
Appeal Decision

Site visit made on 23 November 2021

by S Leonard BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 March 2022

Appeal Ref: APP/Z1775/W/21/3277766
72 Montgomerie Road, Southsea PO5 1ED

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mr Harmer against Portsmouth City Council.
 - The application Ref 20/00696/FUL, is dated 26 June 2020.
 - The development proposed is described as "C4 use to Sui Generis Use".
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Decision

1. The appeal is allowed and planning permission is granted for the change of use from house in multiple occupation (Class C4) to 8 bedroom/8 person house in multiple occupation (Sui Generis) at 72 Montgomerie Road, Southsea PO5 1ED, in accordance with the terms of the application, Ref 20/00696/FUL, dated 26 June 2020, and the plans submitted with it, subject to the attached schedule of conditions.

Procedural Matters

2. The description of the proposal in the banner heading is taken from the application form. However, I have used the description of development given on the appeal form in my decision, since this more accurately and precisely describes the appeal scheme.
3. The planning application was not submitted retrospectively, but I saw during my site visit that the scheme has been implemented, and the property is occupied. I have dealt with the appeal accordingly.
4. Since the submission of the planning application and the appeal, a revised version of the *National Planning Policy Framework* (the Framework) was published on 20 July 2021. I have taken the revised Framework into account where relevant to my decision.
5. The site lies within 5.6 km of the Solent Special Protection Areas (the SPAs). During the course of the appeal, I have been provided with a completed Legal Agreement under Section 106 of the Town and Country Planning Act 1990 (the Act) which is signed and dated 21 February 2022, and provides for payments for "Bird Aware" and "PCC Nutrient Neutrality Credit" contributions. These relate to asserted mitigation for the effects of the appeal scheme on the integrity of the SPAs. This is a matter to which I later return.

Background and Main Issues

6. The Council failed to determine the planning application within the prescribed period. Following the submission of the appeal against non-determination, the Council has subsequently submitted a Statement of Case, including a draft Officer Report, which confirms that, had it fallen to the Council to make a decision, the application would have been recommended for approval.
7. The Council has confirmed that the appeal scheme accords with the relevant Policies PCS17 (Transport), PCS20 (Houses in Multiple Occupation) and PCS23 (Design and Conservation) of the *Portsmouth Plan* (2012) (the PP), the Council's *Houses in Multiple Occupation (HMOs) – Ensuring Mixed and Balanced Communities Supplementary Planning Document* (updated October 2019) (the HMO SPD), and the *Parking Standards and Transport Assessments Supplementary Planning Document* (2014) (the PSTA SPD), in respect of the effect of the appeal scheme on the balance of the community in the area, the living conditions of the future occupants of the property, neighbouring living conditions and car parking provision.
8. I find no reason to disagree, having regard to the existing lawful use of property as a HMO, the resulting number of additional occupiers, and a comparison of the scheme against the Council's adopted HMO minimum room size standards and parking standards, and on the basis of the written evidence before me and my site inspection.
9. Notwithstanding the above, and the completion of the Section 106 Agreement, the Council has confirmed that, in its view, planning permission is not required for the appeal scheme, on the basis that it considers that the addition of 2 occupants to the existing lawful HMO does not amount to a material change of use. As such, the Council considers that the appeal scheme could be carried out as a fall-back position, irrespective of the determination of the current appeal. The Council considers this fall-back position to comprise a material consideration of overriding weight, so that unconditional planning permission should be granted without a requirement for the Section 106 Agreement.
10. I have noted the Council's reference to other allowed appeal decisions¹ in respect of HMO changes of use, where enforcement notices were quashed. However, notwithstanding these decisions, whilst I have determined the appeal on the basis that the change of use has already occurred, it is not for me, under a Section 78 appeal, to determine whether or not the existing Sui Generis HMO use of the property is lawful.
11. To that end, it is open to the appellant to apply for a determination under sections 191/192 of the Act, and my determination of this appeal under Section 78 does not affect the issuing of a determination under section 191/192 regardless of the outcome of this appeal. I have no information before me that such an application, in respect of the appeal site, has been formally determined by the Council. Also, whether or not a change of use is a material change is a matter of fact and degree to be assessed on the particular circumstances and merits of each case.

¹ APP/Z1775/C/20/3245106; APP/Z1775/C/20/3246078; APP/Z1775/C/19/3234941; APP/Z1775/C/19/3266831; APP/Z1775/C/20/3245108; APP/Z1775/C/20/3246077; APP/Z1775/C/20/3245110; APP/Z1775/C/20/3246079; APP/Z1775/C/19/3233187; APP/Z1775/C/19/3236610; APP/Z1775/C/19/3238003; and APP/Z1775/C/19/3238287.

12. With the above in mind, I am not persuaded that there is a fall-back position that warrants unconditional approval of the appeal scheme or negates the requirement for SPA mitigation measures. I return to the matter of conditions later. Moreover, in the context of this appeal, the responsibility for assessing the effects of the proposal on the Solent SPAs falls to me as the competent authority, for the purposes of the *Conservation of Habitats and Species Regulations 2017* (as amended) (the Habitat Regulations). I have therefore raised this matter to a main issue.

SPAs

13. The SPAs comprise a coastline that has a network of mudflats, shingle and saltmarshes which provide essential winter feeding and roosting grounds for birds that spend the winter here, including more than 90,000 waders and wildfowl including 10 per cent of the global population of brent geese. The SPAs were designated by the Government to protect these over-wintering birds.
14. The appeal scheme results in an increase in 2 bedrooms within the 5.6km 'Zone of Influence' of the SPAs. This net increase in residential development has a potential two-fold impact upon the SPAs arising from, firstly, possible disturbance to the birds arising from increased recreational activity around the shorelines of the harbours, and, secondly, the prospect of increased levels of nitrogen and phosphorus entering the water and resulting eutrophication, arising from additional waste-water created by additional residents at the site.
15. As such, without mitigation, the appeal scheme presents a likely significant effect upon the integrity of these sites, particularly when the impacts are considered in combination with other residential developments located within the 5.6km Buffer Zone to the SPAs. Therefore, it is necessary for me, as the competent authority, to undertake an Appropriate Assessment (AA) under the Habitats Regulations, of the implications for the sites in view of the conservation objectives of the SPAs. I have undertaken this on a proportionate basis with regard to the evidence submitted by the Council, which includes the Council's AA, which sets out the measures proposed to mitigate for all identified adverse effects that could potentially occur as a result of the proposal, together with Natural England's response, which confirms that it concurs with the conclusions of the AA.
16. In 2017 the Council adopted the *Solent Recreation Mitigation Strategy* (SRMS) which provides a strategic solution to ensure that the requirements of the Habitats Regulations with regard to the in-combination effects of increased recreational pressure on the SPAs arising from new residential development are met through mitigation measures.
17. The SRMS provides for the payment of a mitigation contribution to offset the effects of an increased population on the SPAs. Contributions made under the Mitigation Strategy are put towards a package of mitigation measures including a team of rangers, communications marketing and education initiatives, the facilitation and encouragement of responsible dog walking, codes of conduct, site-specific visitor management and bird refuge projects, new/enhanced strategic greenspaces, a delivery officer and monitoring of the mitigation measures.
18. The submitted Section 106 Legal Agreement signed by the appellant and the Council, would secure a payment of £522 to mitigate the likely significant effect

of the proposal on the SPAs due to increased recreation disturbance of wading birds around the shorelines of the harbours.

19. The Council has confirmed that, whilst a sub-regional strategy to deal with the nitrates issue is currently being developed by the Partnership for South Hampshire, Natural England and other partners and interested parties, in 2019 Portsmouth City Council adopted the *Interim Nutrient-Neutral Mitigation Strategy* (the INNMS) which expects developers firstly consider their own form of mitigation such as 'off-setting' against existing land-use, extant planning permission or other land within their control, or the implementation of mitigation measures such as Sustainable Urban Drainage Systems, interception or wetland creation. Then if not feasible, purchasing 'credits' from the Council's Mitigation Credit Bank which are accrued by the Council's continuous programme of the installation of water efficiencies into its own housing stock and making these credits available to new development.
20. The appellant has confirmed that the first option is not viable for the appeal scheme. The completed Section 106 Agreement, would secure the required 'credit', involving a payment of £1875, in accordance with the INNMS.
21. I consider that the SRMS and INNMS set out suitable measures for the mitigation of the likely significant effects of the development on the SPAs, and that the contributions secured by the above means are necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development, and therefore meet the statutory tests set out in regulation 122 of the CIL Regulations.
22. I am therefore satisfied that the appeal scheme provides adequate measures to avoid and mitigate its potential adverse impacts on the integrity of the SPAs, in accordance with PP Policy PCS13, which amongst other things, seeks to ensure that unavoidable negative impacts on biodiversity are appropriately mitigated. This would also accord with the Habitats Regulations, which seek to ensure that development does not adversely affect European sites and species.

Conditions

23. I have considered the requirement for conditions in the light of the tests set out in Paragraph 56 of the Framework and the National Planning Practice Guidance (PPG) and imposed them where I consider them to be necessary and reasonable.
24. Given that the development has already been implemented, there is no requirement for a condition setting a timescale for the commencement of the approved development. It is necessary to define the plans for certainty (1).
25. A condition is necessary to limit the number of residents to a maximum of 8 at any one time (2). That accords with the details of the planning application, and is necessary, since, whilst I have found that number of residents not to be harmful, having regard to mitigation against potential harm to the SPAs, any increase above this would have to be assessed against relevant development plan policies and the Habitats Regulations.
26. A condition is required to ensure that the communal kitchen/dining room on the ground floor is retained as communal living space to ensure appropriate living conditions for the occupiers of the HMO (3). Notwithstanding the

Council's HMO Licensing requirements, Licensing and Planning are the subject of separate regulations. The communal living space shown on drawing Ref PG.4132.19.4 Rev A accords with the details of the planning application. Whilst I have found that amount of communal living space not to be harmful, any reduction would need to be assessed against relevant development plan policies and the HMO SPD.

27. I saw during my site inspection, that the proposed cycle storage shown on approved drawing Ref PG.4132.19.4 Rev A has not been provided on site. Therefore, a condition to ensure the provision of secure on-site cycle parking is justified in the interests of promoting sustainable travel in the city (4).
28. In the interests of the living conditions of the occupiers of the site and neighbouring occupiers, and the character and appearance of the area, a condition is justified to ensure the provision of adequate refuse storage facilities (5).
29. Having regard to the finite size of the Council's Mitigation Credit Bank, a condition is required, in conjunction with the Section 106 Agreement, to ensure the implementation of the nitrates mitigation measures in accordance with the INNMS (5). This relates to the actual purchase of the 'credits', and would normally be required just prior to the occupation of the development. However, I have worded the condition to take into account the development that has already been carried out.
30. The purpose of conditions 3, 4 and 5 is to require the appellant to comply with a strict timetable for dealing with cycle storage, waste storage and nitrogen and phosphorus mitigation, which need to be addressed in order to make the development acceptable. The conditions are drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission, it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matters, because the development has already taken place. The purpose and effect of the conditions is therefore to ensure that the use of the site authorised by the grant of planning permission may only continue if the appellant complies with each one of a series of requirements.

Conclusion

31. For the above reasons, I conclude that the appeal should succeed, and planning permission be granted subject to conditions.

S Leonard

INSPECTOR

Schedule of conditions

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: TQRQM19295100435162, TQRQM19295100034043 and PG.4132.19.4 Rev A.
- 2) The occupation of the HMO hereby permitted shall be limited to a maximum of 8 persons at any one time.

- 3) The ground floor room annotated as 'kitchen/dining' as set out on drawing PG.4132.19.4 Rev A shall be retained as communal space at all times and shall not be used for any other purposes.
- 4) Unless within one month of the date of this decision a scheme for secure cycle storage is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within one month of the local planning authority's approval, the use of the site as an 8 bedroom/8 person house in multiple occupation (Sui Generis) shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed until such time as a scheme is approved and implemented.

Upon implementation of the approved cycle storage provision in this condition, that provision shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

- 5) Unless within one month of the date of this decision a scheme for waste storage is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within one month of the local planning authority's approval, the use of the site as an 8 bedroom/8 person house in multiple occupation (Sui Generis) shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed until such time as a scheme is approved and implemented.

Upon implementation of the approved waste storage provision in this condition, that provision shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

- 6) Unless within one month of the date of this decision a scheme for the mitigation of increased nitrogen and phosphorus levels resulting from the development is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within one month of the local planning authority's approval, the use of the site as a HMO for 8 persons shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed until such time as a scheme is approved and implemented.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

*****End of Conditions*****