The Planning Inspectorate

Appeal Decisions

Inquiry Held on 16, 17, 25 February and 2 March 2021
Site visit made on 9 March and 16 April 2021

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 April 2021

Various Appeals

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mansford Core 2 Managing Trustee No.1 Ltd (Appeals A, C, E, G, I, K) and Mansford Core 2 Managing Trustee No.2 Ltd (Appeals B, D, F, H, J, L) against six enforcement notices issued by Portsmouth City Council.

Appeal A: APP/Z1775/C/20/3245106
Appeal B: APP/Z1775/C/20/3246078
Land at 22 Pains Road, Southsea PO5 1HE

- The enforcement notice was issued on 20 December 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a dwellinghouse within use class C4 of the Town and Country Planning (Use Classes) Order 1987 ("the Order") to Sui Generis use as a House in Multiple Occupancy ("HMO") for 7 or more unrelated residents.
- The requirements of the notice is: Cease using or allowing the Land to be used as a Sui Generis House in Multiple Occupation as defined in 3.1 of the notice.
- The period for compliance with the requirements is 12 months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (c) and (d) and Appeal B is proceeding on the grounds set out in section 174(2)(c) and (d) 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.

Appeal C: APP/Z1775/C/20/3245110
Appeal D: APP/Z1775/C/20/3246079
Land at 78 Manners Road, Southsea PO4 0BB

- The enforcement notice was issued on 20 December 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a dwellinghouse within use class C4 of the Town and Country Planning (Use Classes) Order 1987 ("the Order") to Sui Generis use as a House in Multiple Occupancy ("HMO") for 7 or more unrelated residents.
- The requirements of the notice is: Cease using or allowing the Land to be used as a Sui Generis House in Multiple Occupation as defined in 3.1 of the notice.
- The period for compliance with the requirements is 12 months.
- Appeal C is proceeding on the grounds set out in section 174(2)(a), (c) and (d) and Appeal D is proceeding on the grounds set out in section 174(2)(c) and (d) of the Town and Country Planning Act 1990 as amended.

Appeal E: APP/Z1775/C/20/3245108
Appeal F: APP/Z1775/C/20/3246077
Land at 60 Cottage Grove, Southsea PO5 1EW

- The enforcement notice was issued on 20 December 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a dwellinghouse within use class C4 of the Town and Country Planning (Use Classes) Order 1987 ("the Order") to Sui Generis use as a House in Multiple Occupancy ("HMO") for 7 or more unrelated residents.
- The requirement of the notice is: Cease using or allowing the Land to be used as a Sui Generis House in Multiple Occupation as defined in 3.1 of the notice.
- The period for compliance with the requirement is 12 months.
- Appeal E is proceeding on the grounds set out in section 174(2)(a), (c) and (d) and Appeal F is proceeding on the grounds set out in section 174(2)(c) and (d) of the Town and Country Planning Act 1990 as amended.

Appeal G: APP/Z1775/C/19/3233187
Appeal H: APP/Z1775/C/19/3236610
Land at 134 Francis Avenue, PO4 0ER

- The enforcement notice was issued on 10 June 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a single dwellinghouse within use class C3 of the Town and Country Planning (Use Classes) Order 1987 ("The Order") to Sui Generis use as a House in Multiple Occupancy ("HMO") for 7 or more unrelated individuals.
- The requirements of the notice are: a) Cease using or allowing the Land to be used as House in Multiple Occupation of any description. b) Cease using or allowing the Land to be used other than as a single dwellinghouse within class C3 of the Order.
- The period for compliance with the requirements is 12 months.
- Appeal G is proceeding on the grounds set out in section 174(2)(a), (c), (d), (e) and (f) and Appeal H is proceeding on the grounds set out in section 174(2)(c), (d), (e) and (f) of the Town and Country Planning Act 1990 as amended.

Appeal I: APP/Z1775/C/19/3234941
Appeal J: APP/Z1775/C/19/3266831
Land at 23 Manners Road, Portsmouth PO4 0BA

- The enforcement notice was issued on 16 July 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a single dwellinghouse within use class C3 of the Town and Country Planning (Use Classes) Order 1987 ("The Order") to Sui Generis use as a House in Multiple Occupancy ("HMO") for 7 or more unrelated individuals.
- The requirements of the notice are: a) Cease using or allowing the Land to be used as a House in Multiple Occupation of any description. b) Cease using or allowing the Land to be used other than as a single dwellinghouse within C3 of the Order.
- The period for compliance with the requirements is 12 months.
- Appeal I is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) and Appeal J is proceeding on the grounds set out in section 174(2)(c), (d) and (f) of the Town and Country Planning Act 1990 as amended.

Appeal K: APP/Z1775/C/19/3238003
Appeal L: APP/Z1775/C/19/3238287
Land at 278 Fawcett Road PO4 0LG

- The enforcement notice was issued on 28 August 2019.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a single dwellinghouse within use class C3 of the Town and Country Planning (Use Classes) Order 1987 ("The Order") to Sui Generis use as a House in Multiple Occupancy ("HMO") for 7 or more unrelated individuals.
- The requirements of the notice are: a) Cease using or allowing the Land to be used as a House in Multiple Occupation of any description. b) Cease using or allowing the Land to be used other than as a single dwellinghouse within C3 of the Order.
- The period for compliance with the requirements is 12 months.
- Appeal K is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) and Appeal L is proceeding on the grounds set out in section 174(2)(c), (d) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decisions

1. The appeals are allowed, and the enforcement notices are corrected and quashed.

Procedural Matters

2. It became apparent during the Inquiry that it would be necessary for me to undertake an internal site inspection of the six properties. Given the pandemic restrictions, and in the interests of the health and safety of all those concerned, it was agreed that a virtual site visit would be undertaken. The main parties were in attendance during that event. I also undertook an unaccompanied physical site visit in order to see the properties from the public realm as well as the surrounding area.

3. Evidence was presented to the Inquiry about other Houses in Multiple Occupation (HMOs) in Southsea, however, the planning merits or lawful status of other HMOs in the area remains a matter entirely for the Council.

The Enforcement Notices

4. It is common ground between the parties that the plan attached to the notice at 134 Francis Avenue (Appeals G and H) was at an incorrect scale. A substitute plan has been provided and I will therefore correct the notice accordingly. This dispenses with the ground (e) appeal.

5. I raised at the Inquiry whether the notices should be corrected in the interests of precision, to refer to the actual number of unrelated residents, which is common ground, as opposed for 7 or more unrelated residents. The parties did not object to this course of action and as injustice would not arise, I shall therefore correct the notices accordingly to reflect the actual circumstances that have occurred.

The ground (c) appeals

6. For an appeal to succeed on ground (c) the onus is on the appellants to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. Planning policy considerations or the planning merits arising from the use of the properties are therefore not relevant.

7. The planning system is largely underpinned by the definition of development, and thus whether development has occurred. It is the case of the appellants that the matters alleged in the enforcement notices do not amount to development, as no material change of use has taken place at the six properties. 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.'

8. 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.

9. For the purposes of my assessment the six properties can be divided into two groups: those concerning the alleged material change of use from use class C4 (HMO) to a sui generis HMO and those from use class C3 (dwellinghouse) to a sui generis HMO.

22 Pains Road, 78 Manners Road, 60 Cottage Grove (the C4 properties)

10. There are three Class C4 HMO properties in this regard. This is to say that the Council accepts their lawful use is for occupation by between three and six unrelated individuals, as their only or main residence, who share basic amenities such as a kitchen or bathroom. It is then common ground between the parties that there are 7 residents at 78 Manners Road and 60 Cottage Grove, and 8 residents at 22 Pains Road. It is the additional residents that prompted the Council's enforcement action. The residents are university students.

11. The question to be addressed is whether the difference between a sixth and seventh resident (or eighth in the case of 22 Pains Road) 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. These properties are therefore already HMOs. Whilst I appreciate that there is evidence contained in the Council's HMO Supplementary Planning Document[1] concerning complaints, those complaints do not differentiate between a class C4 HMO and a sui generis HMO. It is also evident that non-HMOs also provide a source of complaint, albeit at a lower level. In the case of the Central Southsea

[1] Houses in Multiple Occupation (HMOs) – Ensuring mixed and balanced communities SPD October 2019

Ward, the respective figures are 7.5% and 2%. The Council then provided evidence in the form of Environmental Health complaint logs for the properties concerned, but these numbers varied considerably between the properties, albeit relating mainly to matters of noise (or equivalent disturbance) and vermin. The evidence of Mrs Brown, for the appellant, put fluctuations in complaints down to problem tenants, as opposed the nature of the use itself.

13. The most specific evidence came from Mr Millard, who lives between two HMO properties, which includes one of the appeal sites. He sought to contrast the difference between a 5-person HMO, where he felt residents lived more as part of the community, and an 8-person HMO, terming them as mini halls of residence, with a higher turn-over of residents. He also explained that given his background in higher education he favoured speaking directly with the students, rather than raising formal complaints with the Council. It therefore seems logical for me to assume that the Council's figures represent an under-reporting of sources of complaint, but I have no reason to doubt that this is similarly likely to be the case in respect of non-HMO properties as well.

14. Mr Millard also described the sui generis HMO as a super-HMO. This colloquial term was latterly adopted by the Council. I however do not accept that terminology or inference in respect of the three properties concerned. Whilst clearly there is then some degree of multiplier effect and additional residents will generate additional rubbish, there was little evidence that there was materially more rubbish or that sui generis HMOs were materially more likely to have vermin problems. I could also see during my physical site visit that these properties had adequately sized front forecourts to accommodate the necessary bins.

15. Whilst Mr Millard considers the properties are socially and environmentally overcrowded, given their origins as standard terraced houses, the evidence from Mrs Brown described the building works undertaken for their conversion, which were reasonably extensive.

16. Whilst I appreciate that students occupying the properties are more likely to have parties, I did not find the evidence of very frequent parties of around 40 people, and therefore that multiplier effect, to be convincing, as this is not borne out by the complaint logs or in other representations or evidence. I therefore consider that parties are a more likely occurrence in student HMOs, but that there are not material affects arising from a seventh or eighth resident in this regard.

17. The evidence of Mrs Brown was that the number of residents made no difference to the management of a property and in her experience the number did not increase the likelihood of vermin. Whilst I then do accept that more resident's will likely generate more demand for parking, aside from general observations that outside of term-times there was more parking availability, there was little specific evidence to demonstrate on the balance of probabilities that perceptions of parking difficulties were materially linked to a change in character arising from the seventh or eighth resident at these properties. There was limited evidence before me concerning parking saturation.

18. I very much appreciate the concerns that were expressed by Cllr Pitt, Mr Massiah as well as Ms Webber on behalf of the East St Thomas Resident's Forum. However, their evidence, whilst valuable, only provided a flavour of the sorts of issues that can be experienced through a higher concentration of HMOs in the area, not specific evidence attributable to the materiality of the properties concerned.

19. Whilst I appreciate there is a use class system which provides identification and that Officers of the Council, as practitioners, understandably apply this, it does not automatically follow that, as in the cases here, an additional resident/s would result in a material change of use. 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, even though the Government had made a conscious decision to introduce a new class C4 and to amend the previous class C3 in April 2010. The effect of the order is therefore entirely permissive.

20. 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 residents, 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.

21. The evidence before me therefore does not give me reason to find that the actual occupation of these properties has created specific problems or caused a significant change in activity or upon the character of the area, which might reflect some material change over the accepted lawful HMO use consisting of six residents. It has therefore been demonstrated on the balance of probabilities by the appellants that there has not been a breach of planning control in respect of these 3 properties.

134 Francis Avenue, 23 Manners Road, 278 Fawcett Road (the C3 properties)

22. The remaining three properties each have 7 residents. The appellants see little difference in finding that the occupation of these properties also do not amount to development.

23. It is said that before they were purchased, in 2008, under the use class order that was in effect at that time (the pre-April 2010 version), the properties could have been lawfully occupied by up to 6 residents as an HMO and so their occupation by a seventh resident does not result in a material change of use.

24. Whilst the properties could have been occupied by up to 6 residents, that is an entirely artificial proposition and one which I do not accept. Neither party could provide evidence that those properties were occupied by 6 residents. All that is therefore known is that the lawful use fell within use class C3 at the time of acquisition. The evidence of Mrs Brown then describes the works undertaken[2], which to me demonstrates on the balance of probabilities that they were more likely to have been occupied as family homes, as opposed by 6 residents. In

[2] Paragraph 1.11 of Mrs Brown's Proof of Evidence

particular, I note the need for fire doors, which I was told were a specific HMO licensing requirement.

25. The appellants highlight an appeal decision at 13 Wilton Avenue[3]. However, at paragraph 7 that Inspector was able to particularise 14 strands of evidence to underpin his conclusion that there was not a material change of use in that case. That extent of evidence was not before me at the Inquiry for the properties concerned.

26. Even having regard to Section 55(2)(f), I do not have evidence to demonstrate on the balance of probabilities that the use of these 3 properties for 7 unrelated residents, with an unknown pattern of occupation prior to their purchase in 2008, would not result in a significant difference in the character of activity arising and thus not amount to development.

27. It therefore remains the case that the appellant's own evidence needs to be sufficient. As a matter of fact and degree, based upon the evidence before me, the appellants have not discharged the necessary burden of proof to demonstrate their case on the balance of probabilities, in respect of these 3 properties.

Conclusion

28. For the reasons given above I conclude that the appeals on ground (c) consequently succeed in respect of 22 Pains Road (Appeals A and B), 78 Manners Road (Appeals C and D) and 60 Cottage Grove (Appeals E and F), but, fail in respect of 134 Francis Avenue (Appeals G and H), 23 Manners Road (Appeals I and J) and 278 Fawcett Road (Appeals K and L).

The ground (d) appeals

29. For an appeal on ground (d) to succeed the onus is on the appellants to demonstrate, on the balance of probabilities, that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice. It is contended that the material change of use has occurred for a continuous period of 10 years prior to the issue of the enforcement notices.

134 Francis Avenue

30. The enforcement notice was issued on 10 June 2019, making the relevant date 10 June 2009. The crux of the issue between the parties is the extent to which the lack of actual occupation is problematic.

31. The Council's position is that there has not been continual occupation of the property as a sui generis HMO for the relevant period such that the Council was not time barred from enforcement action. This is because the actual occupation of 134 Francis Avenue commenced after the relevant date.

32. Mrs Brown, in her role as Development Director, has first-hand knowledge of the works undertaken and timeline of progress. Her evidence has been

[3] Appeal Ref APP/D1780/C/04/1162748

confirmed on oath and the Council does not specifically contest the dates provided by her or offer contradictory evidence.

33. The evidence of Mrs Brown is that the property was acquired with vacant possession on 28 August 2008. It was then first marketed as an HMO on 1 November 2008. The property was reserved by 7 people on 16 January 2009, having each paid a tenancy set-up fee, and the Assured Short Hold Tenancy Agreement (AST) was completed on 5 May 2009. That ran for the 2009/10 academic year with the tenancy commencing on 7 September 2009. This evidence demonstrates on the balance of probabilities the intended use.

34. As I have previously stated, Mrs Brown's evidence describes the works undertaken to the properties. In the case of 134 Francis Avenue, as with all the properties, there is also a detailed break-down of the works undertaken at Appendix 1 to her Proof of Evidence. As part of her role, Mrs Brown was responsible for the production of a generic work specification and instructing contractors to carry out and complete the works. She would attend site visits/meetings atleast monthly to review progress and would approve monthly invoices.

35. The difference between the parties amounts to the period prior to 7 September 2009. The Council does not then dispute that the property has been in continuous use as a sui generis HMO since that date.

36. However, case law[4] provides authorities for the proposition that buildings do not necessarily need to be occupied for there to have been a material change of use, rather, all the evidence must be considered in the round.

37. The property would have been wholly unusable for residential purposes during the bulk of the building works that were undertaken. Whilst the property was not formally handed back by the contractor until 29 June 2009, Mrs Brown highlighted her evidence was that furniture was delivered to the property on 22 May 2009 and an order placed for made to measure blinds on 5 June 2009. Her evidence was that such items would not have been delivered to the property prior to its practical completion due to the risk of damage.

38. As a matter of fact and degree, the evidence of Mrs Brown demonstrates on the balance of probabilities that the building works to convert and refurbish the property for use as a sui generis HMO would have been substantially complete prior to the relevant date of 10 June 2009. Accordingly, the physical alterations that had occurred by then were wholly characteristic and consistent with use as a sui generis HMO planning unit. Added to this is the evidence that marketing had been carried out and the AST was already in place. Had the Council had cause to visit the site during this period, it would have appeared that those works had affected a material change of use. Enforcement action could then have been taken as the works saw the creation of communal areas, 7 key-coded lockable bedrooms with self-closing fire doors, as well as the conversion of some living rooms, which would not be commensurate with occupation by a family or class C3 use.

[4] Impey v Secretary of State for the Environment and Another (1984) 47 P. & C.R. 142 & Welwyn Hatfield Borough Council v SSCLG [2011] UKSC 15

39. In the circumstances of this particular case, a short period of non-occupation was not the determinative factor for the Council to establish the breach of planning control. Too much stress can be placed on the need for actual use or occupation to first commence. It was not therefore vital or the most important aspect when considering the matter in the round.

40. The Building Control certificate for the property was then issued on 2 February 2010. Mrs Brown put this delay down to procedural and administrative reasons. I accept this could have been the case, and given the evidence is that the property was occupied from September 2009, it is not determinative in any event.

41. The appellant's evidence is therefore sufficiently precise and unambiguous that the material change of use was affirmatively established. As a matter of fact and degree, the appellants have discharged the necessary burden of proof to demonstrate on the balance of probabilities that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice.

23 Manners Road

42. The enforcement notice was issued on 16 July 2019, making the relevant date 16 July 2009.

43. The evidence is that the property was acquired with vacant possession on 22 June 2008, marketed from 1 November 2008, reserved by 7 people by 16 January 2009 with the AST completed on 20 April 2009, and with the tenancy commencing on 7 September 2009. The property was formally handed back by the contractor on 4 March 2009 with the Building Regulations certificate issued the following day.

44. The appellants make the same case as for 134 Francis Avenue. They therefore rely upon the evidence of Mrs Brown which describes a similar pattern and extent of building works undertaken. In light of my previous findings, when considering the matter in the round, and even if I were to take the later date of when the property was formally handed back by the contractor, this is still before the relevant date of 16 July 2009.

45. Accordingly, the appellants have demonstrated on the balance of probabilities that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice.

278 Fawcett Road

46. The enforcement notice was issued on 28 August 2019, making the relevant date 28 August 2009.

47. The evidence is that the property was acquired with vacant possession on 6 October 2008, marketed from 1 November 2008, reserved by 7 people by 17 January 2009 with the AST completed on 9 April 2009, and with the tenancy first commencing on 7 September 2009. The property was formally handed back by the contractor on 27 July 2009 with the Building Regulations certificate issued on 1 October 2009.

48. For the same reasons, the appellants have accordingly demonstrated on the balance of probabilities that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice.

Conclusion

49. For the reasons given above I conclude that the appeals on ground (d) consequently succeed in respect of 134 Francis Avenue (Appeals G and H), 23 Manners Road (Appeals I and J) and 278 Fawcett Road (Appeals K and L).

Overall Conclusion

50. For the reasons given above I conclude that the appeals should succeed on grounds (c) and (d) respectively. Accordingly, the enforcement notices will be corrected and then quashed. In these circumstances the appeals under the various grounds set out in section 174(2) to the 1990 Act as amended and the applications for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decisions

Appeals A and B

51. It is directed that the enforcement notice be corrected by:

- deleting the words *'7 or more'* and their replacement with the word *'8'* within paragraph 3.1 of the notice

52. Subject to this correction the appeals are allowed, and the enforcement notice is quashed.

Appeals C and D

53. It is directed that the enforcement notice be corrected by:

- deleting the words *'or more'* within paragraph 3.1 of the notice

54. Subject to this correction the appeals are allowed, and the enforcement notice is quashed.

Appeals E and F

55. It is directed that the enforcement notice be corrected by:

- deleting the words *'or more'* within paragraph 3.1 of the notice

56. Subject to this correction the appeals are allowed, and the enforcement notice is quashed.

Appeals G and H

57. It is directed that the enforcement notice be corrected by:

- deleting the words *'or more'* within paragraph 3.1 of the notice

- substituting the plan attached to the notice for that of the WYG plan Number 0017, Classification FI_60_20, Revision P01

58. Subject to these corrections the appeals are allowed, and the enforcement notice is quashed.

Appeals I and J

59. It is directed that the enforcement notice be corrected by:

- deleting the words *'or more'* within paragraph 3.1 of the notice

60. Subject to this correction the appeals are allowed, and the enforcement notice is quashed.

Appeals K and L

61. It is directed that the enforcement notice be corrected by:

- deleting the words *'or more'* within paragraph 3.1 of the notice

62. Subject to this correction the appeals are allowed, and the enforcement notice is quashed.

Paul T Hocking

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ms Jacqueline Lean of Counsel, instructed by Tetra Tech Planning

She called	Mrs Rachel Brown	Campbell Property UK Ltd
	Mr Robin Upton	Tetra Tech Planning

FOR THE LOCAL PLANNING AUTHORITY:

Mrs Leanne Buckley-Thomson of Counsel, instructed by Portsmouth City Council

She called	Mr Simon Dunn-Lwin	Portsmouth City Council

INTERESTED PERSONS:

Councillor Steve Pitt
Mr James Massiah
Mr Peter Millard
Ms Katherine Webber representing the East St. Thomas Residents Forum
Mr Edward Leigh representing Portsmouth City Council during the virtual site visit

DOCUMENTS

1. Updated core documents
2. Appellant's opening submissions and legal materials
3. Council's opening submissions, summary table and legal materials
4. Emails on behalf of the East St. Thomas Residents Forum
5. Mr Massiah's emails/photos
6. Mr Millard's emails/photos
7. SPA trigger note and AA matrix
8. SPA mitigation note and nutrient neutral mitigation strategy
9. Agreed suggested list of conditions
10. Draft unilateral undertaking
11. Council's closing submissions
12. Appellant's closing submissions
13. Six executed unilateral undertakings
14. Executed supplemental unilateral undertaking