

**PLANNING ENFORCEMENT:  
DELEGATED REPORT TO RESOLVE HMO INVESTIGATION**

<b>DA Number: 22/00233/HMO</b>	
<b>Address: 13 Wyndcliffe Road, Portsmouth PO4 0LA</b>	
<b>Alleged Breach:</b>	
Change of use from C4 to Sui Generis without planning permission.	
<b>Site description / Investigation report:</b>	
<p>13 Wyndcliffe Road is a two storey terraced property with accommodation over three floors, situated within the Central Southsea Ward of the city.</p> <p>Private Sector Housing brought this matter to Planning Enforcement's attention.</p> <p>13 Wyndcliffe Road has been licensed for the following periods:</p> <ol style="list-style-type: none"> <li>1. 5 persons from 23/10/2015 - 27/8/2018</li> <li>2. 7 persons from 27/3/2019 - 26/3/2024.</li> </ol> <p>18/01332/FUL: A planning application was submitted on 1<sup>st</sup> August 2018 for change of use from purposes falling within Class C4 (house in multiple occupation) to a 7 bedroom house in multiple occupation (sui generis). This application was refused on the 8<sup>th</sup> October 2018.</p> <p>The reason for refusal was as follows:</p> <ol style="list-style-type: none"> <li>1) <i>The proposed change of use from dwellinghouse (Class C3)/HMO (Class C4) to Sui Generis HMO would fail to support a mixed and balanced community in an area already imbalanced by the level of similar such uses. The proposal is therefore contrary to Policy PCS20 of the Portsmouth Plan and the Houses in Multiple Occupation Supplementary Planning Document (July 2018).</i></li> <li>2) <i>The proposed use of the building as a seven bedroom sui generis House in Multiple Occupation would, as a result of its undersize bedroom and limited sized bathrooms fail to provide the necessary space for an adequate standard of living accommodation for future occupiers and would represent an overintensive use of the site. The proposal is therefore contrary to Core Planning Principles of the National Planning Policy Framework and Policies PCS20 and PCS23 of the Portsmouth Plan, including the supporting Houses in Multiple Occupation Supplementary Planning Document (July 2018).</i></li> <li>3) <i>Without appropriate mitigation the development would be likely to have a significant effect on the Portsmouth Harbour and Chichester and Langstone Harbours Special Protection Areas and so is contrary to Policy PCS13 of the Portsmouth Plan and the Conservation of Habitats and Species Regulations (as amended).</i></li> </ol>	

This decision was appealed, and the Inspector dismissed the appeal on the 4<sup>th</sup> June 2019, due to local community balance, and effect on the Special Protection Areas. commenting:

*"On the evidence put to me in this one, I find that it has been reasonably shown that the local area has a very high concentration of HMOs and there is already a significant imbalance in the housing mix. While changing the use of the property to a 7 bedroom HMO would not on its own add many additional bedrooms and people, it would contribute to the general increase in HMO accommodation and the cumulative effect of this would be to make the imbalance in the housing stock worse and harm the local community. I therefore find the at the proposal conflicts with PP Policy PCS20."*

The Inspector found the standard of living accommodation to be acceptable, commenting:

*"...the two additional bedrooms proposed in this application to result in a 7 bedroom HMO would be of an appropriate standard to ensure that the occupiers have reasonable living conditions and there is no conflict with PP Policies PCS20 as described above, or PCS23 regarding 'design and conservation'."*

19/01433/FUL: A further planning application was submitted on 18/09/2019 - Change of use from purposes falling within Class C4 (house in multiple occupation) to a 7 bedroom house in multiple occupation (sui generis) (Revised Scheme 18/01332/FUL). The application was later withdrawn on 13/09/2022.

**Planning Policy:**

In addition to the National Planning Policy Framework (NPPF) the relevant policies within the Portsmouth Plan are PCS23 Design and Conservation and PCS20 Houses in Multiple Occupation.

Further guidance on the proper design and delivery of HMOs is also provided in the Houses in Multiple Occupancy SPD, and the associated guidance from the Private Sector Housing team 'Standards for HMOs' of September 2018.

**Other Material Considerations**

The enforcement notice appeal decisions for 22 Pains Road, 78 Manners Road and 60 Cottage Road, the 'Campbell Properties' decision.

The enforcement notice for each property in this case alleged that there had been a breach of planning control because there was a material change of use from a C4 HMO (6 persons) to Sui Generis HMO for 7 or 8 persons.

The appellant appealed these enforcement notices under 174(2) (c) TCPA that those matters (if they occurred) do not constitute a breach of planning control.

The appeal was dealt with by way of public inquiry

The appeal decision was issued in April 2021. The inspector concluded that the increase in occupancy from 6 persons to 7 or 8 persons within an HMO (the planning unit) did not amount to a material change of use and is therefore not development.

The planning inspector correctly identified that the movement out of the description of the Use Classes Order, in this case C4 to Sui Generis, is not in itself the determinative consideration for a change of use from a C4 HMO to a Sui Generis HMO for 7 or 8 persons.

As a matter of fact and degree the use of the property as a Sui Generis HMO for 7 or 8 persons did not result in some significant difference in the character of activities from

<p>what had gone on previously when the property was used a C4 HMO (occupied by 6 persons. The addition of 1 or 2 persons did not amount to a material change of use.</p> <p>These decisions were reviewed by the Council's chief planner, city solicitor and advice was sought from a barrister and found to be sound.</p>
<p><b>Planning History</b></p>
<p>Other than detailed above:</p> <p>18/00063/GPDC: Construction of single storey rear extension. Application returned before registration on 15/06/2018.</p>
<p><b>Analysis</b></p>
<p>Under section 172 (1) Town and Country Planning Act 1990 (TCPA):</p> <p><i>" The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—</i></p> <p><i>(a) that there has been a breach of planning control; and</i></p> <p><i>(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."</i></p> <p><b>(a) Is there a breach of planning control?</b></p> <p>In order for a breach of planning control to have taken place, development must have occurred. Development is defined under s55 of the Town and Country Planning Act (1990) as:</p> <p><i>"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."</i></p> <p>Since the refusal of planning application 18/01332/FUL: Change of use from purposes falling within Class C4 (house in multiple occupation) to a 7 bedroom house in multiple occupation (sui generis), the Council must take into consideration the appeal outcome resulting from the appeals made by Campbell Properties (see above) against the service of six planning enforcement notices against similar changes of use as has been identified in this case. That decision, like the 2019 appeal at this site, is a material consideration when reaching conclusions in similar cases, such as this one.</p> <p>The guidance provided by the Campbell Properties decision is provided in a decision letter provided in April 2021 and the inspector in the 13 Wyndcliffe Road appeal was therefore unable to consider it. The Council must now consider whether it is expedient to pursue enforcement action against the use of 13 Wyndcliffe Road as a 7 person HMO.</p> <p>In this instance, the Council must consider whether the addition of a further 1 occupant into an existing six bedroom HMO, is a material change of use, and is therefore development.</p> <p>While the increase of occupancy does, by definition, move the property outside of use class C4, it has been held in law and at appeal that the Use Classes Order (1987) (as amended) is permissive and should be used as guidance only. Therefore, the materiality of each individual circumstance must still be fully considered by the LPA to determine whether a material change of use, and therefore a breach of planning control,</p>

has occurred. This is a planning judgement as a matter of fact and degree in each case.

In this instance, while there has been some intensification of the occupancy of the property in question, this does not appear to have quantifiably or qualitatively altered how the property is used. For example, the addition of the extra occupant into the property has not changed the nature of how the occupants reside and use/share the facilities, in that they still have their own bedrooms and share communal facilities. There is nothing to suggest that this results in a materially different use to that which would fall within a higher occupancy C4 HMO. It should also be noted that internal alterations do not constitute development in themselves.

Again, while each instance must be assessed on its own merits in order to ascertain whether development has occurred, a primary material planning consideration is precedent set by past decisions, particularly appeal decisions, in materially similar circumstances.

In the cases of Campbell Properties, a joint inquiry against PCC planning enforcement notices determined in April 2021, the decision was made by Inspector P Hocking that an increase of 1 or 2 occupants within a HMO, even where it technically moves the property between use classes, was not a material change of use in the case of all 3 properties heard at appeal.. This decision appears to be materially very similar to the property in question and therefore should be given significant weight in considering whether a material change of use has occurred in this instance.

Officers are therefore satisfied that the change in the occupancy of this established HMO is not a material one, and as such cannot be considered development requiring planning permission. Section 172(1)(a) TCPA is not satisfied as no breach of planning control has occurred at this site and no planning enforcement action can be taken.

However, if contrary to this recommendation it is considered that s172(1) (a) TCPA has been satisfied and a breach of planning control has occurred, the Council would need to consider whether it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

### **The Planning Merits of the Use**

Even in the instance that it is concluded that a material change of use had occurred, the LPA must then consider the planning merits of the development in order to decide whether it would have been expedient to pursue formal enforcement action.

The first relevant policy that the development should be considered against is PCS20's mixed and balanced communities objective. This is implemented through the HMO SPD through assessing whether the addition of a new HMO would imbalance a community. This is achieved by calculating whether a new HMO would cause more than 10% of HMOs within a 50m radius of the site to be HMOs.

While this policy is robust and has been upheld at appeal, it has been agreed by the Planning Inspector and the Planning Committee that this is not applicable to *existing* HMOs that are increasing in occupancy, as it does not increase the number of HMOs in an area. This is the case in this instance, and therefore, the property's use in question is not contrary to this aspect of PCS20.

The other relevant policy is space standards, as the SPD states the minimum sizes of each room within a HMO. These standards are in line with Private Sector Housing guidance. The Council's Private Sector Housing team have reviewed floor plans and inspected the property and come to the conclusion that it reaches those standards and

accordingly issued a licence for the property. Through investigation by the Planning Enforcement team nothing has been identified to suggest a different conclusion should be reached and Officers are satisfied that the room sizes, layout and provision result in a good standard of living environment for residents in accordance with the aims of Policy PCS23.

It is noted that this property was originally refused planning permission due to concerns surrounding the failure of a mixed and balanced community due to the level of similar such uses and these concerns were also echoed in the Inspector's decision to dismiss the appeal against this refusal. The Council's SPD advises that in order to assess the mix and balance of a community the residential properties within 50m of the relevant site should be examined and no more than 10% of those properties should be permitted to become HMOs. Interrogation of the Council's records identifies that 33 of the 93 properties within that 50m radius area are currently HMOs. This amounts to 35.5%. The change in occupancy discussed in this report of course makes no change to these figures.

While the above recommendation makes clear that it is not considered that a material change of use has occurred at this site, if a contrary position is taken the SPD advises that *"in areas where concentrations of HMOs exceed the 10% threshold the Council will consider the potential harm to amenity caused by an increase in the number of bedrooms in an already unbalanced community."* The addition of an additional occupant to an existing HMO is a very small alteration of the overall community. While the Council has no information in respect of the occupancy of C3 dwellings in the relevant area, nor can it reasonably obtain it, a standard occupancy presumption of 2.4 occupants for each property can be applied in line with general practice in other areas of planning assessment. If an occupancy of 6 persons is presumed for each of the HMOs in the relevant area, a reasonable approximation of the total population in this area arising from HMOs and from C3 dwellings can be made. Utilising these assumptions approximately 343 people live in this area, with 199 (58%) of them living in HMOs. The change in occupancy discussed in this report changes that to 200 people (58.3%). This minor change is not considered to have any discernible impact on the community in the area. Similarly due to control of management of the site imposed by the HMO licence, and the minor increase in occupancy of the dwelling itself it is considered that no demonstrable adverse impact on the amenity of adjacent neighbours has been caused by the increase in the number of bedrooms in this already unbalanced community.

Officers are therefore satisfied that if planning permission were sought and needed the proposal would not be considered contract to Policy PCS20 of the Portsmouth Plan. ,

**Conclusion:**

That the case be closed because, under s172(1)(a), there has been no material change of use identified, and therefore no breach of planning control against which formal enforcement action can be taken.

Should the committee be minded to reject this view and consider the use as unacceptable, then any Enforcement notice served would seek to rely on the reasons for refusal of 18/01332/FUL and the Inspector's comments made when dismissing the appeal made against this decision. However, it is anticipated that any appeal made against such an enforcement notice would be likely upheld on appeal with the potential to leave the Council liable to an award of costs.

Should the Committee be minded to consider that planning permission is required for the use, and that the use is acceptable, Officers would discuss with the Applicant how to regularise the matter, including any necessary mitigation for the effects of the development upon the Special Protection Areas.

**AGREED BY**

**Signed** ..... **Date** .....

**Background Papers:**

**Private Sector Housing plans**

**HMO License for 7 persons**