

# Appeal Decision

Site Visit made on 12 October 2021

**by Martin Small BA(Hons) BPI DipCM MRTPI**

an Inspector appointed by the Secretary of State

**Decision date: 3<sup>rd</sup> November 2021**

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**Appeal Ref: APP/Z1775/W/21/3270358**

**3 Pains Road, Southsea, PO5 1HE**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Simon Birmingham against the decision of Portsmouth City Council.
  - The application Ref 19/00866/FUL, dated 31 May 2019, was refused by notice dated 24 February 2021.
  - The development proposed is described as C4 (house in multiple occupation) use to Sui Generis use (House in multiple occupation for over 6 persons).
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## Decision

1. The appeal is dismissed.

## Procedural Matters

2. I observed during my site visit that the room annotated as 'Study' on the existing floor plans was in use as a bedroom. I have therefore determined this appeal on the basis that the development has taken place. As 7 bedrooms are shown on the proposed floor plans and the drawing indicates that all rooms are for single use, I have considered this appeal on the basis of an assumed occupancy of 7 persons as confirmed by the appellant.
3. Subsequent to the determination of the planning application by the Council, the appellant submitted a revised 'proposed' floor plans drawing to reflect the actual works that have been undertaken (PG3135 18 5 Rev H). This drawing differs from that considered by the Council (PG3135 18 5 Rev E) in the addition of a shower and toilet on the ground floor. With regard to the '*Wheatcroft principles*'<sup>1</sup> I am satisfied that accepting this revised drawing would not deprive anyone who should be consulted on the revisions of the opportunity to be so. I have therefore determined this appeal on the basis of the revised drawing.

## Main Issues

4. The main issues are:
  - i) the effect of the development on the integrity of the Solent Special Protection Areas (the SPAs)<sup>2</sup>; and
  - ii) whether the proposed development provides satisfactory living conditions, with particular regard to personal and communal space and access to bathroom facilities.

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<sup>1</sup> *Bernard Wheatcroft Ltd v SSE* [JPL 1983 P37]

<sup>2</sup> The Portsmouth Harbour SPA, Chichester and Langstone Harbours SPA, Solent and Southampton Water SPA, Solent and Dorset Coast potential SPA, Solent and Isle of Wight Lagoons Special Area of Conservation and Solent Maritime Special Area of Conservation.

## Reasons

### *The SPAs*

5. The mudflats, shingle and saltmarshes of the SPAs provide essential feeding and roosting grounds for an assemblage of internationally important numbers of water birds which together comprise the qualifying features of the SPAs. The conservation objectives for each of the SPAs are to ensure that the integrity of the site is maintained and restored in order to protect the habitats and the birds that depend on them.
6. Research undertaken during 2009-2013 predicted that new housing around the Solent would lead to more people visiting the coast for leisure, the majority from within a 5.6 km straight line distance of the SPAs<sup>3</sup>. This increased recreation has the potential to cause more disturbance to the birds, thus threatening their survival.
7. Furthermore, Natural England (NE) has identified that high levels of nitrogen and phosphorus, mostly from agricultural sources or wastewater from existing housing or other development, are being discharged to the water environment in the Solent<sup>4</sup>. These levels are causing eutrophication of the SPAs which impacts on their important bird species. NE considers that there is a likely significant effect on the SPAs due to the increase in wastewater from new developments coming forward.
8. The appeal property is within 5.6 km of the Portsmouth Harbour SPA. There is likely to be additional recreational activity and wastewater arising from the additional occupant. Whilst this change would be small considered in isolation, when considered in combination with other projects, it is likely to have a significant effect on the integrity of the SPAs. It is therefore necessary for me, as the competent authority, to undertake an appropriate assessment (AA) and consider whether or not mitigation could reduce any adverse effects on the protected sites.
9. The Solent Recreation Mitigation Strategy (2017) (SRMS) provides a strategic solution to ensure that the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended) (the Habitats Regulations) with regard to the in-combination effects of increased recreational pressures on the SPAs arising from new residential development are met through mitigation measures.
10. The Strategic Access Management and Monitoring mitigation measures include a team of rangers to help coastal visitors and communities understand the importance of the different bird species and the impact of disturbance. As the SRMS has been endorsed by NE, I am satisfied that these measures would provide adequate mitigation for any recreational impacts associated with the development. The measures are funded by contributions from all new residential dwellings within 5.6 km of the SPAs, usually secured through a legal agreement.
11. As regards nutrients, given the difficulty for smaller developments to achieve nutrient neutrality, NE suggests that strategic mitigation options may include a

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<sup>3</sup> Liley D and Tyldesley D (2013) Solent Disturbance and Mitigation Project Phase III Towards an Avoidance and Mitigation Strategy.

<sup>4</sup> Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (version 5 June 2020).

- scheme collecting financial contributions from developers. The Council has published an Interim Nutrient Neutral Mitigation Strategy (2019) (INNMS).
12. The INNMS sets out three possible mitigation options including "*Purchasing of 'mitigation credit' from the control of, and water efficiency improvement works to, the Council's own property assets or other recognised source of 'credit' in perpetuity*". The INNMS explains that the Council is currently able to accumulate 'mitigation credit' to help offset new development through water efficiency improvements to the Council's housing stock and by holding vacant Council assets due for redevelopment.
  13. This mitigation option is to be funded through a proportionate contribution from developers as appropriate, collected and pooled through S.106 agreements. For smaller development proposals that are seeking to use the mitigation credit, the Council will offer such credit in perpetuity for an appropriate administration and monitoring fee, to be secured through a planning obligation. I consider the INNMS sets out suitable measures for the mitigation of the likely significant effects of the development on the SPAs.
  14. Contributions towards the mitigation measures set out in the SRMS and INNMS are necessary to make the development acceptable in planning terms. The Committee Report refers to the appellant opting to pay the requisite contribution towards mitigation for the recreational impacts through a S.111 agreement but I have no confirmation of that contribution having been paid.
  15. The appellant has indicated a willingness to enter into a S.106 agreement for the contribution towards mitigation measures and stated that this would be done through the appeal process. However, no planning obligation has been provided to me. I also note the uncertainty over the availability of mitigation credits at any particular point in time. I cannot be confident therefore that the necessary mitigation for either the recreational or nutrients effects of the development have been or would be secured.
  16. I have considered whether a condition should planning permission be granted would provide an appropriate means of securing adequate mitigation. The Council has suggested such a condition which I note was imposed on the planning permission granted for a similar development at 48 Green Road, Southsea, to which the appellant draws my attention<sup>5</sup>. The suggested condition refers to "a scheme for the mitigation of increased nitrogen and phosphorus levels and potential Recreational Disturbance – Wading Birds". The Council's evidence and the informative with the suggested condition indicates that that mitigation is usually secured through a legal agreement.
  17. However, the Planning Practice Guidance advises that a negatively-worded condition requiring the applicant to enter into a planning obligation is unlikely to be appropriate in the majority of cases. Such a condition may be appropriate in exceptional circumstances where there is clear evidence that the delivery of the development would otherwise be at serious risk, for example, in the case of particularly complex development schemes. However, I have no evidence that this circumstance is applicable to this proposal. A condition requiring a planning obligation would therefore not be appropriate, in my view, in the circumstances of this appeal.

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<sup>5</sup> 19/01096/FUL

18. I therefore conclude that, from the evidence provided and taking a precautionary approach, I cannot be reasonably certain that the development does not have an in-combination adverse effect on the integrity of the SPAs from additional recreational activity. Furthermore, without a suitable mechanism to secure appropriate mitigation, the development has an in-combination adverse effect arising from the occupation of the additional bedroom through increased wastewater discharge.
19. Accordingly, in this respect, the development conflicts with the Habitats Regulations and Policy PCS13 of The Portsmouth Plan Portsmouth's Core Strategy (2012) (the Core Strategy). Policy PCS13 sets out that green infrastructure will be protected by, amongst other things, refusing developments that would have an adverse effect on a habitats site either alone or in combination with other plans and projects.

#### *Living conditions*

20. The development has resulted in the loss of a room indicated as 'Study' on the existing floor plans drawing. Although only increasing the occupancy of the appeal property by one person, the development has therefore resulted in the loss of useable communal space.
21. However, the property includes a dining room separate from the kitchen with a table and sofas, both seating 4 in comfort, and a basement 'entertainment room / lounge' which has seating for 6 in comfort. The kitchen, dining room and lounge are approximately 11.8 m<sup>2</sup>, 14.3 m<sup>2</sup> and 15.7 m<sup>2</sup> respectively. These rooms therefore exceed the floorspace standards set out in the Council's "Houses in multiple occupation (HMOs) – Ensuring mixed and balanced communities" Supplementary Planning Document (2019) (SPD).
22. The development therefore accords with the SPD guidance on the extent of communal floorspace in respect of these rooms. The first and second floor shower rooms as shown on the Proposed floor plans are marginally smaller than the standards in the SPD, but both rooms are useable. Moreover, the SPD is guidance and does not have the weight of a planning policy.
23. Passing through the dining room to access the kitchen can be done with reasonable ease. Although in a basement, the lounge receives adequate natural light from an almost full height glazed window which opens onto external steps to the garden. Whilst outlook from the basement is limited, the dining room and kitchen both receive adequate natural light and have a satisfactory outlook from existing windows. The kitchen is of a good standard with fitted cupboards and appliances. Furthermore, although other than bedroom 1 the bedrooms are not generous in size they all exceed the minimum standard in the SPD and provide adequate accommodation.
24. The new bedroom 7 is located on the ground floor at the rear of the property, beyond the kitchen. The occupant of the room would therefore need to pass through the kitchen and dining room to access a shower or toilet. However, as these are communal areas and the facilities are on the same floor, this is not so unacceptable as to warrant the withholding of planning permission.
25. I therefore conclude that the development provides satisfactory living conditions for the occupiers of the property with regard to the provision of both personal and communal space and access to bathroom facilities. Accordingly I

find no conflict in this respect with Policy PCS23 of the Core Strategy which, amongst other things, requires that new development provides a good standard of living environment for occupiers.

### **Other Matters**

26. I acknowledge that the property has an HMO licence for 8 persons and provides a good standard of accommodation overall. However, these matters do not outweigh the likely significant effect on the integrity of designated habitats sites which would be adverse and for which there is no adequate mitigation before me.
27. I note the common objections raised by multiple members of the East St Thomas Residents Forum (the Forum). The locality of the appeal property has a high proportion of HMOs. However, the property was already in use as an HMO and the development has not increased the proportion of HMOs in the area. The SPD sets out that with proposals to change the use of a Class C4 HMO to a Sui Generis HMO in areas with an existing imbalance of HMOs the Council will consider the potential harm caused by an increase in the number of bedrooms. I have no evidence that the one additional bedroom / occupant at the appeal property has resulted in significant further harm to the already unbalanced community.
28. It has not been demonstrated that the circumstances of the appeal at 13 Wyndcliffe Road, Southsea, to which the members of the Forum refer, are comparable to those in the appeal before me. No evidence has been provided either to corroborate the claims of issues with parking, noise, disturbance, antisocial behaviour, litter or rubbish with the occupation of the appeal property or other HMOs in the area. I am thus not persuaded that the change of use with one additional occupant is harmful to the living conditions of the occupiers of nearby properties. I therefore find no conflict with the SPD in this respect. Therefore none of the matters raised by the members of the Forum have been determinative in this appeal.

### **Conclusion**

29. Although I have found that the development provides adequate living conditions for 7 persons, this is not sufficient to outweigh the conflict with the development plan and the Habitats Regulations I have identified above. There are no other considerations that indicate that a decision should be made other than in accordance with the development plan.
30. Therefore, and having regard to the other matters raised, the appeal is dismissed.

*Martin Small*

INSPECTOR