and SAMM. On the basis of the information contained in the AMS, I am satisfied that the contribution sought is necessary to make the development acceptable planning terms as well as being fairly and reasonably related in scale and kind to the development subject to the enforcement notice.
30. In view of the Council's reluctance to confirm whether there is capacity within the SANG at this time, I have carefully considered whether the planning obligation to provide the contribution sought by the Council could be secured through the imposition of a planning condition, as suggested by the appellant. In this context, I acknowledge that the Planning Practice Guidance (PPG) explains that it may be possible to use a negatively worded condition to prohibit development authorised by a planning permission until a specified action has been taken. The PPG specifically cites the entering into of a planning obligation requiring the payment of a financial contribution as an example of where such a condition may be used.
31. However, the use of a condition envisaged in the PPG is principally intended to apply to a situation where the development has not commenced. In that scenario, failure to comply with any of the requirements in the condition simply results in the planning permission falling away. Whilst it is possible to impose such a condition where a development has commenced, in this case the situation is complicated by the fact that the development for which the financial contribution is sought is the subject of an enforcement notice.

32. If planning permission was to be granted subject to a condition requiring the completion of a legal agreement to provide the contribution sought in relation to SANG and SAMM, the effect would be to quash the enforcement notice. In this case, the situation is further complicated by the Council's admission that it would make an allocation of capacity only if sufficient capacity is available in the SANG at the relevant time. There is consequently a risk that the condition could not be discharged because there was not sufficient capacity in the SANG at that time. In that scenario, the use of the appeal site as a 14 bedroom HMO and a one-bedroom house would not be acceptable in planning terms but would be ongoing in breach of a condition to which a planning permission was granted. The Council would then be in a position of having to consider again the expediency of serving a further enforcement notice to require the cessation of that use.
33. In these circumstances, I am not convinced that a condition requiring the completion of a legal agreement to secure the contribution sought by the Council could be framed to accord with the six tests set out in the Framework and the PPG, specifically in terms of being precise and enforceable. For that reason, notwithstanding that the PPG contemplates the use of negatively worded conditions in certain circumstances, I consider that the imposition of a condition as suggested by the appellant would not be appropriate in this case.
34. I conclude that, in the absence of a suitably worded legal agreement, the development does not make adequate provision for a contribution towards appropriate Special Protection Area Mitigation and Avoidance measures. I therefore conclude that the development subject to the enforcement notice conflicts with Policies CP13 and CP15 of the Rushmoor Core Strategy. These policies require that development likely to have a significant effect on the TBHSPA will be required to put in place adequate mitigation measures.

Other Matters

35. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the use of the appeal property as a 14 bedroom House in Multiple Occupation and a one-bedroom house fails to accord with the development plan in one respect. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
36. The appellant has referred me to the Hart, Rushmoor and Surrey Heath Housing Market Assessment (SHMA), published in 2014. In particular, the appellant points to the recognition within that document that, with the Queen's own Gurkha Logistic Regiment based in Aldershot, the area has become a popular destination for Nepalese in-migrants. The SHMA explains that this includes both ex-Gurkhas and non-army Nepalese migrants and that, for cultural reasons and various difficulties in accessing other housing options, this has resulted in a localised need for HMO accommodation. The appellant also confirms that he has witnessed a strong demand from this community for HMO accommodation, and I understand that 10 of the 14 rooms in the HMO are currently occupied by retired ex-army Gurkha Nepalese.

37. In considering the points made by the appellant in this respect, I have had due regard to the Public Sector Equality Duty (PSED) contained in section 149 of the Equality Act 2010. I acknowledge that the SHMA identifies a particular requirement in Rushmoor for HMO accommodation to meet the housing needs of Nepalese in-migrants derived from the association with Aldershot of the Queen's own Gurkha Logistic Regiment. It is also evident that the use of the appeal property as a HMO contributes towards meeting the housing needs of that community. However, the appellant has provided no evidence to demonstrate that this identified need is not being met, and cannot be met, by existing HMOs in Rushmoor or the other Boroughs to which the SHMA relates.
38. Having regard to the above, in balancing the housing needs of the community of Nepalese in-migrants against the harm caused by the use of the appeal property as a HMO, I am not persuaded that the housing needs of the Nepalese community is in itself overriding and could not be met by existing HMOs. Moreover, I am mindful that the conflict with the development plan in this case is in relation to the lack of a financial contribution towards mitigation measures for impact on the TBHSPA, a Special Protection Area designated pursuant to the Habitat Directive. The latter has been transposed into domestic legislation by the Conservation of Habitats and Species Regulations 2010. In my view, the potential harm to the TBHSPA is therefore a material consideration that attracts substantial weight in the balancing exercise to be carried out in this case. Consequently, on balance, I consider that the housing need of the community of Nepalese in-migrants does not outweigh the harm caused by the use of the appeal property as a HMO resulting from the lack of an appropriate financial contribution towards mitigation measures for impact on the TBHSPA.

Conclusion on the ground (a) appeal

39. I have found that the use of the appeal property as a 14 bedroom House in Multiple Occupation and a one-bedroom house does not have an unacceptable impact on highway safety or the convenience of other highway users, and does not unacceptably harm the living conditions of the occupiers of neighbouring residential properties. I am also satisfied that this use of the appeal property preserves the character and appearance of the Cargate Avenue Conservation Area. Nevertheless, in the absence of a suitably worded legal agreement to make adequate provision for a contribution towards appropriate Special Protection Area Mitigation and Avoidance measures in relation to the TBHSPA, the harm caused by the use is unacceptable in planning terms. There are no other material considerations of sufficient weight to outweigh that harm.
40. The appellant has indicated that a split decision would be appropriate if I did not find the development acceptable in its entirety. The sole harm arising from the breach of planning control relates to the impact on the TBHSPA and it is clear that the greater part of this harm is derived from the use of the main building as a HMO. I have therefore carefully considered whether the use of the outbuilding as a one-bedroom house would be acceptable in this respect when considered in isolation. However, there remains a question concerning the capacity of the SANG and there is no indication before me that it could accept the further impact arising even from a single dwelling without harm to its protected habitat. Consequently, a split decision would not be appropriate in this case.
41. Accordingly, I conclude that planning permission ought not to be granted.

The appeal on ground (g)

42. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is six months. A period of 12 months is sought.
43. The essence of the appellant's case on this ground is that the existing tenants hold 12 month tenancies and that it would be unreasonable to rescind those tenancies at short notice. However, I have not been provided with a copy of those tenancy agreements. Consequently, I have no information regarding the terms and conditions of those tenancies, including any provisions for the termination of those tenancies before full term is reached. Moreover, I have been provided with no indication about the start or end dates of the tenancies held by the existing tenants, and therefore how long those tenancies have to run in the normal course of events. In the absence of that information, I am not persuaded that there is any reason to extend the period of compliance on this basis.
44. I note the appellant's reference to Lord Scarman's comment about the human factor in planning decisions. In considering this ground of appeal, I have had regard to the rights enjoyed by the existing tenants under the Human Rights Act 1998 and also to the PSED. In particular, I am mindful of the various difficulties experienced by the Nepalese community in accessing other housing options. Nevertheless, these considerations need to be balanced against the potential harm arising from the breach of planning control. In this case, this harm relates to the potential impact on the TBHSPA a consideration that, in my view, attracts substantial weight. In weighing that balance and taking all the above considerations into account, I am satisfied that the six month period specified in the notice is proportionate in relation to the harm caused by the breach of planning control.
45. I am also mindful of the Council's indication that it would review capacity in the SANG in relation to a policy-compliant development, should the appeal be allowed. Although the appeal is to be dismissed, in view of my findings in relation to the impact on the TBHSPA, the appellant may wish to submit to the Council a fresh planning application accompanied by an appropriate legal agreement to provide the financial contribution towards appropriate Special Protection Area Mitigation and Avoidance measures.
46. Whilst I make no comment on the outcome should a planning application be submitted, in considering the period of time that may be reasonably be required for the submission and determination of such an application, I am mindful that a legal agreement would need to be drafted and executed. I am also mindful that the Council will require sufficient time to review capacity in the SANG. However, I am satisfied that a period of six months would be sufficient to accomplish all these tasks. I therefore consider that no extension to the period of compliance specified in the notice is required in this respect.
47. Accordingly, the appeal on ground (g) fails.

Conclusion

48. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed planning application.

Formal Decision

49. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Paul Freer

INSPECTOR