RTPI
Chartered Town Planners

ATLAS
PLANNING GROUP

PLANNING STATEMENT

3-7 Macnaghten Road

Southampton SO18 1GL

February 2024

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Appendices

Appendix A – Appeal reference (APP/D1780/C/22/3309785)

INTRODUCTION

1.1 This Statement has been produced by Atlas Planning Group in support of an application seeking full planning permission for the demolition of vacant light industrial units and office and replacing with 6x three-bedroom semi-detached dwellings at 3-7 Macnaghten Road, Southampton, SO16 6LP.

1.2 The Statement will assess the development proposal in the context of adopted national and local planning policy found within the National Planning Policy Framework and Southampton City Council's Development Plan Documents.

SITE DESCRIPTION

2.1 The application site, which measures approximately 926m^2, currently comprises of vacant light industrial units/ office with two on-site car parking spaces.

2.2 Macnaghten Road which is situated within the ward of Bitternene Park, and its immediate surroundings are residential in character, predominantly comprises of two-storey, red brick semi-detached houses. Vehicular and pedestrian access to the site is provided directly from Macnaghten Road, via two existing private driveways with dropped kerbs to the on-site parking.

Figure 1 - Application site

2.3 The light industrial workshop was built for its existing purpose and comprises of a lightweight steel, timber, and cladding panel construction. As noted in the accompanying Design and Access Statement, the existing structures are coming towards the end of their lifespan and therefore, should be considered acceptable for demolition as they require investment and improvement to serve its current use.

2.4 While the site lies outside of the city centre boundary, as defined by Southampton City Council's Local Development Plan, the proposal is located in a highly sustainable area, with close proximity to local primary and secondary schools which are located less than 20 minutes away by foot, as well as bus services into the city centre from Bitterne Triangle which is c. 0.8 miles to the north east and Bitterne Train Station 350 metres to the south.

Figure 2 – Aerial view of application site

PLANNING HISTORY

3.1 The application site itself does not have recent planning history, but surrounding planning activity is considered relevant to the determination of this application.

FULL PLANNING APPLICATION 2015 - 15/00610/FUL

3.2 In April 2015, a planning application was submitted to Southampton City Council which sought full permission for the:

> "*Erection of a part 3-storey, part 2-storey building to create 2 x 3-bed houses, 1 x 2-bed house and 6 x 2-bed flats with associated parking and cycle/refuse storage"*

3.3 The application was approved with a number of conditions in August 2015 and is located c.60 metres from 3-7 Macnaghten Road. The main planning considerations were:

i. The principle of development
ii. Design and impact on the character of the area
iii. Impact on residential amenity
iv. Quality of the residential environment proposed
v. Parking and highways impact; and
vi. Off-site mitigation

3.4 The proposal was for the re-use of previously developed land within suburban Southampton and was considered to result in a more efficient use of land by contributing to the City's housing provision target. The application site was considered appropriate for residential use given its highly sustainable location and proximity to Bitterne Triangle, which not only provides good access to public transport, but also to local facilities including shops, schools, employment, and community facilities.

3.5 It was also considered that a high-quality residential environment would be created for the proposed occupants and the proposed development would not result in unacceptable harm to the living conditions of the occupiers of adjoining properties. Whilst the car parking situation was acknowledged to be a main concern raised by local residents, it was concluded that the positive aspects of the proposal outweigh the negative.

THE PROPOSAL

4.1 This application seeks full planning permission for the demolition of two E (G) (iii) light industrial units and office and the erection of six (C3) dwellinghouses within the curtilage of 3-7 Macnaghten Road.

4.2 The proposed development would consist of six semi-detached three-bedroom dwellings with two on-site car parking spaces located at the front of each dwelling. With vehicle and pedestrian access being made from Macnaghten Road, access arrangements for the site will remain the same as the industrial/ commercial premises. Whilst the provision of on-site parking will lead to a loss of street parking for the 22-metre stretch of existing high kerb on Macnaghten Road (see figure 3), it is considered that the proposal is coherent with the surrounding pattern of development.

Figure 3 - Proposed site plan

4.3 The proposed dwellings will have a GIA of 107.5 square metres over three floors, with each unit being a 3-bedroom dwelling. Each plot will have a rear garden. The street frontage will also benefit from new planting and a new specimen tree to soften the scheme into the streetscape and enhance biodiversity.

Figure 4 - Proposed east and north elevation

Figure 5 - Proposed west and south elevation

4.4 The dwellings are set back c.5 metres from the highway and are served by individual driveways. The development will follow the building line of 1 Macnaghten Road and the semi-detached dwellings adjacent to the application site (Nos 4, 6 and 8). To be coherent with the surrounding pattern of development, windows on the third floor are located to the rear of the property. There is a separation distance of 39 metres (to the west) between the proposal and nearest dwellings of Nos. 66, 64 and 62 of Whitworth Cresent.

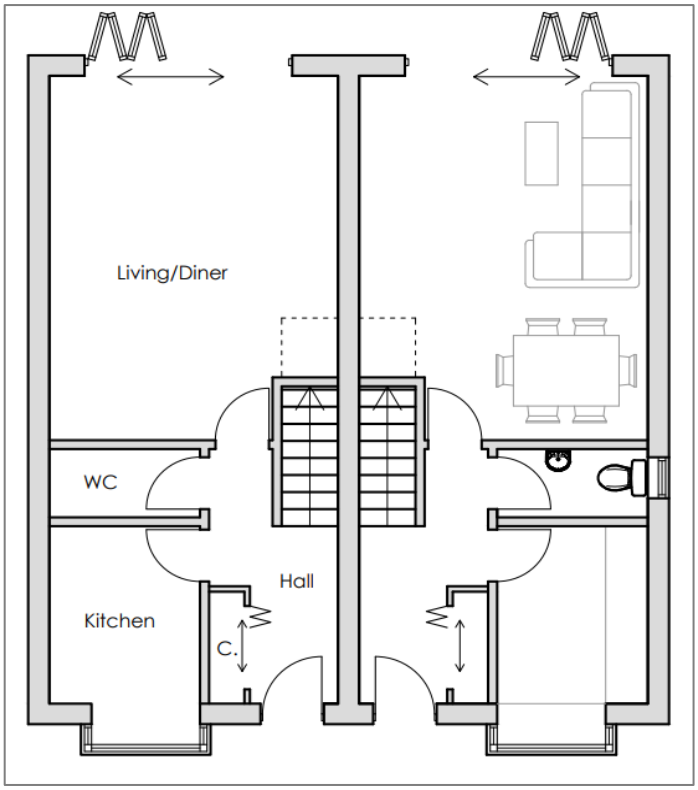

Figure 6 - Ground floor plan

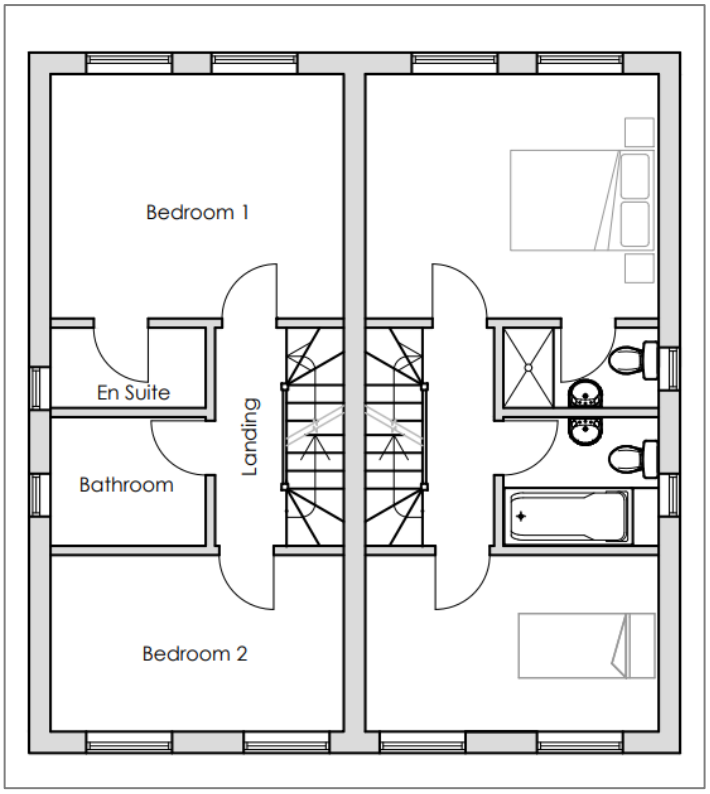

Figure 7 - First floor plan

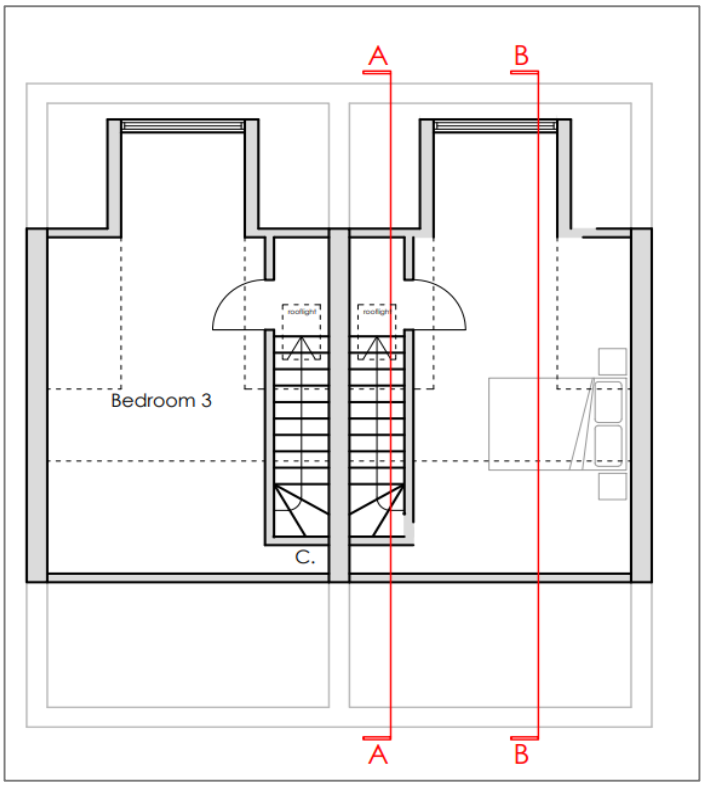

Figure 8 - Second floor plan

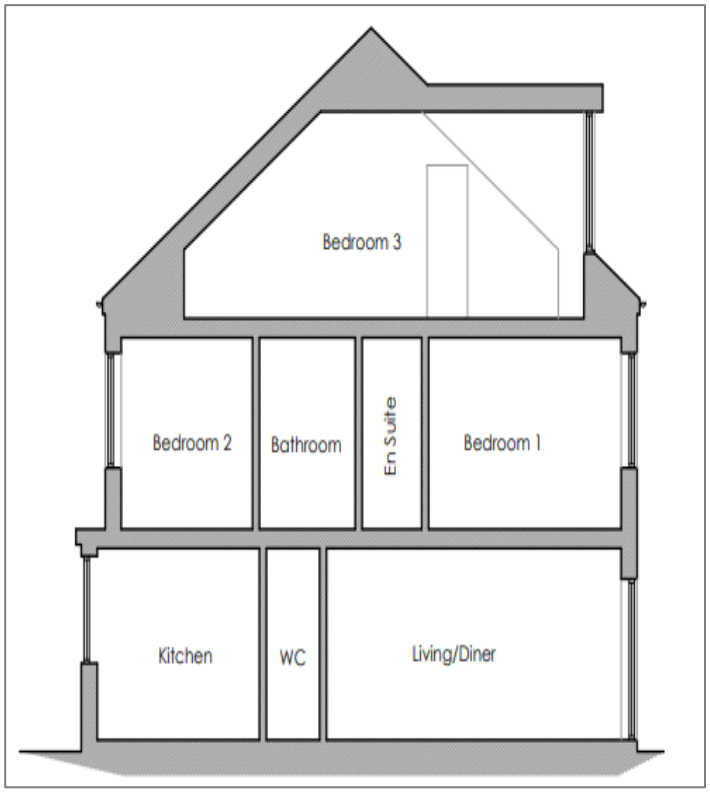

Figure 9 - Proposed section

PLANNING CONSIDERATIONS

5.1 Southampton City Council's Core Strategy (including changes from the Core Strategy Partial Review) DPD and Local Plan Review DPD contain the authority's adopted planning policies and are the starting point for determining planning decisions within the authority area, in accordance with Section 38(6) of the Planning and Compulsory Purchase Act 2004.

5.2 The National Planning Policy Framework (NPPF) provides a national tier of policy and decision-making guidance for the planning system and forms a material consideration for all planning decisions.

5.3 The policies and guidance contained within the statutory DPDs and all other relevant material considerations have been consulted to ensure that the proposal is an appropriate form of development for the application site.

PRINCIPLE OF DEVELOPMENT

5.4 Policy H1 states:

"In order to meet the projected supply of housing residential development will be permitted:

(i) on sites shown on the Proposals Map and listed in Appendix 6;

(ii) on major sites where residential development is identified as an element of a mixed use scheme;

(iii) through the conversion or redevelopment, where appropriate, of commercial premises, particularly redundant shops and offices;

(iv) through the conversion, where appropriate of existing dwellings;

(v) on windfall sites;

(vi) on sites occupied by an unneighbourly business use in a residential area."

5.5 The proposal comprises the redevelopment of a vacant industrial premises on a windfall site. It is therefore supported by Policy H1.

5.6 The proposed development would also make a far more efficient use of the application site than the existing situation. This is encouraged repeatedly by the NPPF:

Paragraph 123 –

"Planning policies and decisions should promote an effective use of land in meeting the need for homes and other uses, while safeguarding and improving the environment and ensuring safe and healthy living conditions."

Paragraph 128 –

"Planning policies and decisions should support development that makes efficient use of land, taking into account:

b) local market conditions and viability;"

Paragraph 129 –

"Where there is an existing or anticipated shortage of land for meeting identified housing needs, it is especially important that planning policies and decisions avoid homes being built at low densities, and ensure that developments make optimal use of the potential of each site."

5.7 The application site is 922 square metres. The existing use has a built footprint of 550 sqm with a net density level of 60dph. The cumulative built footprint for the six dwellings totals 632 sqm which means that the proposal will achieve a net density level of 69dph and contribute to the shortfall in the Council's housing land supply (see Appendix A). As the application site falls with an area of medium accessibility which should achieve a minimum of 50 dph, it can be considered that the proposed development would accord with Policy CS 5 and would make a far more efficient use of the site than the existing vacant light industrial uses.

5.8 In light of this clear direction from the NPPF and the Core Strategy, the more efficient use of the application site at a higher density than the existing use should be encouraged. As outlined in the sections below, this more efficient use of land does not compromise either the character and appearance of the area or the residential amenity of neighbouring properties.

IMPACT UPON THE CHARACTER & APPEARANCE OF THE AREA

5.9 Policies SDP7 and SDP9 require that developments are of a high design quality and do not adversely impact the character or appearance of the surrounding area. Policy SDP7 states:

"Development which would cause material harm to the character and/or appearance of an area will not be permitted. Proposals should:

(i) be compatible with existing landforms and natural features that contribute to the quality of the local environment;

(ii) retain, and where possible enhance, important existing urban spaces, townscape, parkland, natural or historical features;

(iii) respect the existing layout of buildings within the streetscape;

(iv) respect the scale, density and proportion of existing buildings;

(v) integrate into the local community."

5.10 SDP9 states, inter alia:

"Planning permission will only be granted where the building design is of a high quality. Proposals should respect their surroundings in terms of:

(i) scale, massing and visual impact;

(ii) the impact on the skyline;

(iii) the quality and use of materials;

(iv) the quality and use of architectural detailing"

5.11 As aforementioned, the site lies in an area with a relatively distinct pattern of development. The current character of the area is made up of generally red brick structures with defined window lintels and cills, bay windows at ground floor and access to rear gardens via side paths.

Figure 10 - Character and appearance of Macnaghten Road

Figure 11 - Character and appearance of Macnaghten Road

Figure 12 – Character and appearance of Macnaghten Road

5.12 The scheme would not have an adverse impact upon the street scene of Macnaghten Road as the proposed dwellings are set back c. 5 metres from the highway. The proposed building line will be consistent with that of No. 1 Macnaghten Road and the semi-detached dwellings on the adjacent side of the road (Nos. 4- 8). It can therefore be considered that the proposal will not be out of keeping with the surrounding distinct pattern of development and will enhance the appearance of the existing vacant and out of keeping use.

5.13 Additionally, there would be no requirement for additional entry points for the proposed dwellings as the proposals would make use of existing access from Macnaghten Road, thus respecting the existing layout of the site. The visualisations below demonstrate how the proposal would sensitively sit in the residential context and would have no impact on the character and appearance of Macnaghten Road.

Figure 13 -Visualization of proposal from 13 Macnaghten Road

Figure 14 - Visualisation of proposal from Harcourt Road looking south

Figure 15 - Proposed semi-detached dwellings (plots 7A and 7B)

5.14 Given the proposed development will be in keeping with the typology and appearance of the residential character of Macnaghten Road, the above remarks demonstrate that the requirements of SDP7 and SDP9 are considered to have been met in full.

RESIDENTIAL AMENITY

5.15 Policy SDP9 also requires that developments respect their surroundings with regard to:

"(v) the impact on surrounding land uses and local amenity"

5.16 Further, policy SDP1 states:

"Planning Permission will only be granted for development which:

(i) does not unacceptably affect the health, safety and amenity of the city and its citizens;"

5.17 As Macnaghten road is residential in character and appearance, it can be considered unlikely that there will be any overlooking or in-looking between the proposed dwellings and neighbouring properties. Bedroom 2 windows (see figure 4) will be located on the east elevation. Whilst such windows front Macnaghten Road, the scheme has been designed to ensure that windows at first floor level are not directly aligned with the adjacent properties (Nos 4, 6 and 8). Small, frosted windows also serve the side elevations to ensure adequate daylight into the bathrooms only and means there will be no intervisibility between the proposed dwellings.

5.18 This has also been considered for the bedroom 3 dormer window which is placed on the west (rear) elevation. Given the existing tree screening and separation distance of c. 39 metres between Nos. 66, 64 and 62 of Whitworth Cresent, it can be considered that proposal exceeds the 15-metre standard stated in the RDG and will not result in any overlooking or in looking of habitable rooms.

5.19 Furthermore, given the orientation of the scheme is designed to be a mostly south-east facing aspect, the new dwellings would benefit from an acceptable outlook and achievable levels of natural daylight from each habitable room within the proposed development.

5.20 The occupants will also have access to a private garden each. The neighbouring residential properties have sufficient garden space which allow for practical use and reflect the established

residential character of the area and the size of the semi-detached houses. The RDG SPD states that back garden depth and rear garden area needs to be 10 m/ 70m².

5.21 Whilst the rear gardens for units 7b and 7a have an area of 47m² and 42m² respectively, which is smaller than the 70m² desired by the SPD, the rear garden area for units 5b, 5a 3b and 3a are between 66m² and 78m² and have a rear garden depth of c.13 metres which exceeds the requirements for residential amenity stated in the SPD.

5.22 By providing 107 sqm of amenity space over three floors which exceeds the Nationally Described Space Standards, and between 66 sqm and 78 sqm private garden space for four of the dwellings, it can be considered that such amenity space is sufficient to serve the needs of the future occupiers and will not compromise the amenities of neighbouring residents.

5.23 For the reasons above, the proposed development would accord with the requirements of Policies SDP9 and SDP1 in relation to residential amenity.

HIGHWAY IMPACT

ACCESS

5.24 SDP4 states:

> *"Development will only be permitted where access into the development is provided in priority order for:*
>
> *(i) pedestrians and disabled people;*
> *(ii) cyclists;*
> *(iii) public transport;*
> *(iv) private transport."*

5.25 The dwellings will have access from Macnaghten Road with two on-site car parking spaces proposed for each dwelling. This will enable pedestrians and disabled people, cyclists and private vehicles direct access to the new dwellings.

5.26 Macnaghten Road is served by a mix of on-street and on-site car parking. Though it may be argued that such provision of on-site spaces will lead to a reduction of on-street parking for the road alongside the development, the on-site offering will help to reduce the pressure, if any, on the

existing street parking as the spaces will directly serve the proposed dwellings. Such proposal will therefore not be out of keeping with the residential context and the proposal can be considered to provide sufficient access for those prioritised in SDP4.

5.27 In addition, the application site is served by several nearby bus stops and Bitterne Train Station 320 metres to the south west, which provides access to both local and regional destinations and overall, satisfies the criteria set out at SDP4.

PARKING

SDP5 states:

"Planning permission will only be granted where development provides:

(i) no more car parking than the maximum in the adopted standards in Appendix 1;
(ii) provides parking for disabled persons in accordance with the standards in Appendix 1;
(iii) at least the level of secure cycle parking in accordance with the standards in Appendix 2;
(iv) lorry and motor cycle parking in accordance with the standards in Appendix 3.

In the case of B1 development a condition or legal agreement will be sought to limit the use to ensure that parking provision remains appropriate."

5.28 Each dwelling will be provided with two on-site parking spaces and one EV charging point. Whilst a parking survey has not been carried out to demonstrate that the proposal will not lead to demand exceeding supply of on-street parking, given the built footprint of the existing vacant light industrial unit totals 550 sqm, and the adopted Parking Standards SPD 2011 recommends 1 space per 45 sqm, it can be considered that the proposal would see a reduction in parking demand and thus an improvement upon the parking stress in the area. The below photos also show that there is adequate on-street parking space for the proposal to comply with the parking standards set out in Appendix 1 of the Local Plan.

5.29 With no anticipated objections from statutory consultees, it can also be considered that the proposal satisfies the criteria set out in Table 2 of the adopted Parking Standards SPD 2011:

- Macnaghten Road is not an existing Controlled Parking Zone (CPZ)
- Macnaghten Road is not on an existing bus route
- Macnaghten Road is not on a designated strategic cycle network link or planned link
- Effective carriageway width of 5.5 metres is maintained

Figure 16 - Adequate space for 6 on-street car parking spaces

Figure 17 - Adequate space for 6 on-street car parking spaces

5.30 It has been demonstrated that the proposal fully complies with SDP5 as the scheme does not exceed the maximum in the adopted standards in Appendix 1. The two on-site parking spaces for each dwelling ensures that there is sufficient parking for disabled persons.

OTHER MATTERS

FLOODING

5.31 Given that the application site is within the settlement boundary, the proposed development is situated within Flood Zone 1 and therefore has a low probability of flooding from rivers and sea.

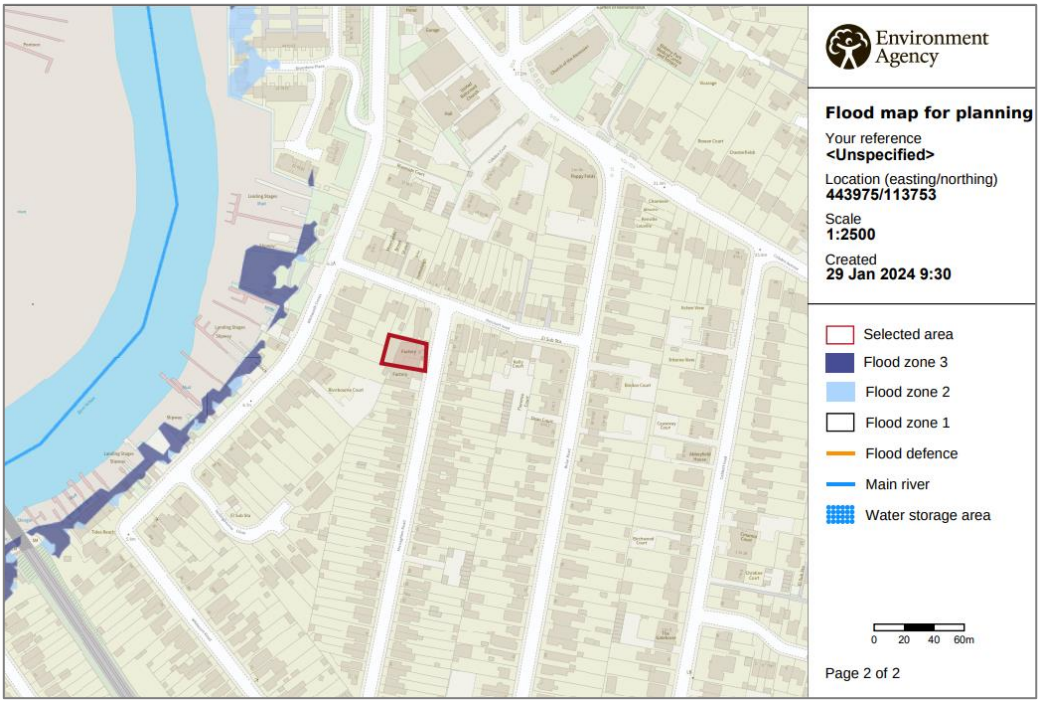

Figure 18 - Application site within flood zone 1

REFUSE/RECYCLING

5.32 Each of the proposed dwellings would benefit from individual bin stores for the storing of refuse bins. This means that there will be adequate space provided to facilitate the sorting and storage of household waste within both the internal and external layout of the proposed homes and thus be in accordance with part 9 of the Residential Design Guide SPD.

PLANNING BALANCE AND CONCLUSIONS

6.1 This application seeks full planning permission for the demolition of existing E (g) (iii) workshops and construction of 6x (C3) three bed semi-detached dwellings.

6.2 The above sections have demonstrated how the proposed six dwellings, located on a windfall site within the settlement boundary, are situated in a highly sustainable residential area and can be considered to make much more of an efficient use of land compared to the existing vacant and out of keeping light industrial use.

6.3 Though SCC's five-year housing supply position is currently unclear, the recent appeal decision (Appendix A) concludes that there is a shortfall in the Council's Housing Land Supply and the proposal thus promotes an effective use of land by contributing to the much-needed supply of homes. The development will offer improvements to the environment, ensure safe and healthy living conditions for future occupants, and be in full accordance with Southampton City Council's Development Plan and the NPPF.

6.4 Whilst it can be argued that the provision of on-site car parking will lead to a reduction of available parking for existing occupants of Macnaghten Road, the proposed on-site parking will directly serve the future occupants which will relieve the pressure, if any, on the existing street car parking.

6.5 The development proposal has been carefully considered and ensures that:

- ✓ The principle of development is acceptable having regard to all relevant planning considerations;
- ✓ It will respect the existing character and appearance of the area;
- ✓ It will cause no harm to the residential amenity of neighbouring properties;
- ✓ It will have an acceptable highway impact.

6.6 Given the benefits of the proposal and the limited conflict with national policy and local development plan policies, it can be considered that the proposal would not undermine the Council's underlying aims; weighed against the economic, environmental, and social benefits.

6.7 For these reasons, we commend the proposal to you and respectfully request that the LPA approve this application without delay.

The Planning Inspectorate

Appeal Decisions

Site visit made on 11 July 2023

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 November 2023

Appeal A Ref: APP/D1780/C/22/3309785
Land at 41 Burgess Road, Southampton, SO16 7AP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Massoud Yeganeny against an enforcement notice issued by Southampton City Council.
- The notice was issued on 27 September 2022.
- The breach of planning control as alleged in the notice is without planning permission:
  (i) the material change of use of the Land to six self-contained flats;
  (ii) the construction of a first floor rear extension shown shaded blue on the attached plan marked "Plan 2"; and
  (iii) the installation of four side facing windows on the east elevation shown shaded green on the attached Plan 2.
- The requirements of the notice are to:
  (i) Cease the use of the Land as self-contained flats;
  (ii) Remove all kitchens and cooking facilities that solely facilitate the use as self-contained flats;
  (iii) Remove the first floor rear extension shown shaded blue on the attached Plan 2;
  (iv) Remove the four side facing windows shown shaded green on the attached Plan 2 from the east elevation and reinstate the flank wall to its former condition prior to the unauthorised works taking place; and
  (v) Remove all resulting materials from complying with steps (ii) to (iv) above from the land.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) 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 B Ref: APP/D1780/W/22/3303362
41 Burgess Road, Southampton, SO16 7AP

- 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 Massoud Yeganeny against the decision of Southampton City Council.
- The application Ref 22/00214/FUL, dated 9 February 2022, was refused by notice dated 25 May 2022.
- The development proposed is retention of first floor rear extension and six self contained flats.

Appeal C Ref: APP/D1780/X/22/3309870
41 Burgess Road, Southampton, SO16 7AP

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Y Yeganeny against the decision of Southampton City Council.
- The application ref 22/00976/ELDC, dated 1 July 2022, was refused by notice dated 6 September 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 application for a lawful development certificate for existing use as a house in multiple occupation (HMO, use class C4).

Decisions

Appeal A

1. It is directed that the enforcement notice is varied by deleting 'four' and substituting with of 'nine' as the time for compliance in paragraph 6.

2. Subject to the variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B

3. The appeal is dismissed.

Appeal C

4. The appeal is dismissed.

Appeals A and B Preliminary Matters

Appeal A

5. The appellant states that the property is used a house in multiple occupation (HMO) and that is the authorised use. That potentially raises a hidden ground (b) appeal[1]. However, the appellant then confirms that in April 2021 a first floor extension was constructed to the rear of the property, and it was converted from a HMO to six self-contained flats.

Appeal B

6. I have used the spelling of the appellant's name as per that given for Appeals A and C, rather than that set out in the application form, which appears to be a typo.

Appeals A and B

7. Since the appeals were submitted, a revised version of the National Planning Policy Framework (the Framework) has been published (September 2023) and this is a material consideration which should be taken into account from the date of its publication. As the amendments do not bear directly on this appeal, I have not reverted to the parties for comment.

Appeal A on ground (a) and Appeal B

Background and Main Issues

8. The appeal building has been sub-divided into six self-contained flats and to facilitate the same it has been extended to the rear at first floor level, with the

[1] That the alleged breach has not occurred as a matter of fact

resultant space being used to provide a combined kitchen, dining and living area for one of the flats.

9. The planning application, subject to Appeal B, sought to regularise that change of use and operational development. The enforcement notice, subject to Appeal A, seeks to address those matters, as well as the installation of four side facing windows in the east elevation.

10. The reasons for issuing the enforcement notice are largely the same as the reasons for refusing the planning application. Consequently, there is significant overlap in the planning merits of both appeals. My reasoning therefore relates to Appeals A and B, unless otherwise stated.

11. The main issues are the effect of the development on:

- the provision of family housing;
- the character and appearance of the area;
- the living conditions of neighbouring occupiers with particular regard to privacy; and
- whether the development provides acceptable living conditions for its occupants, with particular regard to outlook, privacy and the provision of internal living space; and
- whether a s106 planning obligation is necessary to secure financial contributions for highway improvements, highway damage and Solent disturbance mitigation.

Reasons

Family housing

12. Core Strategy[2] Policy CS 16(2) seeks to provide a mix of housing types and more sustainable and balanced communities through no net loss of family homes on sites capable of accommodating a mix of residential units unless there are overriding policy considerations justifying this loss. For the purposes of Policy CS 16, '*family homes'* are defined as '*dwellings of three or more bedrooms with direct access to useable private amenity space or garden for the sole use of the household*'.

13. The Council's position, in short, is that the conversion of the existing dwelling into six separate flats, which do not meet that definition, would result in the net loss of a '*family home*' and would, on that basis, fail to contribute towards a mixed and balanced community, contrary to Policy CS 16 (and saved Policy SDP 1 of the City of Southampton Local Plan Review (March 2006) (Local Plan)).

14. The appellant's position is that as the property has been in use as a HMO since at least 2006, the property cannot be regarded as a family home for the purpose of Policy CS 16.

[2] Local Development Framework Core Strategy Development Plan Document – Amended version incorporating the Core Strategy Partial Review March 2015

15. It will be evident from my Appeal C decision that I have dismissed the appeal against the Council's decision to refuse a LDC for the use of the property as a HMO. As part of that appeal, it is argued that should the appellant decide to cease the use of the flats and comply with the enforcement notice, then, in accordance with s57(4) of the 1990 Act, the property could revert to its lawful use as a HMO[3]. However, as explained, under s191(4) of the 1990 Act, the relevant date for ascertaining whether the existing development is lawful is the date of the LDC application, which in that case was 9 February 2022. However, the enforcement notice was not issued until 27 September 2022, so on the date of the LDC application the appellant could not avail himself of the provisions of s57(4).

16. Nevertheless, I have found that the previous use of the property as a HMO had, on the balance of probabilities, become immune from enforcement action through the passage of time before being lost by the subsequent change of use to flats. Appeals A and B are not constrained by the date of the LDC application so following the issuing of the enforcement notice, planning permission is not required for the purpose for which it could lawfully have been used, namely a HMO.

17. As the appellant has applied for a LDC to specifically protect the HMO use, there is a real prospect of that fallback position being realised. For the purposes of Appeals A and B, that is the pre-existing use against which the provisions of CS 16 should be considered.

18. The appellant has drawn my attention to two appeal decisions in respect of No 72 Burgess Road[4] and No 36 Lodge Road[5]. In the case relating to No 36 the Inspector found the above definition of a '*family home*' to be layout-based, making no reference to the type of occupancy or use, and that '*Household'* is applied in the singular, whilst use of the word '*family'* further denotes a focus on dwellings occupied by single households formed by persons bound by a familial relationship.

19. On the other hand, he observed that HMOs '*provide accommodation for unrelated persons who do not form a single household. The distinction between the two is commonly understood. It is also reflected in the different use classes defined within the Town and Country Planning (Use Classes) Order 1987 (as amended), and further explained within the Housing Act 2004 (as amended). Whilst simple use of language thus clearly implies the recognition of a difference between an HMO and family home, this is further apparent in reading the definition within the context of Policy CS16 as a whole*.

    Here bullet (3) of Policy CS16 states that the headline objective will be met by controlling HMOs where planning permission is required. The latter would be the case where a dwelling house was to be converted to a large HMO, but also where the permitted change between dwelling house to small HMO was restricted, for example by Article 4 Direction. In this regard paragraph 5.2.13 of the supporting text of Policy CS16 explains that the formation of smaller

[3] S57(4) - *Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.*
[4] Appeal Ref: APP/D1780/W/20/3265347
[5] Appeal Ref: APP/D1780/W/19/3241594

HMOs results in loss of family homes. This could clearly not be the case however if smaller HMOs and family homes were to be considered as one and the same thing.'

20. Given that No 36 was used as a HMO prior to its subdivision into four separate flats, the Inspector found that it was not a family home; either for the purposes of Policy CS 16, or as commonly understood. On that basis he concluded that its use for flats would not result in the loss of a family home and that no conflict with Core Strategy Policy CS 16(2) would arise.

21. The Inspector for the appeal at No 72 similarly found that as the property was lawfully occupied as a small HMO it did not comprise a family home for the purposes of Policy CS 16.

22. The Council has referred to an appeal decision at 39 Tennyson Road[6] where the Inspector was of the view that the test within Policy CS 16 is whether a site is '*capable of accommodating a mix of residential units'*. I have not been provided with a copy of that decision but in the first instance, there must be a loss of a family home.

23. In the case of the appeal property, the loss of family home arose from its change of use to a HMO, rather than the change of use to flats. I therefore find no reason to arrive at differing conclusions to the Inspectors for the above referenced appeals, that there is no conflict with Core Strategy Policy CS 16.

24. I have noted the Council's reference to the previous appeal decision relating to No 36[7], where the Inspector found that the pre-existing HMO arrangement would have been capable of occupation as a family unit of accommodation with no alteration to the fabric of the building. However, the Inspector for the subsequent appeal, as discussed above, was not convinced that the definition of a family home set out in Policy CS 16 can be logically understood or applied on the basis of potential (as also referred to in the Tennyson Road appeal), or that the policy itself provides any indication that this was intended.

25. The Inspector went on to say that even if he had found otherwise, he saw no reason to believe that No 36 would revert to anything other than a HMO were the appeal to be dismissed, and, on that basis there would be little or no likelihood that it would make a positive contribution to the identified need for family housing or that the development would cause any harm to the provision or supply of such housing. Those findings can similarly be applied in the cases before me.

26. Nevertheless, the internal subdivision of the property for six separate flats significantly reduces the likelihood of the building ever being reconfigured and being used as a family home, whereas a typical HMO configuration with bedrooms and shared kitchen and bathroom facilities, would, in physical terms, be similar to a dwelling and thus have greater interchangeability and likelihood of reversion. Indeed, planning permission would not be required to do so.

27. In that regard, the likely fallback position of a six person HMO would, in terms of its physical configuration be more closely aligned to the intentions of Policy CS 16(2), and thus preferable in that regard.

[6] Appeal Ref: APP /D1780/W/21/3283202
[7] Appeal Ref: APP/D1780/W/18/3210190

28. Nevertheless, I conclude that the development does not result in the loss of a family home and thus is not contrary to Core Strategy Policy CS 16.

29. Although saved Local Plan Policy SDP 1 (quality of development) is cited in the Council's decision notice and enforcement notice, I find it to have limited relevance to this main issue.

Character and appearance

30. The appeal property is an attractive two storey, red brick building with tile hipped roof to the front and front feature gable over a two storey bay. The rear part of the main roof has been altered from a hip to a gable.

31. The first floor extension is positioned on top of a single storey red brick, flat roof rear extension. Because it is finished in light coloured shiplap timber style cladding, with plastic eaves and a flat roof, it strongly contrasts with the original building both in its design and use of materials. The result is a visually jarring and unduly obvious addition, that is made worse by the cladding extending beyond the plane of the brick of the side wall and the eaves being higher than that of the main building, creating a crude and poorly designed junction with the main roof slope.

32. The resultant harm to the side elevation is clearly visible from the street and the neighbouring property. From the rear it appears visually imposing and as a poor form of development. I note the appellant's suggestion (under ground (f) of Appeal A), to amend the materials, but, even if matching materials were to be used, the harm arising from the physical form and relationship with the main building would remain.

33. The appellant has sought to draw my attention to an extension approved by the Council at No 63 Julian Road. Having regard to the specific points made, I accept that there is some variety to the finishing materials used in the area, however, the extension is viewed in the context of the red brick host building and red brick neighbouring property. Moreover, for No 63 the Council refer to limited views from the public realm, whereas the side of the extension is clearly visible in this case. Furthermore, I would have reached the above same conclusions, even if the Council had not referred to its design guide.

34. I do not therefore see sufficient parallels with No 63, which would add material weight in favour of the appeal development, and, in any event, it is a fundamental principle of the planning system that each case is determined on its own merits.

35. For the reasons explained, I find that the extension results in unacceptable harm to the character and appearance of the area, contrary to Core Strategy Policy CS 13, saved Local Plan Policies SDP 7, SDP 9 and H7, Policies BAS 1 and BAS 4 of the Bassett Neighbourhood Development Plan (BNDP), the Council's Residential Design Guide, and to paragraphs 130 and 134 of the Framework . Those state, amongst other things, that development should respond positively and integrate with its local surroundings, character and architectural vernacular.

36. The Council's reasons for refusal and issuing the enforcement notice on combined character and appearance and living conditions grounds also cite conflict with saved Core Strategy Policy CS 5, BNDP Policies BAS3 and BAS 5

and Local Plan Policies SDP 6 and SDP 16. However, those policies relate to housing density, windfall sites, urban design principles and noise and therefore have limited relevance to this main issue. That is similarly so of the Parking Standards Supplementary Planning Document.

Living conditions

37. The Council highlights that all six flats have a floorspace which fall below the minimum set out in the Nationally Described Space Standard. The shortfall identified for five of the flats ranges between 16-25m^2 and as such is significant. The Council highlight further deficiencies in the bedroom sizes.

38. Both parties have referred me to an appeal decision at Lyon Street[8], which is within the same administrative area. In that decision the Inspector noted that the Council had indicated that it has not formally adopted the Space Standards and that they appeared not to be referenced in any development plan policy. Although the Council believed the standards to be a useful reference point for considering the suitability of the units before him, the Inspector attributed this matter limited weight because the Planning Practice Guidance (PPG) advises that where a local planning authority wishes to require an internal space standard, they should only do so by reference in their Local Plan to the Space Standard.

39. I find no reason to disagree with the general principle of that approach insofar as it reflects the advice of the PPG. Nevertheless, as highlighted by the Council, the Inspector for the appeal at 60 Tennyson Road[9] noted that whilst recognising the Space Standard is not formally adopted, the standards reflect the Government's aspirations for high quality design and amenity. The Inspector additionally noted that the development plan includes policies which seek to ensure that proposals do not unacceptably affect the wellbeing of residents. On that basis he ascribed significant weight to the extent of the shortfall, as the size of the units is an important consideration to assess the liveability of the proposed dwellings and establish whether a good standard of accommodation would be provided.

40. Based on my own observations of the appeals property, it comes as no surprise that most of the units fall well below minimum standards intended to provide adequately sized homes that are fit for purpose. I recognise that the appellant has sought to provide reasonably well-appointed accommodation, nevertheless, based on the quality of the layout and standard of accommodation, rather than a strict assessment against minimum standards, I find the flats, to be cramped, with limited circulation and compromised functionality and little opportunity for meaningful storage.

41. The ground floor bedroom windows of the flats on the eastern side elevation face out on to No 45 Burgess Road. Whilst the fence that has been erected filters views into the bedrooms from the adjacent driveway of No 45, it is likely that occupants would feel the need to close the curtains, even during the daytime, to achieve a reasonable level of privacy. Moreover, because of the height and proximity of the fence, it dominates the outlook from those windows and adds to the sense of confinement within the flats.

[8] Appeal Ref: APP/D1780/W/20/3257579
[9] Appeal Ref: APP/D1780/W/20/3251054

42. For the flat at first floor level, that sense of enclosure is avoided. However, the bedroom window faces directly into the side windows of No 45 and the separation is not sufficient to avoid mutual overlooking and loss of privacy. The first floor side window also overlooks parts of the garden of No 45, thereby causing further loss of privacy.

43. I note the appellant's suggestion that the first floor window be altered to an oriel window where the north facing pane could be fixed and obscured. However, that would compromise the outlook and sense of confinement within the bedroom.

44. The Council has also drawn my attention to a planning application[10] for the adjacent property at No 45 for a single storey side and rear extension which would result in habitable windows even closer to the shared boundary, thereby exacerbating the intervisibility and loss of privacy. Although I am unaware of the outcome of that application, I agree with the Council that the insertion of habitable room windows into the side elevation of the appeal property is prejudicial to the potential for additional development on the adjacent site. I recognise the appellant currently owns both properties but that could very easily change.

45. Due to the position of the main entrance to flat 6, occupants and visitors would have to pass directly adjacent to the bedroom window of flat 5 to gain access. As a result, the levels of privacy within flat 5 are severely and unacceptably compromised.

46. I appreciate that all flats are two roomed with separate bedrooms and all have external windows. However, the deficiencies in the size of the rooms and the poor levels of outlook and privacy remain, and the harm arising is not outweighed by occupants having access to a large rear garden. Moreover, the previous HMO was licenced for 6 occupants, whereas a number of the flats had at least queen sized beds, so occupation and space deficiencies could be even greater.

47. I note the appellant's argument that the markets should determine size requirements and that it is about the quality of the development not necessarily adherence to strict floor space sizes. However, notwithstanding the above, I do not find this to be a compelling reason to justify the development as if this argument was supported on every case where living conditions are found to be unsatisfactory, the integrity of the planning system to provide high quality development with a high standard of amenity for existing and future users would be undermined.

48. Moreover, although the development modestly increases the quantum of residential units within the City, the accommodation does not tally with the Council's Housing Strategy to provide good quality housing.

49. I therefore find that the development provides unacceptable living conditions for its occupants and results in unacceptable harm to the living conditions of the occupants of the neighbouring property at No 45, contrary to saved Local Plan Policies SDP 1 and SDP 9, paragraph 130 of the Framework and the Council's Residential Design Guide. Those state, amongst other things, that

[10] Ref: 22/01517/FUL

planning permission will only be granted for development which does not unacceptably affect the amenity of the city and its citizens.

Section 106 Obligation

50. The Council's third reason for refusal and for issuing the enforcement notice is that in the absence of a completed s106 agreement, the proposals fail to mitigate against direct impacts on highways and Solent disturbance.

51. These objectives are supported by Core Strategy Policy CS 25 which states that development will only be permitted if the necessary infrastructure, services, facilities and amenities to meet the needs of the development are available or will be provided at the appropriate time, and that the Council will seek developer contributions towards directly related measures to deliver a high quality development. The Council's adopted Developer Contributions SPD is supplementary to that Policy[11].

52. The appellant explains that he is in the process of collating the information required for the section 106 agreement. However, the Procedural Guide for planning appeals[12] states that the appellant must ensure that the Planning Inspectorate receive an executed and certified copy of the planning obligation no later than 7 weeks from the start date of an appeal following the written representation procedure. That which is before me is in draft form and is undated and unsigned. For those reasons alone it is legally unsound and incapable of being enforced, notwithstanding the issues identified by the Council. In these circumstances I am unable to afford the draft obligation any weight.

Site specific transport contributions

53. The SPD threshold for site specific transport requirements includes all residential development involving a net increase of five or more residential units. The appellant disputes the Council's view that applies in this case on the basis that there is no increase in numbers of occupants at the property; it is still six.

54. However, the likely lawful HMO use comprises a single planning unit, whereas the use for flats has created six smaller planning units, thereby resulting in a net increase of five or more dwelling units. The number of occupants is not part of the threshold consideration. Nevertheless, as noted, the HMO use is for up to six people, controlled by licence, whereas occupation of the flats could be materially greater.

55. The Council explain that the transport system in Southampton is under ongoing pressure, which new developments exacerbate and that it is therefore important for all new development to contribute to measures which will mitigate the additional impact arising on transport infrastructure by promoting and improving alternate modes of transport, such as cycling and walking and access to public transport. That is consistent with Core Strategy Policy CS 18 and saved Local Plan Policy SDP 4, which seek to encourage sustainable transport.

[11] Southampton Local Development Framework Developer Contributions Supplementary Planning Document – April 2013
[12] Procedural Guide: Planning appeals – England - Updated 5 October 2023 – paragraph 18.2.2

56. The SPD states that most developments require localised contributions that are site specific and that these address the immediate impact of a development and can be secured either through a financial contribution paid to the council to carry out the identified works, or through developer provision of the identified works.

57. In this case, the Council's Highway Team has identified a £10,000 contribution towards pedestrian and cycle improvements and connectivity including towards the provision of Burgess Road shared use link, to improve and convert the footway along the spur to the west to a shared use path thereby providing better cycle links and higher quality footways. However, I have no evidence which justifies or shows how that figure was arrived at. Therefore, having regard to the planning obligation tests in the Framework, I cannot reasonably conclude that the contribution is fairly and reasonably related in scale and kind to the development.

58. Nevertheless, I am satisfied that such a scheme is directly related to the development and that some form of contribution is necessary to make the development acceptable in planning terms, and, in the absence of any kind of secure mechanism for providing the same, the development is contrary to Core Strategy Policies CS 18 and CS 25, saved Local Plan Policy SDP 4 and the SPD.

Highways condition survey

59. The Council explain that in the past it has been left to fund repairs to the public highway attributable to damage caused by development related traffic, because of difficulties identifying the actual perpetrator and no individual party accepting responsibility. To address that, it now seeks a Highway Condition Survey obligation to be included in all of its Section 106 Agreements, as a standard requirement.

60. That involves an initial survey intended to identify the baseline state of the public highway prior to work commencing. A second survey is then undertaken prior to occupation so a comparison can be made with the initial survey. Any damage highlighted is reviewed and a reparation arrangement is agreed with the developer for the reinstatement of the survey area to its original state.

61. The use of s106 obligation for the delivery of a highway condition report is identified in the Council's SPD and having regard to the above tests, I am satisfied that it would be directly related to the development and capable of being fairly and reasonably related in scale and kind.

62. However, in this case, the development has already been completed. The Council state that an assessment can be made as to whether any harm has arisen, but it is not explained how the former, above identified difficulties would be avoided.

63. Accordingly, in the circumstances, I cannot find that such an obligation is necessary to make the development acceptable in planning terms.

Habitats sites

64. The proposed development is within 5.6km of the European designated Solent and Southampton Special Protection Area (SPA) and Ramsar site and the Solent Maritime Special Area of Conservation (SAC). Collectively known as the

Solent SPAs, they are internationally important in providing mudflats, shingle and saltmarshes which are essential feeding and roosting habitats for overwintering birds.

65. As the development results in a net increase in dwellings within the 5.6km 'Zone of Influence', there is a pathway for effects on their designated features through possible disturbance to the birds arising from increased recreational activity around the shorelines, such as walking, jogging, cycling and dog-walking, particularly when those effects are considered in combination with other residential developments located within the zone.

66. Indeed, as per the advice from Natural England and as detailed in the Solent Recreation Mitigation Strategy (SRMS), a net increase in housing development within 5.6km of the Solent SPAs, without mitigation, is likely to result in impacts to the integrity of those sites through a consequent increase in recreational disturbance.

67. I am therefore required to undertake an Appropriate Assessment (AA) of the development pursuant to the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations).

68. The SRMP has been prepared in partnership with Natural England and provides a strategic solution to ensure the requirements of the Habitats Regulations are met with regard to the in-combination effects of increased recreational pressure on the SPAs arising from new residential development. It sets out a costed avoidance and mitigation strategy to protect the integrity of the SPAs with a payment based on the size of each residential unit. The required payment is undertaken through a legal agreement to ensure that the requirements of the strategy and the related mitigation are secured.

69. The Council's AA concludes the development will have a likely significant effect in the absence of avoidance and mitigation measures on the Solent SPAs but that there will be no adverse effect on the integrity of the designated sites if a contribution towards the SRMS is secured by way of legal agreement. I see no reason to find otherwise, and I am therefore satisfied that a planning obligation, or other appropriate mechanism to secure mitigation measures, is necessary to make the development acceptable in planning terms.

70. In the absence of a secured contribution towards mitigating measures, I conclude that the development is likely to significantly adversely affect the integrity of the Solent SPAs. I am not aware of any overriding public interest which would justify permitting the proposal or that there are any alternative solutions which would have no or a lesser effect on the integrity of the protected sites.

71. I therefore find that the development does not meet with the legislative requirements of the Habitats Regulations and is contrary to Core Strategy Policy CS 22 which seeks, amongst other things, to ensure development does not adversely affect the integrity of international designations, and that necessary mitigation measures are provided.

Other matters and conclusion

72. I note the appellant's explanation that COVID-19 was one of the main drivers for changing the layout of the property, but, notwithstanding whether the

associated concerns are now germane, they do not justify allowing the development, which I find to be contrary to the development plan as a whole, for the reasons explained.

Presumption in favour of sustainable development

73. The Council cannot demonstrate a five year supply of deliverable housing sites. That means, as per paragraph 11.d) of the Framework, *granting planning permission unless: i. the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole*.

74. Footnote 7 of paragraph 11 confirms that areas of particular importance would include the Solent SPAs. Paragraph 180 of the Framework states that if significant harm to biodiversity resulting from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused. As I have found that the development is likely to significantly adversely affect the integrity of the Solent SPAs, the application of that policy provides a clear reason for refusing permission. Consequently, the '*tilted balance*' of paragraph 11.d)ii. is not engaged.

75. Indeed, paragraph 182 of the Framework states that the presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an AA has concluded that the plan or project will not adversely affect the integrity of the habitats site. In the absence of secured mitigation, I have found that the development is likely to significantly adversely affect the integrity of the Solent SPAs.

76. Even if the tilted balance were to be applied, the development is contrary to paragraphs 180 and 182, for the reasons explained. I have also found that the development is harmful to the character and appearance of the area, is harmful to the living conditions of neighbouring occupiers and fails to provide acceptable living conditions to its occupants. Accordingly the development is contrary to paragraph 130 of the Framework.

77. Although the site benefits from a relatively sustainable location, the development does not provide for a site specific transport contribution towards highway improvements and as such fails to comply with paragraph 104 of the Framework which states that transport issues should be considered from the earliest stages of development proposals, so that opportunities to promote walking, cycling and public transport use are identified and pursued.

78. The development does result in a modest increase in the amount of dwellings within the site and therefore increases housing supply. The development therefore gains support from paragraph 69 of the Framework, which recognises that small and medium sized sites can make an important contribution to meeting the housing requirement of an area.

79. Ordinarily, that would attract significant weight given the Council does not have a five year supply of housing land. However, in this case, I have found the flats to be sub-standard and do not provide acceptable living conditions for

occupants. Therefore, any numerical benefit to the Council's housing stock is significantly compromised by the quality of the development. Moreover, the Council advise that its shortfall in its housing land supply is relatively small (0.5 years) and no evidence is provided by the appellant which disputes that.

80. In the circumstances, I have therefore attached little weight to the net increase in residential units within the site and to the argument that they provide starter units which contribute to the objective of creating mixed and balanced communities.

81. I appreciate that there would have been economic benefits through the conversion works but those would have been relatively modest. It is also unlikely that the economic benefits of occupation would be significantly different to the previous use as a HMO. I therefore apply limited weight to those benefits identified.

82. Having regard to paragraph 119 of the Framework, I do not find that the development makes effective use of land because it does not safeguard and improve the environment or ensure healthy living conditions. For the same reasons the development does not meet the social and environmental objectives of sustainable development.

83. Therefore, even if the '*tilted balance'* was engaged, the adverse impacts of the development significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole. As a result the presumption in favour of sustainable development does not in any case apply.

Conclusion on Appeal A on ground (a)

84. For the reasons given above, I conclude that the ground (a) appeal should not succeed and I shall refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Conclusion on Appeal B

85. For the reasons given above, and having considered all other matters raised, I conclude that the appeal should be dismissed.

Appeal A on Ground (f)

86. The appeal on ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or the injury to amenity caused by the breach.

87. In this case, the breach of planning control is the material change of use of the land to six self-contained flats; the construction of a first floor rear extension and the installation of four side facing windows. The requirements tally and follow logically from the allegation and are, in short, to cease the use as self-contained flats, remove all facilitating cooking facilities, remove the extension and side windows and remove all resulting materials.

88. The purpose of the enforcement notice is therefore to remedy the breach. To that end, it cannot be excessive to require the removal of the extension and the windows (even putting to one side the harm I have found from those

aspects under ground (a)), even if the use for flats could be controlled by the removal of just the facilitating cooking facilities.

89. I note the appellant's concerns that the requirements do not seek to return the building to its former use, but an enforcement notice cannot require revival of a former use, even if it is lawful.

90. In that regard, it is more likely than not, that the lawful use of the building is as a HMO for up to six persons. The appellant argues that if the property were to revert back to that use, then it would benefit from the permitted development rights conferred by Schedule 2, Part 1 of the GPDO[13], for development within the curtilage of a dwellinghouse.

91. I have considered the appellant's permitted development arguments in relation to the extension and side windows and whether they amount to a hidden ground (c) appeal - that those matters alleged do not constitute a breach of planning control. However, the arguments appear to be made solely in relation to the fallback use of a HMO, rather than the alleged use. In any event, '*dwellinghouse'* for the purposes of Class A of the GPDO does not include buildings containing one or more flats.

92. Nevertheless, it is not a condition of qualifying for Part 1 permitted development rights that a '*dwellinghouse'* is of a particular type or used in accordance with use class C3. It is likely that a dwellinghouse in use as a small HMO, as defined by use Class C4, will fit within the GPDO 2015 definition and benefit from Part 1 permitted development rights.

93. The appellant argues that the first floor side extension (without the cladding) would be permitted by Class A. Even if it falls within the limitations of paragraph A.1(h)[14] as suggested by the appellant, the Council point out that the extension would not meet limitations (d), (i) and (ja). No evidence to the contrary is provided by the appellant thus it is more likely than not that the extension would not benefit from Class A permitted development rights.

94. The first floor side window would also fail to comply with the conditions of paragraphs A.3(b), which sets out requirements to be obscure glazed and non-opening, unless of a certain height.

95. It is likely the installation of the three ground floor side windows would be permitted development under Class A for a Class C4 HMO. Even if that was also the case for the flats, an enforcement notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement, so that the land is restored to its condition before the change of use took place. The ground floor side facing windows serve bedrooms and evidently facilitate the material change of use building. Indeed, the appellant confirms that the extension and provision of the side windows were undertaken to allow for the change of use.

[13] The Town and Country Planning (General Permitted Development) (England) Order 2015
[14] (h) the enlarged part of the dwellinghouse would have more than a single storey and— (i) extend beyond the rear wall of the original dwellinghouse by more than 3 metres, or (ii) be within 7 metres of any boundary of the curtilage of the dwellinghouse being enlarged which is opposite the rear wall of that dwellinghouse;

96. Nevertheless, although a HMO use is a realistic fallback position, I do not consider that the reinstatement of the side facing windows would represent a greater than theoretical possibility, given that the previous HMO use occurred without them, such that it would serve no purpose to require their removal.

97. Accordingly, it is not excessive for the notice to require the removal of the side windows, or any of the other matters alleged. The appeal on ground (f) therefore fails.

Appeal A on Ground (g)

98. The ground (g) appeal is that the four months given to comply with the notice is too short to enable the re-location of the tenants which may require an eviction notice and because the removal of the first floor extension and windows together with any internal fixtures and fittings cannot happen until the tenants have left.

99. The appellant has provided evidence from his letting agent that the notice period is two months, but sets out a worse case scenario of nine months for vacant possession. Evidence is also provided from a building contractor which estimates a period of six to eight months to carry out the works, although the works listed go beyond that required.

100. I consider the worse case scenario of nine months for vacant possession to be unlikely and whilst the works required by the notice are not insignificant, a period of 12 months, as suggested, is disproportionate and unjustified. In my view, a period of nine months would be a proportionate response to the breach of planning control and would achieve an appropriate balance between any difficulties the appellant may encounter and the public interest in this case.

101. I note the Council's argument that the appellant has been aware of the situation since 2021. However, the appellant is entitled to assume success on any ground in an appeal under s174 of the 1990 Act. Consequently, any suggestion that the period for compliance should not be extended because of time afforded during the appeal proceedings must be rejected.

102. I shall vary the enforcement notice as stated. The appeal on ground (g) succeeds to the extent explained.

Appeal C

Preliminary Matters

103. An application under s191(1)(a) of the 1990 Act seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful.

104. S191(2) of the 1990 Act explains that uses are lawful if no enforcement action may be taken in respect of them, and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

105. The burden of proof lies with the appellant to make his case and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than

probable and his evidence alone is sufficiently precise and unambiguous, that is enough. Evidence should not be rejected simply because it is uncorroborated.

106. On 6 April 2010, an amendment to the Use Classes Order[15] introduced a definition of small-scale HMOs into the planning system. It effectively split the old Class C3 (dwellinghouse) into 2 separate classes – Class C3 (dwellinghouse) and Class C4 (HMO). Consequently, development previously falling under Class C3 was reclassified into either the new C3 or C4 Classes. The reclassification did not amount to a change of use requiring planning permission.

107. The change of use from Class C3 to C4 and vice versa is normally permitted development under Schedule 2, Part 3, Class L of the GPDO. However, it is undisputed that the Council introduced a city-wide Article 4 Direction on 23 March 2012 to remove permitted development rights for a change of use from Class C3 to Class C4.

Main Issue

108. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded. From the evidence before me, that turns on whether the use of the appeal property changed to a HMO ten or more years before the date of the application, at a time when such a change was not permitted development, and then continued without material interruption for a period of at least ten years thereafter, and not since lost, so as to meet the immunity period from enforcement action under s171B(3) of the 1990 Act.

Reasons

109. The LDC sought is for the existing use as Class C4 HMO.

110. The Council's officer report refers to a need to firstly establish whether the property was lawfully in use as a Class C4 HMO when its Article 4 Direction took effect. The appellant also states that the '*ten year rule'* is not required to regularise the HMO and grant the LDC on the basis that the Article 4 direction has only been in place since 23 March 2012.

111. However, s171B(3) states that '*no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach*'. For a breach of planning control to have occurred in this case, there must have been a material change of use, and it is only a material change of use which can have become immune from enforcement action. Having regard to s171A(1), use, in itself, is not an act of development.

112. The permitted development rights for a change of use from Class C3 to C4 came into force on 1 October 2010[16]. Consequently, if the Class C4 use of the property commenced between that date and the date of the Article 4 direction coming into force on 23 March 2012, there would not have been a breach of planning control. For there to have been a breach of planning control and for the ten year immunity period to be met in this case, the material change of use to a HMO must have commenced before the permitted development rights came into force.

[15] The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010
[16] The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010

113. Moreover, to be a Class C4 HMO, a breach to that effect must have commenced in the relatively short window between 6 April 2010, when Class C4 HMO was introduced as a use class, and 1 October 2010, when the permitted development rights came into force. However, that can be ruled out in this case because the appellant asserts that records obtained from the previous owner confirms a HMO use since at least 2006.

114. Although the Council state that the HMO licence issued in May 2006 does not evidence use, it accepts that '*Council tax records show this property has been multi-occupancy and let to non related tenants since 2007'*, and that it has no other contradictory evidence. Therefore, on the balance of probabilities, there was a breach of planning control comprising a material use from the previous Class C3 use to a HMO (rather than specifically a Class C4 HMO).

115. Based on its Council tax records the Council accept that the property was in use as a HMO when the Article 4 direction took effect and continued to be used as such until July 2021. Therefore, whether the beginning of the breach was sometime in 2006 or 2007 makes no difference as ten years hence from either year would clearly be prior to July 2021. Consequently, assuming the status quo, the HMO use would have been immune from enforcement action at the time of the application.

116. However, the Council's position is that in July 2021, there was a material change of use of the property to six self-contained flats, which was still subsisting on the date of the application, thereby resulting in the HMO use being lost. The appellant argues that, as the use for flats is unauthorised, it does not affect the authorised legal use of the property.

117. In *Panton & Farmer*[17] it was held that lawful use rights could only be lost by evidence of abandonment; by the formation of a new planning unit; or by being superseded by a further change of use. A use which was merely dormant or inactive could still be considered as 'existing', so long as it had already become lawful and not been extinguished in one of those three ways.

118. In cases where there is a dispute as to whether an MCU has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary uses of that unit. The planning unit is a concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of change. In *Burdle*[18], it was held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. The concept of physical and functional separation is key.

119. Even though the use can be broadly described as residential, the use of the building for individual flats has created six new physically separate and distinct planning units with different occupancies, compared to the single HMO planning unit. Having regard to *Panton & Farmer,* that on its own is capable of extinguishing the lawful HMO use.

120. If there is a change of use from a HMO to flats, it will be necessary to consider whether the change is material with regard to differences in the

[17] *Panton & Farmer v SSETR & Vale of Horse DC* [1999] JPL 461
[18] *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207,

character of the use and factors such as what works have taken place and any change to the number of units. The sub-division of one planning unit into two or more is not automatically a material change of use unless the original planning unit is a single dwellinghouse. The question will be whether the change to flats results in a significant difference in the character of the use, as a matter of fact and degree, and any planning consequences will be relevant to that.

121. Prior to the date of the application, the Council had refused a retrospective planning application for a first floor rear extension and six self-contained flats (which is subject to Appeal B). As per the description, the plans show that each of the flats has its own facilities for day to day living, including a kitchen and bathroom, so can be reasonably described as individual dwellings. That contrasts with the arrangement shown in the original floor plan layout which reflects a typical HMO property with six bedrooms and shared basic amenities, namely a kitchen and bathroom.

122. The building has also been physically enlarged to facilitate its use for six flats and that has affected its appearance. New windows have also been inserted in the side elevation which results in the loss of privacy to the occupiers of the neighbouring property.

123. The character of the building, its effects and manner in which is used has therefore materially changed, such that at the time of the application the HMO use could not be reasonably described as dormant. For the same reasons, nor could the flats be reasonably be described as an interruption to the HMO use which is of no legal effect in terms of the lawfulness.

124. In the case of *Fairstate Ltd*[19] the judge found (paragraph 19) '*if there is a material change of use from use X which has continued for ten years and has therefore become immune from enforcement action and lawful to use Y, then a change back from use Y to use X will be a further material change of use requiring planning permission. That is why, in shorthand form, it can be said that the right to continue with the immune use will have been 'lost''*.

125. The judge goes on to state (paragraph 22) that '*For so long as a landowner continues to use his land for use X, which has become immune by virtue of having continued for 10 years, a local planning authority will be unable to take enforcement action. However the landowner cannot expect that immunity should continue if he ceases to use the land for use X and uses it for some other purpose, use Y, if a change back from use Y to use X is either deemed to be, or is as a matter of fact and degree, a further material change of use.'*

126. I have found that subsequent to achieving immunity for the HMO use, there was a material change of use from that use to use for flats, prior to and then continuing until the date of the application. Consequently, the change back to a HMO would amount to a further material change of use requiring planning permission, even though the use for flats was unauthorised.

127. The appellant argues that should he decide to cease the use of the flats and comply with the enforcement notice, then, in accordance with s57(4) of the 1990 Act, the property would revert to its lawful use as a HMO. To that end,

[19] *R (on the application of Fairstate Limited) v The First Secretary of State and another* [2004] EWHC 1807 (Admin) [2004] EWHC 1807 (Admin); *Fairstate Ltd v FSS & Westminster CC* [2005] EWCA Civ 238

the appellant has referred me to paragraph 28 of the above Court of Appeal decision which states that "*the effect of section 57(4) [of the 1990 Act] is that if there is a change of use from a (lawful because immune) use X to use Y and an enforcement notice is issued in respect of use Y, then the landowner can revert to use X.*"

128. However, that paragraph goes onto state that if "*the local planning authority do not enforce against use Y, whether because of an oversight or because there is no planning objection to use Y, if the owner then reverts of his own volition from use Y to use X, there is a material change of use (whether as a matter of fact and degree or as a result of the deeming provisions of section 25) and the local planning authority can serve a enforcement notice in respect of that use and the landowner, in those circumstances, cannot avail himself of the provisions of section 57(4).*"

129. That is applicable here because under s191(4) of the 1990 Act, the relevant date for ascertaining whether the existing development is lawful is the date of the LDC application. At that time (9 February 2022) the Council had not enforced against the use of the building as flats. The enforcement notice was not issued until 27 September 2022, so on the date of the application the appellant could not avail himself of the provisions of s57(4).

130. The appellant has referred to the case of *Newland*[20]*.* However, for the reasons explained, at the time of the application there would have been a requirement to obtain planning permission to resume a formal lawful use of the land because no enforcement notice had been issued.

131. I therefore find that the previous lawful use of the property as a HMO had been lost and planning permission would have been required at the time of the application for the change of use of the property back to a HMO.

Appeal C Conclusion

132. For the reasons given above I conclude that the Council's refusal to grant a LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Richard S Jones

INSPECTOR

[20] *Newland v Secretary of State* [2008] EWHC 3132 (Admin)