
Appeal Decision

by Mrs H M Higenbottam BA (Hons) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 26 July 2017

Appeal Ref: APP/P4225/X/16/3162795

40 Eafield Avenue, Milnrow, Rochdale OL16 3UN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Timeout Children's Home against the decision of Rochdale Metropolitan Borough Council.
 - The application Ref: 16/010508/CPL, dated 1 September 2016, was refused by notice dated 4 November 2016.
 - The application was made under section 192(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 proposed use as a residential children's home for no more than 2 young people.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. In answer to the third question in section 8 on the application form it confirms that the proposal has been started. However, the information contained at section 7 sets out how the proposed use 'will' be used. This implies the use had not begun at the date of the application. Moreover, the 'Validation Statement' submitted with the application states that the appellant has been given notice to terminate the rental agreement at the existing property they have occupied since 2010 and that they wish to move the two young people to the new address at 40 Eafield Avenue. I will therefore determine the appeal in relation to an application made under section 192 (1) (a) of the Act for any proposed use of buildings or other land.
3. There is no description of development stated at section 3 of the application form. However, in the 'Validation Statement' submitted with the application it is stated that the application is to confirm that as the property is used ' (b) by not more than six residents living together as a single household where care is provided for residents, that the property would remain as a Class C3 use.' The information relating to the existing use at section 7 states *'the property is to be used as a residential children's home for no more than 2 young people aged between 7 and 17 years. Each will be looked after by a carer, who whilst not a resident of the property will stay on-site as part of their duties. As the property is currently a dwellinghouse the use by not more than 6 residents living together as a single household will remain within Class C3.'* The Council

gave the application the description '*application for a lawful development certificate for proposed use as C3 (b)*'. However, there is no substantiated evidence that this description was ever agreed with the applicant.

4. The 1990 Act provides that the description of development may not be modified where the LDC application relates to a proposed use.
5. The precise description of the proposed use in respect of which a certificate is sought is set out in Section E of the appeal form and this states '*the property is used as a private dwelling (Use class C3). We wish to use as a residential children's home for no more than 2 young people*'. I will therefore determine the appeal on the basis of the description for proposed use as a residential children's home for no more than 2 young people.
6. As such, I will consider whether the use of the appeal property as a residential children's home for no more than 2 young people would be lawful. Where an LDC is sought, the onus of proof is on the appellant and the test of that evidence is on the balance of probabilities. The appellant submitted information in the application form and within the 'Validation Statement'. The Council determined the application on the basis of that evidence. As part of the appeal, in addition to the information contained in the appeal form, the appellant has provided comments in a letter dated 3 March 2017. The Council have provided a statement and questionnaire documents. I will determine the appeal on the basis of the information now before me.

Main Issues

7. The main issues are whether or not the proposed use as a residential children's home for no more than 2 young people falls under use class C3 (b) of the Town and Country Planning Use Classes Order 1987 (UCO) and, if not, whether the proposed use would be a material change of use of the building.

Reasons

Whether the use falls within Class C3 (b) of the UCO

8. The lawful use of 40 Eafield Avenue is within Class C3 of the UCO. It is a two storey dwelling with four bedrooms and a private driveway off the road with parking to the front and side.
9. UCO Class C3 (b) is the use of a property as a dwellinghouse by not more than 6 residents living together as a single household (including a household where care is provided for residents). Care is defined in Article 2 of the UCO and means personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in the case of class C2 also includes personal care of children and medical care and treatment. The definition of care therefore excludes personal care of children from the definition of care, except in Class C2.
10. The appellant states that there are normally 3 carers allocated to each young person and they usually work on a rota basis of two days on shift and four days off shift in a 6 day cycle. However, in the appellant's letter dated 3 March 2017 it is stated that:

'The same member of staff is on duty for a full 24 hours. They will come on duty around 9.30am, carry out duties as a normal parent (school run, shopping etc) and would sleep on site. They would then hand over at a similar time the following day.'

Thus there would generally be two children and two carers at the property. No 40 would be the main or sole residence of the two children; however, the carers would only be at the property during their shifts.

11. The appellant states that the 4 bedroom home would have bedrooms dedicated to sleeping facilities for two young people and two staff. There would be an office to enable staff to undertake general paperwork but that there would be no rooms dedicated to education or therapy at home. Education of young persons would take place in a mainstream setting or at one of the appellant's own off site provisions. Any therapy sessions would take place at the appellant's head office.
12. There is nothing in the submitted evidence to demonstrate that the care to be provided to residents in this case would be in relation to disablement, mental disorder or alcohol or drugs dependence. Therefore, the personal care of the children results in the use falling within Class C2 of the UCO and I not within Class C3 (b). This follows the judgement in *North Devon DC v FSS & Southern Childcare Ltd (QBD 30.1.03 Collins)*.
13. The two carers on site at any one time would not form a household with the two children for whose care they are employed. While the carers would sleep over at the property during their shifts this does not amount to residing at the property. I therefore find that on the balance of probabilities the building would not be used as a dwellinghouse by not more than 6 residents living together as a single household (including a household where care is provided for residents) and thus would not fall within Class C3 (b) of the UCO. It would provide residential accommodation and care for two children in need of care, with carers who work for the appellant company and sleep over during their work shift but who would not use the property as their main residence which I have found to fall within Class C2 of the UCO.

Whether the use amounts to a material change of use

14. Turning now to whether what is proposed would be a materially change of use. In *SSETR v Waltham Forest LBC* [2002] EWCA Civ 330 it was held that the correct comparison to be made is between the actual existing use and the proposed use. The Court distinguished between the actual use, a notional use within a use class of the UCO and the proposed use. The Court rejected the argument that it was appropriate to compare a proposed use with a notional use within a use class in deciding whether there would be a material change of use. It was held in that case that the interposition of a notionally permitted use between the existing use and the use applied for is a complication not relevant to the exercise under section 192 of the Act.
15. So in the current case the correct comparison is an analysis of the actual use of the property as a dwellinghouse, at or when last occupied before the date of the application. The appellant has provided little of substance in relation to the last actual use as a dwellinghouse, prior to its purchase of the property, and simply states that it is a four bedroom dwellinghouse.

16. In this LDC appeal, as stated above, the onus of proof rests with the appellant to demonstrate, on the balance of probabilities that the use does not amount to a material change of use. That burden has not been discharged in a precise and unambiguous manner. I therefore do not have adequate evidence to demonstrate whether the proposed use would or would not be a material change of use. As such, for the reasons stated above, the Council's decision to refuse to grant a LDC was well-founded and the appeal fails.

Hilda Higenbottam

Inspector