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# Appeal Decision

Site visit made on 15 October 2024

**by S Leonard BA(Hons) BTP MRTPI**

an Inspector appointed by the Secretary of State

**Decision date: 20<sup>th</sup> November 2024**

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**Appeal Ref: APP/Z1775/W/23/3335595**

**73 Margate Road, Southsea, Portsmouth PO5 1EY**

- 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 Briscoe against the decision of Portsmouth City Council.
  - The application Ref is 23/00905/FUL.
  - The development proposed is one additional bedroom to the existing HMO.
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## Decision

1. The appeal is dismissed.

## Application for costs

2. An application for costs was made by Mr Briscoe against Portsmouth City Council. This application is the subject of a separate Decision.

## Procedural Matters

3. The planning application was not submitted retrospectively, but the Council has confirmed that the site benefits from a Licence under the Housing Act to operate as an HMO for up to 7 occupants, and I saw during my site visit that the scheme has been implemented. I have dealt with the appeal accordingly, and on the merits of the appeal scheme.
4. Since the refusal of the application, which is the subject of this appeal, a revised version of the *National Planning Policy Framework* (the Framework) was published on 19 December 2023. The main parties have had the opportunity to comment upon the revised Framework in respect of the appeal, and I have taken it into account where relevant to my decision.

## Main Issues

5. The main issues are:
  - Whether the appeal scheme provides adequate mitigation for impacts upon the Solent Special Protection Areas (SPAs); and
  - Whether the appeal scheme provides appropriate living conditions for future occupiers, having particular regard to internal living space.

## Reasons

### Background

6. The appeal property is a two-storey mid-terraced period property, which is occupied as a House in Multiple Occupation (HMO). It includes second floor living accommodation within the roof space, following approval of a lawful development certificate for a proposed loft conversion including roof extensions and rooflights<sup>1</sup>.
7. The property benefits from a lawful development certificate for use as a Class C4 HMO<sup>2</sup>. Class C4 of the Town and Country Planning (Use Classes) Order 1987, as amended, which is headed 'Houses in Multiple Occupation' indicates that the class applies to the use of a dwellinghouse for this purpose "*by not more than six residents*".
8. The appeal scheme solely comprises the internal partitioning of bedroom 6 on the second floor to create an additional bedroom 7 with ensuite facilities. As such, it results in the property changing from a 6-bedroom/6 person HMO to a 7-bed/7person HMO. This falls outside Class C4. It also results in an intensification of the use of the property.
9. The appellant's view is that planning permission is not required for the appeal scheme on the basis that the addition of one occupant to the existing lawful HMO does not amount to a material change of use. Accordingly, the appellant considers that the appeal scheme could be carried out as a fallback position, irrespective of the determination of the current appeal.
10. On the basis that there is a "real prospect" of the appeal scheme being implemented, having regard to established case law<sup>3</sup>, the appellant considers this fallback position to comprise a significant material consideration to be given weight in the assessment of the appeal.
11. This was also the view taken within the officer report to the Planning Committee, which recommended that the appeal scheme does not constitute a material change of use amounting to 'development' as defined under s55 of the Town and Country Planning Act 1990.
12. The consideration of whether a change of use is a material change is a matter of fact and degree to be assessed on the circumstances and merits of each case.
13. In this instance, notwithstanding the officer report, in considering the resulting impacts of the appeal scheme upon parking, waste noise and antisocial behaviour, the Planning Committee took a different view from that of the planning officers.
14. In support of the suggested fallback position, my attention has been drawn to a number of allowed appeal decisions<sup>4</sup> in respect of HMO changes of use

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<sup>1</sup> LPA Ref 20/00972/CPL

<sup>2</sup> LPA Ref 20/00218/CPE

<sup>3</sup> Mansell v Tonbridge and Malling BC & others [2017] EWCA Civ 1314 and Gambone v SSCLG

<sup>4</sup> 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; APP/Z1775/C/19/3238287;

involving an additional bedspace similar to the appeal scheme, where enforcement notices were quashed, or a certificate of lawful use or planning permission was granted, thereby confirming that a material change of use had not occurred.

15. I acknowledge the similarity between these allowed schemes and the appeal proposal and the significance of a fallback position to the determination of the current appeal, should the appeal scheme be deemed not to constitute development.
16. However, notwithstanding the views of other Inspectors in considering the matter in respect of other sites, and 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 the appeal scheme 7-bedroom HMO use of the property is lawful.
17. To that end, it is open to the appellant to apply for a determination under sections 191/192 of the Act. My determination of this appeal under Section 78 does not affect the subsequent issuing of a determination under section 191/192 regardless of the outcome of this appeal.
18. Indeed, since the refusal of the current appeal planning application, the appellant has applied for a Certificate of Lawful Development in respect of the appeal scheme as implemented. This application was refused<sup>5</sup> and an appeal was subsequently lodged<sup>6</sup>. This will be the subject of a separate appeal decision.
19. With all the above in mind, I am not persuaded that there is a fallback position that warrants unconditional approval of the current appeal scheme or negates the requirement for SPA mitigation measures. As such, I have determined the appeal based on my consideration of the Council's two reasons for refusal, which have informed what I have identified as the two main issues.

#### *SPAs*

20. 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.
21. The appeal scheme results in an increase in 1 additional occupant 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. Firstly, there would be the potential for 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 in eutrophication, due to additional wastewater created by an additional resident at the site.

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APP/Z0116/C/13/2192971; APP/Y1110/X/15/3132534; APP/W5780/W/20/3263096, APP/Z1775/W/22/3303724, APP/Z1775/W/22/3302601, APP/Z1775/W/22/3303194

<sup>5</sup> LPA Ref 23/01584/CPL – refused 19 March 2024

<sup>6</sup> APP/Z1775/X/24/3347863

22. As such, whilst considered in isolation this increase would be small, when considered in combination with other projects, 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.
23. 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 and having regard to the evidence submitted by both parties and the views of the statutory nature conservation body, Natural England. The evidence 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.
24. 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 regarding the in-combination effects of increased recreational pressure on the SPAs arising from new residential development are met through mitigation measures.
25. 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.
26. The appellant argues that in this instance a mitigation contribution would not be required since the proposal would not result in a net additional dwelling and would not fall within the accommodation types specifically listed within paragraph 6.4 of the SRMS. However, there is nothing before me to confirm that this is intended to be a comprehensive list of all applicable accommodation.
27. Moreover, paragraph 6.9 of the SRMS acknowledges that the need for mitigation for the recreational impact of other types of residential accommodation will be assessed on a case-by-case basis by the local planning authority and that the key 'test' is based around the likelihood of the proposed development generating additional recreational visits to the SPAs. As such, I am not persuaded, based on the evidence before me, that the SRMS should not be applied to the appeal scheme.
28. Having regard to nutrients, Natural England advises that the uncertainty over potential impacts can be addressed by new development achieving nutrient neutrality. In the interim period awaiting the adoption of a more comprehensive longer term strategic solution to the Solent nitrates issue, the Council has adopted the *Updated Interim Nutrient-Neutral Mitigation Strategy for new Dwellings* (June 2022) (the UINNMS) to provide a short-term mitigation solution to enable new development involving additional overnight stays to demonstrate and secure nutrient-neutrality, including through the use

of a Nutrient Budget Calculator, to ensure that it does not add to the existing nutrient burdens. Paragraph 3.1.1 confirms that this requirement applies to, amongst other proposals, HMO enlargements comprising Class C4 to Sui Generis Use.

29. Where other means of mitigation, such as 'off-setting' against existing lawful land use or the provision of bespoke mitigation measures such as SUDS, interception or wetland creation are not feasible, such as on constrained urban sites like the appeal site, the UINNMS allows the purchase of 'mitigation credit' from the Council or other landowner/recognised source of mitigation credit secured in perpetuity through a legal agreement, with the agreed mitigation measures to be delivered prior to first occupation.
30. The Council's scheme includes the bulk purchase of 'mitigation credit' from a site acquired by the Hampshire and Isle of Wight Wildlife Trust in order to change intensively managed farmland releasing high levels of nutrients (nitrogen) to a less intensively grazed or rewilded site with a much lower nitrogen output, so that the difference in nitrogen output can be used to off-set the impact of new development.
31. The Council's AA, which has been agreed by Natural England, confirms the relevant financial contribution towards the Solent Recreation Mitigation Strategy, which is to be secured by means of a legal agreement. It also confirms that credits are currently available for purchase in accordance with the Mitigation Credit Forecast in the UINNMS, also to be secured by a legal agreement.
32. There is no legal agreement before me to secure the aforesaid required mitigation, and the onus is on the appellant to advance such matters, not for the appeal inspector to request and await a legal agreement prior to determining the appeal. Accordingly, should the appellant decide to pursue the matter, it remains open to submit a further planning application including the relevant legal agreement.
33. I have considered whether planning conditions would be an appropriate means of securing the requisite contributions to mitigation measures. The Planning Practice Guidance advises that a negatively worded condition requiring the appellant 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 is applicable to this proposal. A condition requiring a planning obligation, or obligations would therefore not be appropriate, in my view, in the circumstances of this appeal.
34. I therefore conclude that, in the absence of an executed legal agreement to secure the required recreation mitigation payment and the purchase of a credit in accordance with the SRMS and UINNMS, there would not be appropriate mitigation for the impacts arising from the occupation of the additional bedroom through additional recreational activity and wastewater discharge and the development would be likely to have an in-combination adverse effect upon the integrity of the SPAs.

35. Accordingly, in this respect, the development conflicts with the Habitats Regulations and Policy PCS13 of *The Portsmouth Plan Portsmouth's Core Strategy* (2012) (the PP). Policy PCS13 sets out that green infrastructure will be protected by, amongst other things, refusing developments that would have an adverse effect on a European site either alone or in combination with other plans and projects.
36. This accords with Paragraph 186 of the Framework, which sets out that if significant harm to biodiversity resulting from a development cannot be avoided, adequately mitigated or, as a last resort, compensated for, planning permission should be refused.
37. The appellant has drawn my attention to the screening direction letter dated 1 May 2024 issued by the Planning Inspectorate which states that a financial contribution towards mitigating SPA impacts will not be required due to the proposal comprising an additional room within an existing HMO. This letter, which predates my Decision, relates to the purpose of issuing a screening opinion, having regard to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. Moreover, it states within, that the screening direction does not affect the duties of the appellant under other legislation, including the 2017 Habitat Regulations. As such, this letter does not affect my conclusion on the first main issue.

*Living conditions of future occupiers*

38. The proposal provides an additional seventh bedroom, through the subdivision of bedroom 6 on the second floor. The resulting bedrooms 6 and 7 would have floor areas measuring 9.9 sqm and 10.5 sqm respectively, which would both comfortably exceed the minimum floor space standard for single bedrooms of 6.51 sqm as set out in the Council's relevant adopted guidance<sup>7</sup> (the HMO SPD).
39. However, also of relevance is that the resulting additional resident would mean more persons using the ground floor communal internal living space. This comprises an open plan kitchen/dining room/lounge which measures 28.05 sqm. Where all single bedrooms comprise 10 sqm or more, instead of requiring a combined living space of 34 sqm, the HMO SPD allows for a lower figure of 22.5 sqm, without a requirement for a separate living room.
40. Whilst the appeal scheme bedroom 6 would fall below the required 10 sqm, there would only be a very marginal deficiency of 0.1 sqm. With this in mind and noting that all other bedrooms exceed 10 sqm and the existing communal living space size falls roughly midway between the two alternative higher and lower minimum room size figures, I concur with the Council that it is appropriate to apply the reduced communal living space standard to the appeal scheme and consider the merits of the appeal proposal on the basis of the 10.5 sqm bedroom room size standard.
41. The Council's concerns in respect of bedrooms 6 and 7 relate to room size and layout. Room 6 would be slightly smaller than the minimum required floorspace standard and its ensuite would, at 2.4 sqm, also be below the 2.74 sqm required by the HMO guidance. Room 7 would meet the minimum room size requirements, but a proportion of the bedroom is taken up by corridor space

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<sup>7</sup> Houses in Multiple Occupation (HMOs) – Ensuring Mixed and Balanced Communities Supplementary Planning Document (October 2019)

and the front-facing part of the room has a reduced head height due to the front roof slope.

42. Notwithstanding the above, and whilst I am not treating the appeal any differently due to the fact that the works have been carried out, I did have the benefit of seeing the finished scheme during my site visit. In the case of both rooms, I saw that each bedroom was well laid out with ample furniture, including wardrobe, chest of drawers and desk and chair provision. Also, windows provide an outlook and access to natural light and air in both instances, and the ensembles provided all the necessary sanitary ware. As such, in my opinion, these bedrooms provide an environment in which residents would be comfortable spending time within their rooms.
43. Moreover, I found on my site visit that the existing kitchen/living/dining room comprises a well-laid out good standard of utility including seating/dining space. There is also on-site outdoor living space to the side and rear of the building available for sitting out and clothes drying etc. In my opinion, these communal areas are capable of accommodating use by one additional resident without detrimentally impacting on the living conditions of the residents.
44. As such, having regard to the evidence before me, including my site inspection and compliance with the Council's HMO guidance standards for living space should bedroom 6 be only marginally larger, I find that, the appeal scheme provides acceptable living conditions for 7 occupants, having particular regard to internal living space.
45. For the above reasons, considering the proposed increase of one occupant, and the living environment of the property as a whole, I therefore conclude that the appeal scheme provides appropriate living conditions for future occupants, having regard to internal living space provision. As such, the development accords with PP Policy PCS23 in so much as this policy, amongst other things, requires a good standard of living environment for future residents and users of new development.
46. This is generally consistent with Paragraph 135 of the Framework, which seeks to ensure that developments will function well and promote a high standard of amenity, health, and well-being for existing and future users.

### **Other Matters**

47. I acknowledge that the appellant has an HMO Licence for the occupation of the property by 7 persons. I also saw during my site visit that the accommodation is of a good quality. However, these matters do not outweigh the conflict with the development plan, the Framework, and the Habitats Regulations that I have identified above.

### **Conclusion**

48. Although I have found that the development would not result in inadequate living conditions for 7 occupiers, this is not sufficient to outweigh the likely significant effect upon the integrity of designated habitats sites which would be adverse and for which there is no adequate mitigation before me, with consequent conflict with the development plan, the Framework, and the Habitats Regulations.
49. For the above reasons, I conclude that the appeal should be dismissed.

*S Leonard*

INSPECTOR