



Appeal Decision

Site visit made on 5 February 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 March 2021

Appeal Ref: APP/P4605/X/20/3259963

120 Audley Road, Birmingham B33 9DX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Rasul against the decision of Birmingham City Council.
 - The application Ref 2020/00351/PA, dated 14 January 2020, was refused by notice dated 3 June 2020.
 - 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 use of 120 Audley Road as a home for the care of up to two children under the age of 18 years old, with 24 hour care provided by not more than two carers on a shift basis.
-

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr Rasul against Birmingham City Council. This application is the subject of a separate decision.

Main Issue

3. The main issue of the appeal is whether the Council's decision to refuse the certificate of lawfulness was well-founded.

Reasons

4. An application under S192(1)(a) of the Act¹ seeks to establish whether any proposed use of buildings or other land would be lawful. S192(2) sets out that if on application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law.
5. The appeal property is a five bedroom end-terrace property located off Audley Road. There is hardstanding to the front which, at the time of my visit, was used for parking. Although the appeal site is located in a generally residential area, I saw that there are commercial uses and a primary school within walking distance.

¹ Town and Country Planning Act 1990 (as amended)

6. Both parties have referenced the North Devon judgement², where it was held that children cannot form a household without the presence of a resident caregiver. Nevertheless, it is clear from the North Devon judgement that this does not necessarily mean that a change from C3(a) to C2 will always be material, it will be a matter of fact and degree depending upon the circumstances of the case in question.
7. Given the above, this appeal will turn on whether there would be a material change of use from use as a dwellinghouse to Class C2, use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwellinghouses)). In an application for a LDC, the onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.
8. The appellant has drawn my attention to the case of *R (Hossack) v SSE & Kettering BC* [2002] EWCA Civ 886, which is discussed in section 3B-979 of the *Encyclopaedia of Planning Law*. However, it is not disputed that there would be a change of use, what is in dispute is whether that change would be material. Whilst the number of people occupying the property will form part of my consideration in that matter, the fact that there would be less than six persons living at the property is not, in my view, determinative of whether that change is material.
9. There would be up to two young people aged between 8 and 18 years, with no more than two carers at any one time. Carers would operate on a shift basis and would be drawn from a pool of staff assigned to the dwelling. Daytime carers would generally start their shift around 7:30am, followed by one shift change in mid-afternoon and one in the early evening. The appellant advises that the dwelling does not require any internal or external adaptations, and this is not a matter which is disputed by the Council.
10. Paragraph 2.15 of the appellant's statement of case explains that 'On a typical day, the carers will make and have breakfast with the young people before one or both carers take them to school or out for the day...'. This points towards two carers being on site at one time. Presumably, there will be a handover period when the carers finish their shift, resulting in up to four carers on the premises during a shift change.
11. Although a typical family would generate vehicle movements as a result of travelling to work and school, such trips are often linked. The movements generated by the proposal, by contrast, are unlikely to be, since a care worker would visit the site before leaving to take a looked after child to school or for social activities.
12. The appellant suggests that additional visitors, over and above immediate care staff, would include visits by social workers and suggests that such visits and associated vehicular movements would not be too dissimilar to that of a regular household such as visiting friends and relatives. Whilst this may be true, I have no evidence to suggest that the children living at the property would not also have visits from friends or relatives and so I consider it likely that movements generated by social workers would be in addition to those that would be generated by a C3 use.

² *North Devon District Council vs FSS and Southern Childcare Ltd* [2003] EWHC 157 (Admin); [2003] JPL 1191

13. The appellant advises that the children would be expected and actively encourage to attend mainstream school. Whilst this may be the appellant's intention, I consider it likely that at least some of the children would require some form of home tutoring, particularly those who are not at the property on a long-term basis. Tutors visiting the property may choose to access the site by car, which would generate vehicle movements and associated comings and goings which would be less likely to be generated by a typical family.
14. The appellant suggests that given the size of the dwelling, it could accommodate up to 6 persons, with at least two adults typically resident. The appellant also points out that domestic staff such as cleaners and gardeners may visit a property in C3 use and use Class C3(b) already makes provision for the presence of carers to support residents. However, the appellant has provided no information about the actual use of No 120 Audley Road and so I have no evidential basis upon which to make an accurate comparison between this and the proposed use. Furthermore, it is necessary for me to compare the proposed use with an actual existing one, not a notional use.
15. Whilst the appellant confirms that he has considerable experience in the social services sector and has more recently has been involved in the provision of small care homes for young persons between the ages of 8 and 18, there is a paucity of detailed information regarding the likely movements of staff and visitors to the site.
16. I saw that the area to the front of the property has already been paved and a drop kerb installed and so there is already some off-road parking at the site. Nevertheless, the area available for parking is limited and so at least some of the carers or visitors accessing the site are likely to need to park on the main road. Furthermore, given the limited space to the front of the property, it would not be possible to enter and leave the site in a forward gear, meaning that vehicles may have to reverse out onto the highway. Vehicles reversing out onto the highway could pose a risk to users of the highway, particularly if vehicles are parked on the pavement and highway, as I observed during my visit.
17. Whilst occupants of the dwelling would generate vehicle movements and could choose to park on the highway, I consider it likely that the movements generated by the proposed use, including tutors, care workers and social workers, would be significantly greater than would be generated by a C3a use and would lead to increased parking demand in the area.
18. The appellant has drawn my attention to a number of decisions made by various local planning authorities³. The Council has also drawn my attention to appeal decision APP/N4720/X/13/2201154. Whilst I note the cases referred to involved proposals with varying occupancy levels and staffing levels, I do not have full details before me and cannot therefore be sure they are comparable to the case before me. The local authority decisions were not made by Birmingham City Council and so they do not offend general principles of consistency in decision making. Furthermore, as set out in the North Devon judgement, whether or not a material change of use would occur is dependent on the circumstances of the case concerned.

³ SL/2017/0400, 11/19/0238 and 2016/19/91341/W

19. I am advised that Birmingham City Council issued a certificate in November 2018 for 74 Wellington Road, Handsworth, Birmingham confirming that its use for four young people and two resident carers was lawful, reference 2018/08389/PA. However, as confirmed by the Council, the proposal was considered to be for a C3(b) use and was considered to be lawful on that basis. It is therefore not comparable to the appeal scheme before me.
20. In my view, the appellant's evidence is not sufficiently precise and unambiguous and has therefore not demonstrated, on the balance of probabilities, that the use of the site as a home for the care of up to two children under the age of 18 years old, with 24 hour care provided by not more than two carers on a shift basis would not be a material change of use in this case.

Conclusion

21. Thus, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of 120 Audley Road as a home for the care of up to two children under the age of 18 years old, with 24 hour care provided by not more than two carers on a shift basis was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

M Savage

INSPECTOR