

**THIS ITEM IS FOR INFORMATION ONLY**

(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)

<b>Title of meeting:</b>	Planning Committee
<b>Subject:</b>	Recent decisions regarding Houses of Multiple Occupation
<b>Date of meeting:</b>	12 April 2023
<b>Report by and Authored by:</b>	Ian Maguire Assistant Director for Planning and Economic Development
<b>Wards affected:</b>	All

---

**1. Purpose**

- 1.1 To inform members of the recent appeal decisions addressing that there is need for planning permission for the change of occupancy of Houses of Multiple Occupation (HMOs) from 6-beds/occupants to 7-beds/occupants.
- 1.2 To advise members that these appeal decisions are a material consideration for HMO applications, in particular, where there is a change of occupancy of an HMO from 6 -beds/occupants to 7-beds/occupants.
- 1.3 To advise member that where there is an appeal decision for the application site to have regard to that appeal decision as a material consideration when determining the application.
- 1.4 To advise members of the need to produce sound, substantive and defensible reasons for the refusal of planning permission.

**2. Background**

- 2.1 In 2019 Mr Lane submitted applications for the change of use from a C4 HMO (6 occupants) to a sui generis HMO for 7 persons for 3 properties 123 Talbot Road' 48 Jessie Road' and 56 Jessie Road in Southsea These 3 applications were subject to appeals against non-determination by way of written representations. In each case the Council defended the appeals on the basis that the schemes were considered, individually, to result in firstly an 'under provision of communal living space' failing to provide a good standard of living accommodation and secondly that the increased occupancy would result in an unmitigated significant effect on the Solent Special Protection Area by virtue of an increase in nutrient output.

## **THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

- 2.2 All three appeals were dismissed by the Planning Inspectorate in August 2020, however PINS only dismissed the appeals on the second reason for refusal, with their concluding comments being identical in each case:

*"Although I have found that the development would not result in inadequate living conditions for 7 persons, this is not sufficient to outweigh the likely significant effect on the integrity of designated habitats sites which would be adverse and for which there is no adequate mitigation before me, with consequent conflict with the development plan, the Framework and the Habitats Regulations. Therefore, and having had regard to the other matters raised, the appeal is dismissed, and planning permission is refused."*

- 2.2 The three applications were resubmitted in December 2020, with an intention to overcome the single reason for refusal in 2019 and subsequently refused planning permission by the Portsmouth City Council Planning Committee on 26<sup>th</sup> May 2022. All three were recommended for unconditional permission by officers, primarily due to the individual judgement that planning permission was not required in these cases, as the proposed increase from 6 occupants to 7 occupants did not amount to a material change in use and consequently was not development requiring planning permission. These recommendations reflected the overall approach and reasoning of the inspector in the Campbell Properties appeal decisions for 22 Pains Road, 78 Manner Road and 60 Cottage Grove<sup>1</sup>, were similarly a minimal change in occupation in three of those cases did not result in a significant difference in the character of activities from what had gone on previously as a matter of fact and degree and consequently did not constitute development.

- 2.3 Notwithstanding this recommendation, officers also noted histories of the sites in the report to committee in May 2022 including the previous appeal decisions and judgements applied by the previous Inspector as to the adequacy of living conditions in each case.

- 2.4 The reasons whereby the Planning Committee considered planning permission was required and, furthermore considered that in these cases planning permission should be withheld were identical for all three cases, namely that :

*"The proposal is considered to be development requiring planning permission due to the intensity of the use of the accommodation, the impact on parking, waste, amenity impact upon neighbouring residents and the impact on the Solent special protection area.*

*And furthermore Members resolved to refuse planning permission for the following reasons:*

---

<sup>1</sup> PINS Refs: APP/Z1775/C/20/3245106, 3246078, 3245110, 3246079, 3245108, 3246077, 3233187, 3236610, 3234941, 3266831, 3238003, 3238287

## **THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

*The change of use of the property, by reason of the under provision of communal living space would fail to provide a good standard of living accommodation for the occupiers and represent an over intensive use of the site. The proposal is therefore contrary to Core Planning Principles of the NPPF and Policy PCS23 of the Portsmouth Plan and the Houses in Multiple Occupation Supplementary Planning Document. And*

*It has been identified that any residential development in the city will result in a significant effect on the Solent Special Protection Areas, through additional nutrient output; with mitigation against these impacts being required. No mitigation measures have been secured and, until such time as this has been provided, the proposal would have a significant detrimental impact on the Special Protection Areas; contrary to Policy PCS13 of The Portsmouth Plan 2012, the Conservation of Habitats and Species Regulations 2017, the Wildlife and Countryside Act 1981, and Section 15 of the NPPF 2021."*

- 2.5 All three refusals by the Planning Committee were appealed and were considered in a single decision letter as the appeals shared the same appellant and were refused for similar reasons. That decision letter, of 9 March 2023, referred to herein as the "Lane Appeal Decisions" allowed all three appeals. An associated application for costs against the Council, on the basis that the Council has acted unreasonably putting the appellant to the expense of appeal was also granted at the same time. Costs were awarded against the Council in the 3 Lane Appeal Decisions.

### **3 Information**

- 3.1 These decisions are being reported to Planning Committee as Members are advised that they are relevant material considerations in respect of similar applications, a number of which are on the agenda at the meeting of 12 April 2023. Decision Makers are required to give weight to material considerations in the planning process to establish, amongst other things,
- (1) whether the matter is development or not; and
  - (2) whether they dictate if a decision should be made other than in accordance with the Development Plan.
- Material Consideration
- 3.2 Failure to have due regard to a relevant material consideration is a ground to find a decision unsound through Judicial Review and also likely' as was the case in the determination of this appeal' to be a basis both for being unable to robustly defend a decision at appeal and having costs awarded against a council for unreasonable behaviour. The inspector of the Lane Appeal Decisions has made it clear that decision makers must take into account any relevant appeal decision as material considerations.

## **THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

At paragraph 5 of the appeal decision the inspector refers to the previous appeal decisions for the appeal properties, which related to essentially the same scheme. He states:

*"Although the appeals were dismissed, it is highly pertinent that the Inspector found no conflict with Policy PCS23 of the Portsmouth Plan (Portsmouth's Core Strategy) 2012 or paragraph 127 f) of the National Planning Policy Framework (the Framework) in respect of living conditions."*

At paragraph 8 of the appeal decision the inspector has taken into account the Campbell Property Appeal Decisions as material considerations

*"In all three cases the increased occupancy has not involved any external alterations to the properties nor indeed a material change of use that would require planning permission. In coming to that view, I adopt the reasoning of my colleague in the Campbell Properties appeal decision."*

The Lane Appeal Decisions are now also relevant material considerations for HMO applications for a change of use from C4 HMO (6 persons) to sui generis HMOs for 7 persons.

- 3.3 The "Lane Appeal Decisions" specifically address whether or not planning permission was required for the specific, minimal increase in occupation of an established HMO. The "Lane Appeal Decisions" represent 3 further assessments by an appointed inspector of the Planning Inspectorate concluding, as a matter of fact and degree, that an increase from 6-beds/occupants to 7 -bed/occupants did not constitute a material change in the use and therefore did not need planning permission. In total the Council has now received decisions from the Planning Inspectorate, from two separate Inspectors at six different sites in the past two years.
- 3.4 There have been no contrary appeal decisions, whereat an Inspector has expressly found that, as a matter of fact and degree, a change for 6-bed to 7-bed occupation of an HMO *did* constitute development requiring planning permission in Portsmouth. Therefore there are no contrary appeal decisions to take into account as material considerations.
- 3.5 There have been 26 other appeals determined for similar changes of use, since the Campbell Properties decision in 2021, but in none of those appeals has an Inspector sought to engage the primary question of whether planning permission was needed. There appears to be no consistent approach in the method used by Inspectors who have avoided the primary question but many Inspectors simply failed to demonstrate any consideration of the matter within their decision letters at all and where they did, frequently Inspectors expressly avoided a conclusion with

## **THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

*statements such as "However, whether or not a material change of use has occurred is not a matter for me to determine in the context of an appeal made under section 78 of the Town and Country Planning Act 1990 (as amended)."*

- 3.6 The starting point for the determination of any planning application is to consider if the works or change of use are development under s55 of the Town and Country Planning Act 1990 (the "TCPA") and therefore need planning permission. The decision maker, when applying s55 TCPA, is required to make a planning judgement on the facts in each case and must take into account any relevant material considerations, including any relevant appeal decision (for the same site and sites that are materially similar). The Campbell appeal decisions for 22 Pains Rd, 78 Manners Rad, and 60 Cottage Grove are relevant material considerations.
- 3.7 The inspectors in the other 26 appeals have failed to consider the relevant legislation set out at s55 TCPA, so they have not made the necessary planning judgement and have failed to take into account the Campbell appeal decision as relevant material considerations. Officers would advise the Planning Committee that this approach is fundamentally wrong in law.
- 3.8 For completeness Members can be made aware that 2 of these 26 appeals were also subject to claims for appeal costs against the Council. Neither claim, distinguishable from the claims awarded in the recent "Lane Appeal Decision" the subject of this report, sought to raise the issue of a lack of need for planning permission within their argument, so they provide little assistance in addressing that question. One application for costs was unsuccessful, with the Council being found to not have been acting unreasonably, but the other, at 3 Pains Road was awarded in similar circumstances as seen in the 3 "Lane Appeal Decision" cases, in that in that case there had also been a previous appeal that found, contrary to the opinion of the Planning Committee, that the living conditions created were satisfactory and the reasons given by the Planning Committee to revert to their contrary view were consequently in adequate.

### Reasoning of the Decision

- 3.9 Where planning permission is refused there is a statutory duty on an LPA under the Development Management Procedure Order to give notice of a decision on an application for planning permission, stating clearly and precisely the full reasons for the refusal, specifying all policies and proposals in the development which are relevant to the decision. Each planning application must be determined on its own merits. The decision maker must consider the facts on each application when coming to decision. The decision must be reasonable, rational and evidence based. What matters is that the decision-maker can be shown, objectively, to have taken the relevant material into account and reached its own conclusion based on that evidence.

**THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

- 3.10 Careful consideration must - be given when the Planning Committee wishes to exert its own opinion on individual facts contrary to
- 1) the officer recommendation and/or
  - 2) an appeal decision determined by the Planning Inspectorate on the application sites themselves or in materially similar circumstances.

- 3.11 As has been referenced in the award of costs against the Council in the "Lane Appeal Decisions":

*"While it is a fundamental principle of local decision making that a planning committee is not bound to follow the advice of its officers, there is a reasonable expectation that where this occurs it should show reasonable planning grounds for taking a contrary decision and produce sound, substantive and defensible evidence on appeal to support the decision in all respects. That very clearly did not happen in this instance."*

- 3.12 At paragraph 12 of the cost decision the inspector states

*"Unfortunately for reasons that are not entirely obvious, Members chose to depart from that very clear and cogent advice (in the officer's report).*

- 3.13 The Planning Committee of course also has the right to depart from officers' advice in respect of the need and merit of planning permission, however again this right is accompanied by the obligation when doing so to produce sound, substance and defensible planning reasons for doing so. It has been determined that the Council has fallen short of this obligation in the "Lane Appeal Decision" case.

- 3.14 At paragraph 9 of the appeal decision the inspector states:

*"The matter of living conditions and specifically the amount of residual communal space has therefore already been considered and found to be acceptable (by the previous inspector). There has been no significant change in circumstances in the intervening period and no substantial evidence has been adduced by the Council to rebut the Inspector's findings at paragraphs 21-26."*

- 3.15 At paragraph 12 of the cost decision the inspector says:

*"The fact that the previous Inspector had found the amount of living space to be acceptable, was **seemingly brushed aside** on the basis that there was no change to the previous application and therefore no reason for a different decision."*

- 3.16 The inspector goes on to say at paragraph 15 of the cost decision:

**THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

*"There is no explanation in the Minutes, nor the Council's Statement of Case, why Members **disregarded** the Campbell Properties appeal decision. They were of course entitled to do so, provided that very careful justification was provided."*

- 3.17 The Planning Committee does of course have the right to disregard the Campbell Properties Decisions and the Lane Decisions, but in doing so they also have the obligation to provide very careful justification for doing so. That justification can be neither vague nor generalised and furthermore must explain how, in each case on its own merits, an additional occupant at that specific property would result in an intensification of the use of the site that results in a material change of use.
- 3.18 The inspector concluded that the Planning Committee, failed to have proper regard to officer's advice, the previous appeal decisions for the application sites and the Campbell Appeal Decisions and stated that the Planning Committee gave no sound, substantive and defensible reasons for doing so (see paragraphs 9-11 of the cost decision).
- 3.19 These comments by the Inspector provide unambiguous guidance as to the standard and nature of the task before a Planning Committee when they wish to distinguish their judgement from a materially similar previous case, especially when doing so it contrary to officer recommendation.
- 3.20 It is unavoidable to note that the inspector in the case of the "Lane Appeal Decisions" was of the opinion that the way the Planning Committee tackled their conclusion of those cases in the May 2022 Committee meeting demonstrated
- " a disturbing lack of awareness of basic planning procedure and law."*
- 3.21 Furthermore the Inspector, overall expressed his decision that the Council was guilty in their reasoning
- " of using vague, generalised or inaccurate assertions about the proposals 'impact"*
- 3.22 These concerns are of particular importance as a materially similar approach by the Planning Committee to constructing decisions on similar cases has been consistently used in every case since May 2022 and officers' firm advice to Members is that this approach should be reconsidered.
- 3.23 It is within the gift to the planning committee to depart from officers' recommendations and to give different or no weight to relevant appeal decisions, but there must be a reasonable and rational and evidential reasons for doing so.

**THIS ITEM IS FOR INFORMATION ONLY**

**(Please note that "Information Only" reports do not require Integrated Impact Assessments, Legal or Finance Comments as no decision is being taken)**

3.24 In the interest of fairness a decision maker reasons should:

1. be intelligible and adequate
2. enable the reader to understand why the matter was decided as it was
3. state what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved.

and reasons can be briefly stated, need refer only to the main issues in the dispute<sup>2</sup>.

Signed by pp(Director)

**Appendices:**

The "Lane Appeal" Decisions dated 20 February 2023

Appeal Ref: APP/Z1775/W/22/3302601 at 123 Talbot Road, Southsea, PO4 0HD, Appeal

Ref: APP/Z1775/W/22/3303724 at 48 Jessie Road, Southsea, PO4 0EN and Appeal Ref:

APP/Z1775/W/22/3303194 56 Jessie Road, Southsea, PO4 0EN

And decision on Costs application dated 20 February 2023 associated with those appeals

The "Campbell Properties Appeal" Decision dated 29 April 2021

Appeal Refs: APP/Z1775/C/20/3245106, 3246078, 3245110, 3246079, 3245108,

3246077, 3233187, 3236610, 3234941, 3266831, 3238003, 3238287

**Background list of documents:** None

---

<sup>2</sup> South Buckinghamshire DC v Porter, House of Lords - [2004] UKHL 33