



Appeal Decisions

Site visit made on 10 October 2023

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 November 2023

Appeal A: APP/Z1775/X/22/3298877 **83 Margate Road, Southsea PO5 1EY**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Simon Birmingham against the decision of Portsmouth City Council.
 - The application Ref 21/01287/CPE, dated 1 September 2021, was refused by notice dated 28 February 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is: Use as a seven person/seven bedroom house in multiple occupation.
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Appeal B: APP/Z1775/W/22/3296936

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The application Ref 21/00883/FUL, dated 1 September 2021, was refused by notice dated 9 March 2022.
 - The development proposed is: Change of use from house in multiple occupancy (Class C4) to seven bedroom/seven person house in multiple occupancy.
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Summary of Decisions

Appeal A

1. The appeal is allowed, and a certificate of lawful use is issued, in the terms set out below in the Formal Decision.

Appeal B

2. The appeal is dismissed.

Preliminary Matter

3. I have used the descriptions of the Council for the purposes of both appeals as they are more specific/concise. Injustice to the parties does not arise, and I have had consideration to the descriptions used by the appellant for the purposes of my assessments.

Appeal A

Main Issue

4. The main issue is whether the Council's refusal to grant a certificate of lawfulness was well founded.

Reasons

5. In matters such as this, the onus is on the appellant to demonstrate their case on the balance of probabilities that the use of the property as a seven-bedroom/seven-person house in multiple occupancy, as opposed by merely six occupants, would not amount to development and therefore a material change of use does not arise. The property already benefits from a planning permission granted in 2021 for use as a House in Multiple Occupation (HMO) and no conditions restricting that use have been brought to my attention.
6. The planning system is largely underpinned by the definition of development, and thus whether development has occurred. For this purpose, Section 55 of the Act states that development means 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.'
7. Section 55(2)(f) then provides that 'in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class' shall not be taken to involve development of land.
8. Section 55(2)(f) and the use class order (UCO) only provide that a change within a use class is exempted from development. The UCO should not be interpreted as meaning that some change between use classes is necessarily development.
9. The evidence of the appellant is derived from an appeal decision dated 29 April 2021¹ relating to various properties within the Portsmouth City Council area. In summary, it was concluded that a seventh occupant in specific HMO's did not constitute a material change of use.
10. The Council highlights that the property was originally a family home and had then been in use as an HMO by only 4 occupants. Works/extensions had then been undertaken by means of exercising permitted development rights to increase the size of the property. Since then however, planning permission for use as an HMO for up to 6 unrelated occupants, has been granted.
11. The question to be addressed is whether the difference between a sixth and seventh occupant would involve a material change of use. The basic approach is that, for a material change of use to have occurred, there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
12. I appreciate that there is some evidence that an HMO can result in increased anti-social behaviour, noise, rubbish and parking issues. But an HMO has already been granted planning permission at this site, and I do not have

¹ Ref APP/Z1775/C/20/3245106 etc

compelling evidence to lead me to a different conclusion to that of the appeal decision dated 29 April 2021 in respect of a seventh occupant. For the same reason, I do not find that it would result in any material change to the mix or balance of the community.

13. I appreciate that an HMO with more than 6 occupants falls within a different use class. But it does not follow that an increase from 6 to 7 occupants, as is the case here, means that a material change of use has occurred. There is very little evidence before me to demonstrate a significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
14. I understand concerns about the ability of an appellant to roll out the “just one more” argument, but my assessment is confined to the actual number of occupants, not a hypothetical or proposed number. As I have assessed, it is a question of fact and degree as to whether a change from a use falling within one class to a use falling within a different class amounts to a material change of use.
15. As a matter of fact and degree the appellant has therefore demonstrated on the balance of probabilities that a seven-bedroom/seven-person HMO does not amount to development and so a certificate of lawfulness should now be issued.

Conclusion

16. For the reasons given above I conclude, on the evidence now available, that the Council’s refusal to grant a certificate of lawfulness was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Appeal B

Main Issues

17. The main issues are:

- whether the increased occupancy would have a likely significant effect on the Solent Special Protection Area (SPA);
- whether the increased occupancy would have an adverse impact on the area’s mixed and balanced community; and,
- whether the position of the bin store is harmful to the living conditions of occupiers.

Reasons

SPA

18. The appeal property is within 5.6 km of the Solent SPA. The mudflats, shingle and salt marshes within the SPA provide essential feeding and roosting grounds for an assemblage of internationally important numbers of wading birds which together comprise the qualifying features of the SPA. The conservation objectives for the SPA are, in summary, to ensure that the integrity of the site is maintained or restored in order to protect the habitats and the birds that depend on them.

19. The Conservation of Habitats and Species Regulations 2017 (as amended) (the regulations) require a decision maker to undertake an Appropriate Assessment (AA) before giving any permission where there are likely significant effects on the integrity of the designated habitats sites from the proposal. This is either alone or in combination with other plans and projects. This responsibility falls to me in the context of this appeal.
20. The development would result in one additional occupant, with consequent likely additional recreational activity and wastewater. Whilst considered in isolation this increase would be small, when considered in combination with other projects, it is likely to have a significant effect on the SPA.
21. The appellant has provided a Nitrate Statement to advise that they would like to apply for the purchase of Mitigation Credits to mitigate for the additional occupant, which would be subject to a legal agreement. The Council advises that it has also undertaken an AA and could be in a position to progress a legal agreement. Both parties therefore accept the need for mitigation and an executed legal agreement, yet this is not before me. I accept this would be necessary to make the development acceptable as there is not scope for on-site mitigation.
22. The appellant has brought to my attention other appeal decisions concerning the SPA. However, these do not relate to the circumstances before me, given there is no legal agreement or evidence of any payment having been made. The onus is firmly on the appellant to advance such matters, not for me to request and await a legal agreement before my decision is made. Accordingly, should the appellant wish to pursue the matter, it remains open to submit a further planning application with the relevant legal agreement.
23. I conclude that in the absence of an executed legal agreement the development would result in harm to the integrity of the SPA. This would conflict with Policy PCS13 of The Portsmouth Plan, 2012 (the LP), which seeks to ensure, amongst other things, that development protects and enhances biodiversity. For the same reasons it contravenes the conserving and enhancing the natural environment objectives of the National Planning Policy Framework. I then do not consider there to be a fallback position arising from my findings in respect of Appeal A, given the strictures of the regulations, such that permission could be granted in the absence of a legal agreement.

Mixed and balanced community

24. The property benefits from a planning permission granted in 2021 for use as a House in Multiple Occupation (HMO) for up to 6 unrelated individuals, albeit I recognise that prior to this there were 4 occupants, and that it would have likely originally been a single-family home.
25. I accept that the Council's Houses in Multiple Occupation – Ensuring mixed and balanced communities, Supplementary Planning Document, 2019 (SPD), notes that there is a substantive increase in antisocial behaviour, noise rubbish and parking associated with an HMO.
26. I however then have limited specific or verifiable evidence relating to this property or road, in terms of such behaviour or parking saturation, for example. I am in any event not persuaded that the addition of one occupant would materially give rise to the concerns raised by the SPD, given the existing

authorised HMO use, or that there are other cumulative impacts or intensification harms arising from the addition of one occupant at this property.

27. Moreover, given the recent planning permission for the HMO use, the proposal does not result in the loss of a family dwelling, and I am similarly not persuaded that the addition of one occupant would have an adverse impact on the area's mixed and balanced community.
28. I conclude the increased occupancy would not have an adverse impact on the area's mixed and balanced community and so accords with Policy PCS20 of the LP which requires, amongst other things, that a range of household needs continue to be accommodated throughout the City. For the above reasons it also does not contravene the SPD.

Living conditions

29. There is a small area adjacent to a ground-floor bedroom window where bins are currently located. It is however a large bay-window and therefore outlook is not affected. I am also not persuaded that the addition of one occupant would lead to an increase in refuse such that there would be negative impacts arising to the living conditions of the occupant of this bedroom.
30. I conclude the position of the bin store would not be harmful to the living conditions of occupiers and therefore accords with the SPD as there are adequate facilities for the storage of waste within the curtilage of the property.

Conclusion

31. For the reasons given above I conclude that the appeal should be dismissed.

Formal Decisions

Appeal A

32. The appeal is allowed and attached to this decision is a certificate of lawful use describing the use which is considered to be lawful.

Appeal B

33. The appeal is dismissed.

Paul T Hocking

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 1 September 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The appellant has demonstrated on the balance of probabilities that the use of the property as a seven person/seven bedroom house in multiple occupation would not amount to development.

Signed

Paul T Hocking

Inspector

Date: 20 November 2023

Reference: APP/Z1775/X/22/3298877

First Schedule

Use as a seven person/seven bedroom house in multiple occupation

Second Schedule

Land at 83 Margate Road, Southsea PO5 1EY

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 191(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 20 November 2023

by Paul T Hocking BA MSc MRTPI

Land at 83 Margate Road, Southsea PO5 1EY

Reference: APP/Z1775/X/22/3298877

Scale: DO NOT SCALE

83 Margate Road - Location Plan

