



Appeal Decision

Hearing held on 8 October 2019

Site Visit made on 8 October 2019

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 November 2019

Appeal Ref: APP/H4505/C/18/3217996

321 and 323 Rectory Road, Bensham, Gateshead NE8 4RS

- 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 Jomast Accommodation Limited against an enforcement notice issued by Gateshead Council.
- The enforcement notice was issued on 7 November 2018.
- The breach of planning control as alleged in the notice is, without planning permission, the material change of use from a dwelling (use class C3) to an eight-bedroom house in multiple occupation (HMO) (sui generis use).
- The requirements of the notice are: permanently cease the use of the dwelling as an eight-bedroom house in multiple occupation where no more than six persons shall reside at the dwelling.
- The period for compliance with the requirements is 4 weeks.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variations in the terms set out in the Formal Decision below.

Preliminary Matters

1. The appellant was given seven days following the close of the Hearing to submit a revised, completed unilateral undertaking and comments on the provision of the Equality Act 2010. Submissions were received and the Council given appropriate time to comment on their contents. I have taken the submissions of both parties in respect of these matters into account.

The Notice

2. The notice requires the recipient to permanently cease the use of the dwelling as an eight-bedroom house in multiple occupation (HMO) where no more than six persons shall reside at the dwelling. At the Hearing, I raised the point that the phrase "where no more than six persons shall reside at the dwelling" was somewhat confusing. The parties agreed. Case law has held that where there has been a change of use of a single dwellinghouse to a use for multiple occupation, a requirement simply to cease the use is sufficient. A positive requirement to restore the use as a single dwellinghouse would be excessive.
3. To that end, the parties agreed that the notice need not do more than require the use as an eight-bedroom house in multiple occupation to cease. Both

parties agreed that were I to vary the notice accordingly, no injustice would arise to either the Council or the appellant. I see no reason to disagree. Consequently, I will vary the notice to delete the phrase "where no more than six persons shall reside at the dwelling".

4. Similarly, the notice requires the use of the 'dwelling' as an HMO to cease. However, the land to which the notice relates is referred to as 'the land'. It was agreed at the Hearing that the requirement should be varied to change 'the dwelling' to 'the land' and doing so would not result in injustice to the Council or the appellant.
5. Finally, the use of the word permanently within the requirements of the notice is unnecessary, having regard to the provisions of section 181(1) of the 1990 Act which states that compliance with an enforcement notice shall not discharge the notice. The notice can be varied to delete the word without injustice to the appellant or the local planning authority.

The appeal on ground (a)

Main Issue

6. The main issue is the effect of the development on the living conditions of neighbouring residents with particular regard to noise and disturbance.

Reasons

7. The appeal site comprises a terraced property located on Rectory Road in a predominately residential area characterised by terraced streets. Prior to the breach taking place, the property was in a residential use. It is a matter of dispute between the parties whether the last lawful use of the land was as two flats or a single dwellinghouse. The development subject of the notice is the use of the property as an 8-bedroom HMO.
8. A planning application for the change of use from a dwelling to an eight-bedroom HMO at the appeal site was refused by the Council in January 2018¹. A subsequent appeal was dismissed in July 2018. In that decision, the Inspector found that the general level of activity associated with an HMO occupied by up to 16 people would be significantly greater than a typical family house and it would therefore, increase the potential for noise and disturbance. The Inspector dismissed the appeal on the basis of the harm that would arise as a result of that noise and disturbance to neighbouring residents.
9. The appellant now seeks to address those concerns by proposing to restrict occupancy of the HMO to up to eight households comprising asylum seekers who are either a single expectant female or a single mother with a baby or young child. No children over the age of 10 would be allowed to reside at the property. At least four children would be under the age of two years.
10. However, the previous decision makes clear that it was considered on the basis that it could be occupied by up to 16 residents. There is nothing in the previous decision to suggest that the Inspector considered the type of resident that would occupy the HMO. Indeed, there is no indication that the Inspector considered the HMO on the basis that it would be occupied solely by 16 adults living as individual households as suggested by the appellant. In that sense,

¹ APP/H4505/W/18/3196256

there is little difference to the development before me here. Particularly, given the previous Inspector concluded that a condition restricting occupancy could not be imposed as it would restrict the benefit of the permission sought.

11. Ultimately, even if the proposal put forward by the appellant is materially different to that considered by the previous Inspector, the HMO would still be occupied by up to 16 persons. I am unpersuaded by the appellant's view that the age, gender or family dynamic of those persons would sufficiently alter the levels and types of noise to overcome the harm for a number of reasons.
12. Firstly, whilst mothers and their children are unlikely to engage in late night drinking externally, they will nevertheless play much more often in the rear yard. Moreover, even were a condition preventing use of the rear yard imposed as suggested by the appellant, significant noise and disturbance would still arise from the comings and goings of residents to and from the property.
13. I note that children under the age of 10 are unlikely to venture out of the property on their own, meaning that there are unlikely to be the comings and goings of 16 individuals on a daily basis. However, that does not necessarily mean that fewer households would result in fewer comings and goings. As was discussed at the Hearing, households containing children, particularly younger children, are just as likely to come and go from the property on a regular basis. Trips for medical appointments, nursery visits, educational and recreational activities can all occur throughout the day and evening with a degree of regularity. This contrasts with an HMO occupied by 16 individual adults, who may well leave on a morning, be away from the property for the day at work or in education and return on an evening. The proposed household formation would also give rise to visitors from family or friends be that parents, relatives or friends of the mothers or their children.
14. As such, there is no reason to believe that eight households composed in the manner put forward would necessarily give rise to fewer movements than 16. The fact that each individual's circumstances can be so widely different is indicative of the reasons why the Inspector in the previous appeal was not explicit about the type of person that would occupy the HMO, only the number of persons and households that would do so.
15. In any event, regardless of whether occupied by eight households of single mothers and their children or 16 households containing single adults, the comings and goings of eight individual households would still be significantly greater than a typical single household occupying a family house or two smaller households occupying two flats. As the Council pointed out at the Hearing, the comings and goings from a single or two households would be more infrequent than those that would occur here. There would be less likelihood of repeated shopping trips or trips to educational, medical or recreational facilities for example.
16. Consequently, I find that, even if occupied by 8 single mothers and their dependent children, the HMO would result in a harmful level of noise and disturbance to the occupiers of the properties either side – 317/319 and 325/327 Rectory Road.
17. The Council also indicated at the Hearing that occupiers of 198/200, 202/204 and 206/208 Windsor Avenue to the rear are also likely to be affected. However, given the separation distances involved, I am satisfied the use of the

property as an HMO would not result in harmful effects to the occupiers of those properties.

18. Nevertheless, I conclude, for the reasons given above, that the development will have a harmful effect on the living conditions of neighbouring occupiers with particular regard to noise and disturbance. As such, the development is in conflict with Policy CS14 of the Planning for the Future Core Strategy and Urban Core Plan 2016-2030 for Newcastle and Gateshead 2015 which states that the wellbeing and health of communities will be maintained and improved by preventing negative impacts on residential amenity and wider public safety from noise amongst other things. There would also be conflict with saved Policy DC2 of the Unitary Development Plan for Gateshead 2007 which states that permission will be granted for new development where it does not cause undue disturbance to nearby residents.

Other Matters

19. Considerable discussion was had at the Hearing regarding whether or not it would be open for me to restrict occupancy of the HMO those persons put forward by the appellant. However, it follows from my conclusion on the main issue above that a condition which restricts the occupancy to that intended would not be necessary to make the development acceptable in planning terms. It would not therefore meet the tests of paragraph 55 of the National Planning Policy Framework (the Framework).
20. Likewise, the section 106 planning obligation submitted by the appellant would not be necessary to make the development acceptable in planning terms and would not therefore meet the tests of regulation 122(2) of the Community Infrastructure Levy Regulations (CIL) 2010 or paragraph 56 of the Framework. I have not, therefore, taken the obligation into account.
21. I have had regard to appeal decisions at Tankerville Street, Hartlepool, Conference Road, Armley, Manorcrofts Road, Egham and Royal Avenue, Tonbridge which all relate to material changes of use to HMOs and have been raised by the Council. However, in two of those instances the issue of living conditions was not a matter before the Inspector. In addition, the Inspectors found in the other two, like I have, that the use of the properties as an HMO would result in a substantial intensification of the property. As such, the existence of those decisions does not outweigh the harm I have identified above. As it is, I have limited evidence regarding the circumstances of those cases and whether they are directly comparable to those here. In any event, I have considered this appeal on its own merits.
22. The appellant argues that there is an available fallback position in the event the appeal is dismissed. Depending on whether the last lawful use was a single dwellinghouse or two separate flats, the use of the property could change into an HMO for up to 6 or 12 people under rights afforded by the Town and Country Planning (General Permitted Development) (England) Order 2015. However, either way the effect would be less harmful than the 16 person HMO before me here. Thus, the availability of a fallback position under the GPDO would not justify the harm I have identified in respect of the main issue above.
23. The Public Sector Equality Duty (PSED) contained in the Equality Act 2010, sets out the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations

between people who share a protected characteristic and people who do not share it. However, the parties both noted in submissions following the Hearing that there is no engagement of the PSED in respect of this appeal. I see no reason to disagree.

Conclusion on the ground (a) appeal

24. For the reasons given above, and having considered all matter raised, I conclude that the appeal should be dismissed.

The appeal on ground (f)

25. The appeal on ground (f) is made on the basis that the requirements of the notice exceed what is necessary. Section 173(4) of the 1990 Act sets out the purposes which an enforcement notice may seek to achieve. They are either (a) remedying of the breach of planning control or (b) remedying any injury to amenity which has been caused by the breach.
26. The notice, as varied, is not explicit about which of the two purposes it seeks to achieve. At the Hearing the Council indicated that the purpose of the notice was to remedy injury to amenity. In contrast, the appellant found the purpose to be to remedy the breach of planning control.
27. The notice, as varied, requires the use of the land as an eight-bedroom HMO to cease. Such a requirement would have the effect of discontinuing the use of the land. It therefore seems to me that the purpose of the notice falls under section 173(4)(a) – to remedy the breach of planning control. As a result, the requirement to cease the use does not go beyond what is necessary to remedy the breach.
28. Whilst case law has established that it is incumbent on me to consider an obvious alternative that would overcome the planning difficulties at less cost and disruption than total cessation, there was no indication at the Hearing that there were any such alternatives. The fact that there is no certainty regarding the previous use of the premises means I cannot be sufficiently confident that it would be open to me to vary the notice to require compliance with the limitations of the GPDO without injustice to the appellant or the local planning authority.
29. The appeal on ground (f) therefore fails.

The appeal on ground (g)

30. An appeal on ground (g) is made on the basis that the period for compliance with the requirements of the notice is too short. The notice gives a period of four weeks for it to be complied with. The appellant argues that a period of six months is more appropriate.
31. I recognise there is a need for expediency to ensure that the harm to the living conditions of neighbouring residents is overcome. However, a period of four weeks seems to be unduly short to allow present occupiers time to be rehoused. I note that residents need to be rehoused in a managed process and that, whilst the appellant has accommodation available elsewhere, relocation will be a process that takes time and care. As such I find a period for compliance of 6 months a more reasonable time to cease the use of the land.
32. The appeal on ground (g) therefore succeeds.

Human Rights

33. The loss of a person's home would be an infringement of their rights under the Human Rights Act 1998 (HRA). The cessation of the HMO use would amount to interference and would engage the right for respect for private and family life, home and correspondence set out in Article 8 of the HRA. This is a qualified right, whereby interference may be justified if in the public interest, applying the principle of proportionality.
34. I acknowledge that the consequence of dismissing the appeal would be that any person presently residing in the appeal property would be required to vacate the accommodation. However, the notice, as varied due to the success of the appeal on ground (g), allows for a six month compliance period which would allow the residents to find an alternative home. Moreover, there is no indication that those persons would necessarily be made homeless beyond that date.
35. The harm I have identified in respect of the effect on the living conditions of neighbouring occupiers is of such weight that upholding the notice would be a proportionate and necessary response that would not violate those persons rights under Article 8 of the HRA. The protection of the public interest cannot be achieved by means that are less interfering of their rights.

Overall Conclusion

36. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended

Formal Decision

37. It is directed that the enforcement notice be varied by:
- the deletion of the words "4 weeks" from section 6 of the notice and their substitution with the words "6 months" as the time for compliance;
 - the deletion of the word "permanently" from section 5(i) of the notice;
 - the deletion of the word "dwelling" from section 5(i) of the notice and its substitution with the word "land", and,
 - the deletion of the words "where no more than six persons shall reside at the dwelling" from section 5(i) of the notice.
38. Subject the variations, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

J Whitfield

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

David Hardy
Stuart Monk

Squire Patton Boggs (UK) LLP
Jomast Accommodation Limited

FOR THE LOCAL PLANNING AUTHORITY:

Philip Goodfellow
Joanne Munton
Claire Simm

Gateshead Council
Gateshead Council
Gateshead Council

INTERESTED PERSONS:

Linda Ross

Local Resident

DOCUMENTS

- 1 Signed Statement of Common Ground
- 2 Revised Suggested Planning Conditions