

Executive

21 April 2022

Report of the Corporate Director of Place
Portfolio of the Executive Member for Economy and Strategic Planning

Review of the “Controlling the Concentration of Houses in Multiple Occupation” Supplementary Planning Document 2012 (revised 2014) in response to the Council Motion of December 2021

Summary

1. The report responds to the Motion from full Council in December 2021 which asked Executive to consider a review of the Controlling the Concentration of Houses in Multiple Occupation (HMO) Draft Supplementary Planning Document (SPD) 2012 (as amended 2014). It also requested that officers update concentrations of HMOs annually, at residential and street levels, and publish this information on both the Council website and the York Open Data website.
2. The report identifies implications and legal considerations associated with undertaking a review of the SPD and potential changes to the policy. It considers the findings of a recent Local Government and Social Care Ombudsman (LGSCO) decision and an Information Commissioner’s Office (ICO) decision notice.
3. Executive are asked to consider the implications of reviewing the SPD and any changes to policy in the context of the Council’s Local Plan, currently being at examination. Executive are also asked to note the outcomes of the recent decisions from the LGSCO and ICO in relation to HMOs.
4. The report relates to powers under planning legislation to manage the spatial distribution of HMOs and not powers under housing legislation to improve the management and condition of HMOs. Whilst the planning system and HMO licensing are two separate regimes, with distinct functions and objectives in relation to HMOs, how the two regimes work is considered as part of the report.

Recommendations

5. The Executive is asked to:

- 1) Confirm that the current HMO policies are evidence based, robust and fit for purpose and defer the consideration of a review of the Local Plan Policy H8 and the HMO SPD until such a time as the Local Plan is adopted. At which time the appropriate resources and scope can be considered as part of the ongoing process of maintaining an evidence based Local Plan and the National Planning Policy Framework (NPPF) requirement for regular Local Plan reviews.

Reason: To ensure the Local Plan examination is not put at risk and to ensure resources are in place to facilitate a robust evidence base approach to the future review of the Local Plan and policies.

- 2) Note the contents of the report regarding the recent LGSCO decision and the proposed review of the Planning team's enforcement capacity in conjunction with the future HMO licencing report.

Reason: To ensure Members are kept up to date and the commitments made to the LGSCO and the customer are complete.

- 3) Note the contents of the report regarding the recent ICO decision notice and confirm nature of the future publication of HMO data.

Reason: To ensure Members are kept up to date with the Council's Statutory data management obligations regarding it approach to HMO regulation.

Background

HMO SPD

6. In broad terms a House in Multiple Occupation or HMO as they are commonly known, is a house or flat occupied as their main residence by three or more unrelated people who share a communal kitchen, bathroom and/or toilet. In planning terms, there are two different types of HMOs. Between three and six unrelated people, sharing amenities is class as 'C4' or a small HMO. Large HMOs can be defined in broad terms of consisting of more than six unrelated occupants who share

amenities and does not fall within any use class and are considered 'sui generis'¹.

7. HMOs make an important contribution to York's housing offer, providing flexible and affordable accommodation, not just for students but for young professionals and low and middle-income households who may be economically inactive or working in low paid jobs.
8. All large HMO's require planning permission, while small Class C4 HMO's have permitted development rights via the General Permitted Development Order and could change use between a C3 dwelling house and a C4 small HMO without the need for express consent from the Council. Previously the Council considered an evidence base exploring the spatial distribution and impact of HMOs which indicated that in order to provide a more even distribution of HMOs in the City, it is necessary to control the number of Class C4 HMOs within neighbourhoods to ensure that communities do not become imbalanced. This control was achieved through an Article 4 Direction, which came into force on 20 April 2012. The direction covers the main York urban area (see map at Annex 1) and relates to the change of use of dwelling houses from a family house to a use class C4 HMO (being a property, which is occupied by between 3 and 6 unrelated individuals as their main or only residence, who share one or more basic amenities such as a kitchen or bathroom).
9. The Article 4 Direction removes permitted development rights for change of use from a dwelling house to a use class C4 HMO. Planning permission is therefore required for such a change of use. The withdrawal of permitted development rights does not imply that planning applications will be automatically refused if they are submitted. The submission of a planning application simply gives the local planning authority opportunity to consider a proposal against relevant planning policies, supplementary planning documents (where available) and any other material planning considerations.
10. Together, Policy H8 of the publication Local Plan (2018) and the Controlling the Concentration of HMOs SPD provide guidance on how HMO applications will be determined. The guidance applies to planning applications for:
 - development consisting of a change of use of a building from a use falling within the Use Class 'C3' (a family dwelling house or

¹ In a planning sense Sui Generis relates to uses that do not fit within the main use class categories.

flat for example) to Use Class 'C4' (small HMO) within the main urban area under the Article 4 Direction;

- the change of use from Use Class C3 to 'sui generis' large HMOs across the whole Local Authority area;
- flexible permission that allow continuous occupation of a building as either a dwelling house for a family or an HMO for unrelated tenants for a period of 10 years without the need for subsequent planning applications, within Use Class C3 to C3/C4 or C3/Sui Generis large HMOs across the whole Local Authority area.

11. In recognition that HMOs are a vital source of accommodation within the City, used by a range of tenants, the aim of the policy framework is to continue to provide HMO accommodation to meet the City's housing needs, but to manage the supply of new HMOs to avoid high concentrations of this use in an area. Given York's compact nature and well connected public transport network it is considered that the spreading out of HMOs to avoid unsustainable concentrations will still mean that HMOs will remain highly accessible and a key component of our housing offer.
12. Policy H8 can be found at Annex 2. A threshold approach forms the basis of the policy approach, whereby an assessment of the proportion of households that are HMOs is undertaken within a given area. Whilst there is no formal definition of what constitutes a balanced community, there have been attempts to establish what constitutes a large HMO proportion and the threshold at which a community can be said to be/or become imbalanced. Useful precedents have been set in a number of Authorities. For York, through consultation, a threshold of 20% of all properties being HMOs across a neighbourhood and 10% at street level have been established as the point at which a community can tip from balanced to unbalanced.
13. There are three elements to the policy; a threshold assessment at the neighbourhood level (20%), a threshold assessment at the street level (10%) and an assessment of residential amenity². An application can be refused on any of the criteria, it is not necessary for all three to be engaged for an application to be refused. The supporting text to Policy H8 states that the SPD provides guidance on how planning applications will be determined. The SPD references Policy H8 and the threshold approach and provides more detailed guidance on how applications will be determined.

² A consideration of the ability of the area and the property to absorb an additional HMO.

14. The Council attaches moderate weight to Policy H8 (in accordance with the provisions of paragraph 48 of NPPF). The SPD remains a draft until such a time, as there is an adopted development plan in York. The SPD was subject to and shaped by a comprehensive 6-week detailed citywide public consultation. As such, although a 'draft' SPD, the document is a material consideration that is capable of carrying significant weight in determining planning applications. The Planning Inspectorate at appeal has recognised this.
15. In assessing change of use planning applications, to capture as many different types of shared accommodation as possible the Council currently use the following:
 - **Council tax records** - households made up entirely of students can seek exemption from Council Tax and the address of each exempt property is held by the Council. This applies to properties occupied only by one or more students as either full time or term time accommodation. Properties falling within 'Halls of residence' on campus will not be included, however some accommodation owned or managed by the universities off campus will be included;
 - **Licensed HMOs** - records from the Council's Housing team of those properties requiring an HMO licence will be utilised. These are those properties that are occupied by five or more persons;
 - **Properties benefiting from C4 or sui generis HMO planning consent** – in addition to those properties already identified as having HMO permission, where planning permission is given for a change of use to C4 HMO or a certificate of lawful development issued for existing HMOs this will be recorded in the future to build up a clearer picture of HMO properties; and
 - **Properties known to the Council to be HMOs** – this can be established through site visits undertaken by the Council's Housing team in response to reports from the public for example. Local knowledge of known HMOs is welcomed where there is demonstrable evidence that properties are operating as HMOs. If there is not sufficient evidence, it will be assumed that properties are not HMOs.
16. These data sets are collated to calculate an estimate of the proportion of shared households as a percentage of all households. It is considered

that these sources are robust and will provide a fit for purpose approach to identifying the numbers and location of HMOs in an area, although it is accepted that due to the definition of HMO being determined by occupancy rather than construction the data collection methodology can always be improved with more resources. The data is analysed to avoid double counting, for example, identifying where a property may be listed as a licensed HMO and have sui generis HMO planning consent.

LGSCO Decision

17. A complaint was made to the LGSCO (reference ID 20 006 711) about the way the Council granted planning permission for an HMO. The complaint arose due to a failure to maintain the Council's HMO database caused by the internal process of information sharing being infrequent and high vacancy rates in the Strategic Planning Policy team. This led to an incomplete understanding of the HMO densities within the planning process.
18. The LGSCO cannot question whether a Council's decision is right or wrong simply because the complainant disagrees with it. They must consider whether there was fault in the way the decision was reached. The LGSCO found the Council at fault for delays updating its HMO database. However, the LGSCO did not find the fault caused the complainant an injustice, noting the HMO policy is guidance and the policy itself recognises it is not definitive.
19. As part of the LGSCO process, the Council identified the need to review its approach to updating and monitoring the HMO database. The Council said it would review its approach and review the team's resources to enable timely updates of data onto the HMO database. The Council also said it would also review the HMO database and begin any proportionate and reasonable action needed to resolve cases where necessary planning permission is not in place. The LGSCO found this to be positive and the Council is progressing these agreed actions.
20. Following the review of the database, officers are content that the approach to updating and monitoring the HMO database, as set out in paragraph 5.5 of the HMO SPD, is fit for purpose. Updating the HMO database in this way will allow for the best approach to identifying the numbers and location of HMOs in an area when determining HMO planning applications in accordance with Policy H8. The review has identified that the Licensing team are now able to share data on licensed HMOs monthly, rather than quarterly which is what is set out in the Local

Plan supporting text and SPD. This more frequent update on licensed HMOs is now in place, with the Strategic Planning Policy team continuing to work closely with colleagues in Housing to ensure that HMO licences are now updated monthly. The relevant teams are clear of the process to be followed and what information is to be shared and when. Executive are asked to note the revised process with more frequent flow of information.

21. As part of the response to the LGSCO, the Council also recognised that it needed to consider proportionate and reasonable action to resolve cases where necessary planning permission is not in place. As part of this consideration the Executive are asked to consider the impending decision on HMO licensing detailed below.

HMO Licensing

22. As noted above whilst the Council resolution focused specifically on planning policy i.e. the spatial distribution element of the City's HMO. HMO licensing assists in ensuring that standards are met and that management arrangements are effective. It therefore has a different but complementary role to Planning with data from the Licensing regime providing evidence for the application of Planning Policy H8. The purpose of Policy H8 and the SPD being not to constrain supply, but to manage it to avoid high concentrations of this use type in an area.
23. In March 2021 Executive considered the following recommendations:-

Executive are recommended to:

- 1) *Agree to undertake a citywide, statutory, 10 week consultation on the potential designation of a targeted Additional Licensing scheme for HMO's with 3 or 4 occupants within the wards of Hull Road, Guildhall, Clifton, Fishergate, Heworth, Micklegate, Osbaldwick and Derwent; and Fulford and Heslington;*
- 2) *Support a further report being brought before the Executive following the conclusion of the consultation to determine whether to designate an additional licensing scheme.*

Reason: To seek to improve HMOs and thereby benefiting:

- *tenants by ensuring that homes which are safe and well managed,*
- *create a level playing field for all Landlords/agents*

- *support stakeholders such as the Fire and Rescue Service, Police and NHS by improving fire safety, security and reducing the number of unhealthy homes.*
- *support our universities and other educational institutions attract students*
- *support the wider city businesses and residents by providing well managed and sustainable housing.*

24. The report considering the outcomes of the consultation and consideration of the adoption of this enhanced licencing regime and the necessary resources for enforcement are due for consideration at the June Executive. Any additional information coming out of an enhanced licensing regime if adopted, would be in accordance with the Policy H8 and have the potential of an impact on the demand for Planning Enforcement and over time, officers and members will have to consider the scale of the issues arising.

ICO Decision Notice and data

25. Paragraph 16 above identifies the sources of information used for the purposes of compiling the HMO database and the elements of the ICO decision notice that relates to making the information publically available.
26. A complaint was made to the ICO (Case Reference Number: IC-81328-Z8D0) in relation to a request for a copy of the HMO database held by the Council that identifies student HMOs used for the purposes of planning. Whilst the Council provided some information to the complainant, it refused to provide details which would reveal the addresses of student occupied properties, citing sections 12(5)(a) - public safety, and regulation 12(5)(b) - the course of justice, of the EIR. It then later advised that it was also relying on section 13 - personal data, of the EIR. The Commissioner's decision is that the Council is entitled to rely on section 12(5) (a) of the EIR, when withholding the street addresses of student HMO's. The ICO does not require the Council to take any steps as a result of the decision notice. However, the Council did offer to provide the complainant with information, which will provide the number of student properties by ward area, without allowing for the identification of specific properties and their occupants.
27. Since the offer to provide the number of student HMO's, the Council Motion on the 21st December 2021 was made. As a result of this, the Council intends to begin making the addresses of HMO properties publicly available. Having analysed this further it has been concluded it

is therefore no longer possible to provide numbers of student HMO's by Ward, as this would allow the identification of specific student properties so will not now be provided. The Council will based on the decisions made in this report update the complainant according.

28. For the reasons noted in the ICO's decision notice, and in accordance with our HMO planning policies the addresses of those properties on the HMO database will be published but not the category of the occupants.
29. Due to the nature of the Policy H8, it is not possible to provide an indication of the number of HMOs within a street, or neighbourhood area as defined in the HMO SPD. This is because the calculation is undertaken on a case-by-case basis with the property location being the starting point of the calculation. It is possible if Members considered it to be appropriate, to publish an indicative map of HMO densities by ONS output area, this could however not be relied on for interpreting the application of the Council's planning policies. This exercise has previously been undertaken but Members are asked to consider if this should be an ongoing arrangement as this adds value to public understanding or alternatively Members could consider that this heat map approach be construed as misleading.

Enforcement and Resources

30. Having considered the LGSCO decision, the ICO decision, the sources of data and the HMO licencing regime. The Executive needs to consider the necessary resources, the approach to planning and licensing enforcement and the proportionality, recognising the Council's planning obligations are to facilitate development and HMO licensing regulations are focused on the quality of accommodation.
31. Currently there are no dedicated resources within the Planning Enforcement team looking at HMOs and this enforcement work forms part of the Planning Enforcement backlog that is reviewed, risk assessed and prioritised by the Planning Enforcement team and has been subject to multiple Scrutiny meetings over recent years and has received additional investment by the Council. In the vast majority of the Article 4 area, as HMO densities are low, these HMOs will be considered a low priority. It should be noted that the Planning Enforcement team is also constrained by the national shortage of Planning officers.
32. In respect of enforcement, both the Housing Licensing regime and planning regimes work on the principals of inform, educate and then

enforcement as a last resort. In the majority of circumstances, both regimes currently result in no enforcement action and actions by owners to achieve compliance with the regulatory regime which in itself has to be proportionate. In that regard, both regimes are successfully achieving regulatory compliance in most cases with no burden upon the Courts and minimising the impact on the public purse.

33. However, regulation has a clear role and the consideration of the reduced thresholds for HMO licencing is a good example of evidence driven policy review in part arising from the poor quality of HMO provision found when the 2018 Housing Act extended the definition of a large HMO. However if adopted this regime will need resourcing.

Council Motion

34. Council motion was approved on 16 December 2021 resolving that Executive consider initiating, without delay, a review of the HMO SPD, with a view to halving the acceptable percentage thresholds to 10% at neighbourhood level and 5% at street level. The motion also commits Council officers to updating concentrations of HMOs across the Article 4 Direction area annually, at residential and street levels, by providing up to date data on both the Council website and the York Open Data website.

Consultation

35. Policy H8 of the publication Local Plan and the draft HMO SPD have been subject to extensive and comprehensive consultation.

Options

36. The following options are available for Members to consider.

Option 1

37. To instigate a review of the Policy H8 within the Local Plan and reconsider the role that HMO provision makes to deliver the City's Housing need.
 - a) Ask the Planning Inspectorate Inspectors to suspend the current Local Plan Examinations and consider if the Council's proposals to amend Policy H8 would be a main modification and subsequently would this be considered a withdrawal of the plan.

- b) Provide additional resource as necessary for the Housing and Strategic Planning Policy team to re start the Local Plan process and evidence gathering as we would fall under a new regulatory regime if the plan is considered withdrawn.

Option 2

- 38. Confirm the Council's view that its Local Plan policies are robust and fit for purpose, noting the actions taken in response to the LGSCO decision, maintain the current approach to collecting information on known HMOs. Consider planning enforcement implications of the Licensing regime in June and consider additional resources to assist with Planning Enforcement capacity. Note the ICO decision that the Council is correctly protecting the personal information of students by not publishing HMO data on a detailed basis to avoid identification of individuals with common characteristics.

Analysis

Option 1

Consideration of a review into the HMO SPD

- 39. The issue of reviewing the HMO SPD, and any resultant change to policy such as the thresholds, cannot be discussed in isolation, it has to be set within the context of the emerging Local Plan. This is because an SPD must (amongst other things) not contain statements that amount to 'development management policies which are intended to guide the determination of applications for planning permission.' Such statements are required to be in a Local Plan and not within an SPD.³ It is the Local Plan at Policy H8 that sets the principle policy approach to HMOs, not the SPD. An SPD does not have the power to change thresholds set in the Local Plan.
- 40. Government policy set out in the National Planning Policy Framework (NPPF) states that a Local Planning Authority (LPA) can use a Supplementary Planning Document to add further detail to policies that are in the development plan. It adds that the SPD can be used to provide further guidance for developers on particular issues and are capable of

³ The Town and Country Planning (Local Planning) (England) Regulations 2012 govern the contents and preparation of SPDs.

being a material consideration in planning decision. National Planning Practice Guidance explains that SPDs should build upon and provide advice that is more detailed or guidance on policies within adopted local plans; and are a material consideration in decision-making. However, as they do not form part of the core development plan, they cannot introduce new planning policies.

41. Given that the role of an SPD is to add details to policies at a higher level, the HMO SPD cannot override or change Policy H8. Rather the SPD should support the implementation of Policy H8. As Policy H8 references a threshold, a revised SPD that references a different threshold would be at risk of demonstrating new levels of control beyond that prescribed by policy and of breaching the 2012 Regulations. Given that, the Local Plan is now at examination stage, the only way the thresholds in Policy H8 (and the draft SPD) can be changed is through a proposed modification or if the Inspectors requests a change. Post adoption of the Local Plan, the policy could be changed through a review of the plan. There is therefore a significant risk that a review and consultation of the HMO SPD and policy approach whilst the Local Plan is under examination could undermine the Council's position potentially result in a request / instruction for withdrawal by the Inspector on the basis at the hearings that Policy H8 is un-sound.
42. Therefore, due to the potential for the Local Plan process to fail whilst a review of policy as proposed by full Council is a decision Executive could take, officers recommend that a review of the Policy H8 and HMO SPD is undertaken in the context of an adopted Local Plan and considered as part of a review of the plan. It should not be undertaken at the current time in isolation of the rest of the plan, as there is a significant risk that it will undermine the Local Plan integrity and therefore the examination.
43. A future review of the percentage thresholds (referenced in the SPD and Policy H8) would involve an evidence-based consideration as to whether the approach is having the desired effect in relation to concentrations of HMOs and whether the thresholds are robust. This might include a review of planning decisions, appeal decisions and enforcement cases and meetings with residents groups, Councillors, landlords, agents and universities. The evidence would inform any subsequent citywide consultation on options for potential adjustments to the HMO concentration thresholds and the area to which the Article 4 Direction applies. Members will need to consider the resource implications and the facts on the ground of this option at the time.

Option 2

44. Confirm that the current HMO policies are evidence based, robust and fit for purpose and that the Council's existing Local Plan Policy H8 and HMO SPD manages the concentrations of HMOS and have restricted HMOs in the City where large concentrations of HMOs exist. The proposals due for consideration by Executive in June on additional licensing will provide further regulation of quality in those parts of the City with the highest densities of HMO. Good regulation of quality and guidance as to quantity has encouraged a significant investment by landowners and developers in the City to provide purpose built accommodation for students who are the largest driver of HMO demand in the City.
45. The current information gathering for the HMO planning regime is robust and provides sufficient indicative data as to the quantum of HMOs within a street and a neighbourhood for Members and officers to give a proportionate weight to planning applications when considered. To note that in light of the specific nature of the HMO density calculation and the changing nature of property occupation therefore classification as an HMO the density data published at a City level by output area does not reflect Council planning policy and cannot be used in considering planning applications. Members may wish to consider if this information should continue to be published.
46. The current enforcement regime in respect of planning enforcement demand as a whole is proportionate and reflects HMO enforcement priority within the overall planning enforcement function at any one time. HMO quality, through licencing will be considered in the June Executive report and potential short term impacts of any increased planning enforcement activity as a consequence within the wards with the highest HMO densities will also be considered. Members may wish to consider more generally, additional resources to bolster Planning Enforcement as part of the annual budget process, but will need to recognise as with many Council services currently budget is not the only factor and wage inflation in the economy and skills shortages are having a dramatic impact on resourcing teams with niche skills.
47. Ongoing support of purpose built student accommodation by the Council and the Universities is a positive proactive response to meeting students' needs and in line with NPPF and the Local Plan. Both Universities are exploring opportunities for more collaborative working on bringing

forward such developments and Council Planning and Regeneration officers are responding positively in accordance with Council policies.

48. In summary, **Option 2** as detailed below.

- a. To confirm that the Local Plan Policy H8 and SPD are sound and should be considered as part of a future Local Plan review alongside all other Local Plan Policies;
- b. Recognise the HMO database is fit for purpose to give context to guidance on one element of planning considerations;
- c. To consider potential additional Planning resources in light of the June HMO licensing considerations;
- d. To consider overall Planning Enforcement resources as part of the annual budget process.
- e. To endorse a proactive approach with both Universities to bring forward purpose built student accommodation in accordance with the policies of the submitted Local Plan.

Council Plan

49. The proposals in this report contribute to the key outcomes in the 2019-23 Council Plan Making History, Building Communities particularly relating to creating homes and world-class infrastructure.

Implications

50. The following implications have been considered within the report.

- **Financial** – There are no significant financial implications associated with the report. The recommendations can all be delivered within current budgetary allocations.
- **Human Resources (HR)** - there are no implications.
- **One Planet Council / Equalities** – no implication associated with the recommendations of this report. If however, a review of Policy is proposed in the future, it would require all the appropriate impact assessments to be undertaken associated with a new Local plan being developed.
- **Legal** – Legal comments are included in the body of the report.
- **Crime and Disorder** – there are no implications.

- **Information Technology (IT)** – there are no implications.
- **Property** – there are no implications.
- **Other** – there are no implications.

Risk Management

51. There are significant financial and reputation risks with Options 1 and 2 as identified in the report.

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For further information please contact the author of the report

Background Papers:

[Draft Controlling the Concentration of Houses in Multiple Occupation Supplementary Planning Document \(approved 2012, as amended 2014\)](#)

[Minutes of the Meeting of the City of York Council held remotely on Thursday, 16 December 2021](#) (see item 48)

LGSCO decision

<https://www.lgo.org.uk/decisions/planning/planning-applications/20-006-711>

ICO decision

<https://icosearch.ico.org.uk/s/redirect?collection=ico-meta&url=https%3A%2F%2Fico.org.uk%2Fmedia%2Faction-weve-taken%2Fdecision-notice%2F2022%2F4019612%2Fic-81328-z8d0.pdf&auth=W%2BDpV%2Be7KXQfw7S%2FWrm5JQ&profile=decisions&rank=2&query=%21padrenull+%27CpublicAuthority%3A%22%24%2B%2B+City+of+York+Council+%24%2B%2B%22>

Annexes

Annex 1: Article 4 Direction Map

Annex 2: Local Plan Extract Policy H8

List of Abbreviations Used in this Report

HMO – House in Multiple Occupation

ICO – Information Commissioner’s Office

LGSCO – Local Government and Social Care Ombudsman

LPA - Local Planning Authority

NPPF – National Planning Policy Framework

SPD – Supplementary Planning Document