

Appendix 4

13 Wyndcliffe Rd, 22/00233/HMO

Judicial Review, Policy, 5 year housing supply, expediency to take enforcement action, Human Rights Act, Equalities Act:

Following the dismissal on appeal in June 2019 of application 18/01332/FUL, the landowner also sought an order from the court to quash the appeal decision through Judicial Review. The landowner brought 5 grounds of challenge, including that the Inspector was incorrect to apply Policy PCS20 to an application to enlarge an existing HMO, and if the policy was to be applied the individual circumstances of the case and planning impacts should be considered. Grounds were also suggested that the Inspector failed to consider and distinguish other similar appeal decisions in the area and finally a ground was brought in respect of a misunderstanding over the need to mitigate nitrate eutrophication.

All of the grounds as specifically pleaded by the claimant were considered to be unarguable by the court. The Court confirmed that PCS20 is applicable to both developments that include a change of use from a C3 dwellinghouse to an HMO and from a smaller HMO to a larger one. The court was also satisfied that the Inspector did apply PCS20 to the individual circumstances of the planning application. The court went on to confirm that they were satisfied that the Inspector expressly took account of the other appeal decisions in the area that had been submitted and furthermore he had distinguished this case from them and was in any case not bound by those decisions. The final ground in respect of nitrates was dismissed as it was based on a misunderstanding.

Since that appeal the Council's SPD on HMOs has been updated in October 2019. This took the opportunity to remove any ambiguity in respect of the application of PCS20 to developments of existing HMOs, as well as the creation of new HMOs. The additional wording, including the main Officers report on the agenda; *"...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."* were added to both assist understanding for future applications and to make clear a test that was to be applied to the individual circumstances of each application in areas of current overconcentration, namely whether a development would have a harm to the amenity of an area.

It is that test that officers have applied in the report within the agenda, albeit such testing only has relevance if a decision is made that the change in occupation does amount to a material change of use and consequently a development that would be a breach of planning control.

For clarity it is reconfirmed that officers' professional recommendation is that, having considered and notwithstanding the Inspectors reasoning on appeal for 18/01332/FUL, the increase of one occupant in this area results in insignificant harm to the amenity of the area that even if Policy PCS20 is engaged it would not be considered contrary to it.

Members are also directed towards the need, if such need arises through a decision that the change in occupation does amount to a breach of planning control, to ensure that any adverse impacts identified through any judgement of non-compliance with policy or any other harm arising from material considerations are considered in the round with any benefits arising from the development; the judgement of the 'planning balance'.

While officers have identified no significant harms as part of the assessment of planning merits, the significance and weight of any adverse impacts identified is for the decision maker to determine and evidence. Consequently the Committee as decision maker may choose to identify harms associated with the increase in occupancy of an HMO in this area of current overconcentration, if that occupation is considered to be development, at a greater

weight than Officers have prescribed them and thus consider the proposal, as the 2019 Inspector did, to be contrary to policy PCS20. In that scenario however the Committee will need to 'balance' those harms against the benefits arising from the occupation. Principally the benefits are to the provision of housing through the provision of an additional bedspace of occupation within the HMO. While this is a small contribution to the overall housing stock the Council currently is unable to identify a 'five year supply' of housing, with only a 2.9 year supply currently identifiable. In this circumstance the Council is directed to consider that the policies which are most important to determinations associated with housing provision within the Local Plan are out of date. The consequence of this is that decision takers are directed to apply a tilted balance to determinations so that permission is only withheld when the adverse impacts '*...significantly and demonstrably outweigh the benefits...*'. As discussed in the officers' report the harms associated with an intensification of use within this area of overconcentration are considered to be insignificant and therefore fall short of being able to significantly and demonstrably outweigh even the small benefit to the city's housing stock of the provision of a single additional bedspace.

Expediency considerations

As is noted in the officer's report, s.172 TCPA 1990 provides that the issue of an enforcement notice is subject to the LPA being satisfied that:

"(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

However, the Court in *Gazelle Properties Ltd v Bath and North East Somerset Council* [2010] EWHC 3127 (Admin) held that "expediency" is broader than that:

"[56] the concept of expediency in contexts which include the exercise of enforcement powers by a local planning authority goes wider than the concept of material planning considerations such as are engaged in the determination of an application for planning permission, extending, in the enforcement context, to the balance of advantage and disadvantage to the public interest and, in particular, the question of whether the potential gain in going ahead with enforcement action against an identified breach of planning control is worth the cost and time likely to be spent in doing so

The provisions of the development plan are set out in the officer's report and above. In addition, para 59 National Planning Policy Framework ("NPPF") on 'Enforcement' states:

"59. Effective enforcement is important to maintain public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. They should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where appropriate."

The NPPF is a material consideration.

Planning Practice Guidance ("PPG")

The PPG explains the NPPF:

When should enforcement action be taken?

There is a range of ways of tackling alleged breaches of planning control, and local planning authorities should act in a proportionate way.

Local planning authorities have discretion to take enforcement action, when they regard it as expedient to do so having regard to the development plan and any other

material considerations. This includes a local enforcement plan, where it is not part of the development plan.

In considering any enforcement action, the local planning authority should have regard to the National Planning Policy Framework, in particular paragraph 59.

The provisions of the European Convention on Human Rights such as Article 1 of the First Protocol, Article 8 and Article 14 are relevant when considering enforcement action. There is a clear public interest in enforcing planning law and planning regulation in a proportionate way. In deciding whether enforcement action is taken, local planning authorities should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control.

Paragraph: 003 Reference ID: 17b-003-20140306

Revision date: 06 03 2014

'Guidance for Planning Compliance', Portsmouth City Council

The PPG encourages LPAs to have regard to local enforcement plans. PCC's local enforcement plan states:

"Where significant harm to amenity can clearly be demonstrated, then the Council will usually contact the person causing the breach to talk about the problem they have created. This will often result in a planning application being submitted or, where something is considered to be unacceptable, there will be a discussion about removing it. Only if the person causing the breach refuses to talk to the Council, or to resolve an unacceptable matter, will the Council take enforcement action.

Enforcement action is, however, discretionary. The Council has discretion as to whether to take enforcement action or not, and it is not a mandatory duty so to do. Because something is a breach of planning control this is not, in itself, reason to take enforcement action. Even when it is technically possible to take action, the Council is required to decide if such formal action would be "expedient" in the public interest. There needs to be significant harm being caused that is of sufficient detriment to warrant action being taken."

Cascading from the NPPF to the PPG and finally to the local enforcement plan, the key message is that there is a discretion whether to take enforcement action. The use (or not) of that discretion hinges on the balancing of competing factors comprised in "expediency". The NPPF and PPG highlight that an important factor in all enforcement decisions is that effective enforcement outcomes are important for public confidence in the planning system. Part and parcel of that is the idea that enforcement is proportionate. The local enforcement plan encourages the decision-maker to consider whether, once a breach is identified, there is significant harm of sufficient detriment to amenity. In this instance, officers do not believe that there would be significant harm to amenity because the addition of one extra resident in this location would be virtually imperceptible. In that sense, the public interest could be trivialised by taking enforcement action in circumstances where it is felt to be disproportionate.

Other factors relevant to whether to take enforcement action are detailed below.

Human Rights Act 1998 ("HRA 1998") and the European Convention on Human Rights ("ECHR")

The Council is required by the Human Rights Act 1998 to act in a way that is compatible with the European Convention on Human Rights. It is important to note that many convention rights are qualified rights, meaning that they are not absolute rights and must be balanced

against competing interests as permitted by law (the relevant law here being the planning enforcement regime). This report seeks such a balance in relation to:

- Art 6 - Right to a fair hearing - the right to a fair hearing includes the expectation that representations can be made to the Committee, heard impartially, and reasons given for any decision. Impartiality of hearing is closely linked to Art 14, the right not to be discriminated against. The rights to a fair hearing and non-discrimination are not qualified in this context.
- Art 8 - Private and Family Life - Enforcement action against occupation by a resident of a room in a house of multiple occupation is highly likely to result in the termination of a person's sole lodgings. This is a matter where the Committee is advised to be aware of the issue in terms of finding a balance of individual rights with the public interest and other matters. Committee is advised to delegate any time period for compliance to officers drafting any enforcement notice having regard to the likelihood of alternative accommodation being found by a displaced person, as well as any relevant personal circumstances of an affected person and any other relevant circumstances.
Neighbours may also feel that their private and family life is affected, which Members will need to consider in balance with other interests, including the generalised public interest.
- Art 1 to First Protocol - Protection of property - The freeholder, tenant and neighbours affected have different expectations of their enjoyment of property in the context of this application, in addition to the general public interest arising through planning enforcement. These and other considerations may militate for or against enforcement action within the complex balance that the Committee must make.

Equality Act 2010

Under section 149 of the Equality Act 2010, the Council must have due regard to the need to eliminate discrimination, harassment, or victimisation of persons by reason of their protected characteristics. Further the Council must advance equality of opportunity and foster good relations between those who share a relevant protected characteristic and those who don't. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

In the context of this matter, it is not considered that the officer's recommendation would breach the Council's obligations under the Equality Act 2010.

As detailed above in relation to the right to enjoyment of private and family life, in the event that any enforcement action were to involve displacing someone whose protected characteristics are engaged, officers can have regard to this in drafting any enforcement notice or considering other further steps.

Summary on expediency

In summary, "expediency" of taking enforcement action is assessed through a balance of factors including the development plan, material considerations and other relevant factors. Officer advice is that it would not be expedient to undertake enforcement action in these circumstances having regard to PCS20 and the virtually imperceptible impact on amenity of the minor increase in occupation. The provision of additional housing is a benefit. This raises the question of the public interest in taking enforcement action, suggesting that the benefit of action would be negligible. In weighing that balance, the human rights of the various parties must also be considered. Officers advise that while the 'Private and Family Life' and 'Protection of Property' rights of any tenant are the most significant, these are not absolute rights and interference through enforcement action would be a neutral factor overall if mitigated by sufficient time to find alternative accommodation. In the round, enforcement action is not judged to be proportionate and is therefore not considered expedient in this case.