
Appeal Decision

Site visit made on 27 April 2021

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 24 May 2021

Appeal Ref: APP/P4605/C/20/3258717

3 Kinsey Grove, Birmingham B14 5AR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Mohammed Javid Rasul of Caterpillar Care Services Ltd against an enforcement notice issued by Birmingham City Council.
- The enforcement notice issued on 6 August 2020.
- The breach of planning control as alleged in the notice is: -
Without planning permission, the material change of use of the Premises from a single dwellinghouse (Use Class C3) to temporary accommodation (Sui Generis).
- The requirement of the notice is to permanently cease the use of the premises as temporary accommodation.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (g) of the Town and Country Planning Act 1990 as amended (the 1990 Act). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the 1990 Act.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with corrections.

Preliminary Matters and Background

1. Reference has been made to Policies DM11 and DM12 of the emerging Development Management in Birmingham (DMB) document in the evidence before me. The Council have confirmed that there are no unresolved objections to these policies and that the DMB was submitted to the Secretary of State in July 2020 for independent examination by the Planning Inspectorate. Examination hearings took place in November 2020 and the Inspector has issued Main Modifications to the DMB which were subject to public consultation from 24 March – 5 May 2021. The Council anticipate that it will be in a position to adopt the DMB before the end of 2021.
2. 3 Kinsey Road (No 3) is a mid-terrace, 3 storey dwelling within a mainly residential area. Between 2018 and July 2019 the appellant's company utilised the appeal property to provide living accommodation for young people aged between 16 and 18. In June 2019 a planning application¹ for a children's care home at the property was refused on 2 grounds. The current use of the property began in September 2019.

¹ Ref No: 2019/03209/PA

The Notice

3. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority.
4. In this case the description of the alleged breach relates to a material change of use to '*temporary accommodation*'. However, it is apparent from the evidence before me that the appeal site is in use as '*supported living accommodation*'. Both parties were given the chance to comment on whether the description of the alleged breach could be corrected and whether that correction would cause injustice to either main party. As such, I intend to delete the wording '*temporary*' and replace it with '*supported living*'.
5. The wording of the enforcement notice's requirement needs to reflect that of the description of the alleged breach. Therefore, I intend to delete the word '*temporary*' and replace it with '*supported living*' in the requirement.
6. There is no dispute that these corrections can be made without injustice to the parties.

The ground (c) appeal

7. This ground of appeal is that those matters, if they occurred, did not constitute a breach of planning control. In an appeal on this ground the appellants have to demonstrate on the balance of probability that the matters alleged, to have occurred, in the notice do not constitute a breach of planning control.
8. Section 55(1) of the 1990 Act defines development as meaning the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 55(2)(f) of the 1990 Act states that in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class is not to be treated as development for the purposes of the 1990 Act. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land.
9. The notice, as corrected, alleges that a material change of use (MCU) from a dwellinghouse, Class C3 of the Town and Country Planning (Use Classes) Order 1987 (UCO), to supported living accommodation has occurred. Under the UCO, Class C3 is defined as use by (a) a single person or by people to be regarded as forming a single household; (b) not more than six residents living together as a single household where care is provided for residents; or (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4).
10. The appellant considers that the existing use of the property falls within Class C3(b) or Class C3(c) and if not either of those that it falls within Class C4 of the UCO. It is the Council's position that the use of the appeal property does not fall within Class C3(b) or Class C3(c) as the residents do not form a single household for a number of reasons and that the responses on the planning contravention notice(PCN) state that the property is being used as a hostel.

11. There is no dispute that the lawful use of the appeal property is as a dwellinghouse falling within Class C3 of the UCO. Circular 13/87² confirmed that the single household concept, at C3(b), was intended to include small community care homes consisting of not more than 6 people (including resident staff) living together under arrangements for providing care and support within the community. While Circular 13/87 has been superseded, its intention in respect of small groups of people living together and receiving care remains relevant. Circular 03/2005³, now also cancelled, stated that this class not only includes families, or people living together under arrangements for provision of care, but also other groups of people, not necessarily related to each other, who chose to live on a communal basis as a single household.
12. Kettering⁴ confirms that there would be circumstances where people coming together not as a preformed group or for a predetermined period and only as a result of a "common need for accommodation, support and resettlement" would enjoy a relationship that enables them to be regarded as living in a single household. The placing of individuals, who are provided with support and care, to establish independent living could represent such a circumstance.
13. The evidence originally submitted by the appellant in relation to the number of tenants and their lengths of stay indicated that 7 people were occupying the property at one point. However, the appellant's agent has submitted an amended timeline as they have stated that the original one was incorrect. The Council have further stated that the Council's benefit records do not match the submitted amended timeline. The dates of the active housing benefit claims do not appear to accurately correlate with the amended timeline. However, there is no dispute that at the date the enforcement notice was issued that no more than 6 persons were occupying the property.
14. I saw at my site visit that the layout of the property is largely what is expected of a family home with communal lounge, kitchen/dining and garden areas. There is no dispute that bedrooms provide separate private sleeping space and that they have locks on the doors. However, there does not appear to be any significant subdivision of the house, and there is no indication of separate units of accommodation. The Council refers to the fact that residents are placed there as individuals through referrals by a number of different bodies, but I do not find this to mean that they cannot form a single household. There is CCTV at the property, but this is not unexpected in a home where support to residents and management of a property is required.
15. The appellant has explained that residents are encouraged to support each other and that household tenant meetings take place on a weekly basis. Support sessions for the residents can be provided on a one-one basis or as a household. The kitchen/dining area and lounge appear to be well used as communal areas. Even though, the residents do not have tenancy agreements the ongoing residents, indicated by the active housing benefit claims, in November 2020 had been at the property between 7 and 15 months. These factors point to a possibility that a sense of communal living could be formed.

² Circular 13/87 Changes of Use of Buildings and Other Land: The Town and Country Planning (Use Classes) Order 1987

³ Circular 03/2005 Changes of Use of Buildings and Other Land: The Town and Country Planning (Use Classes) Order 1987

⁴ *R (oao Hossack) v SSE & Kettering BC & English Churches Housing Group* [2002] EWCA Civ 886; [2002] JPL 1206

16. Nevertheless, the residents are also encouraged to live independently and are responsible for their own cooking, shopping and cleaning. It is not clear who is responsible for the cleaning/tidying of the communal areas. The gardens are not maintained by the residents. It is also not clear if the residents always feel the need to keep their bedroom doors locked or not. At the time of my visit most of the bedroom doors appeared to be locked.
17. Article 2 of the UCO sets out that 'care' 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 also includes the personal care of children and medical care and treatment. The appellant has stated that the residents have been made involuntarily homeless and may have had dependencies on alcohol or drugs and may have/had a mental disorder. Weekly support sessions provided to the residents offer advice and assistance with benefit claims, registering with medical services and they can teach life skills such as shopping, cooking and finance. Residents appear to be living at the appeal site primarily for rehabilitation purposes with few requirements for acute health services.
18. Nonetheless, based on the evidence before me in respect of the level of support provided to the residents, they are not receiving personal care which falls within the definition of care in the UCO. Furthermore, the appellant has stated that the level of support and care provided may be considered de minimis in comparison to the types of personal care highlighted by that definition. As such, the use of the property does not fall within Class C3(b).
19. Taking into account all of the above, the residents have the choice as to whether they wish to move into the property and even though they are encouraged to live communally they could live a relatively independent life within the property whilst sharing some communal facilities. The occupiers may have some common factors as to why they are living at the property and they have occupied the property together for some months. However, there is little specific evidence to indicate that at the date of the application that they were living as a single household. As such, on the balance of probability, it is more likely than not that the residents do not live together as a single household and the use of the property cannot be treated as falling within Class C3(c).
20. Under the UCO, the use of a building as a dwellinghouse by not more than six residents as a 'house in multiple occupation' (HMO) falls within Class C4. An HMO does not include a converted block of flats to which section 257 of the Housing Act 2004 (the 2004 Act) applies but otherwise has the same meaning as in section 254 of the 2004 Act. Section 254(5) of that Act states thata building or part of a building within subsection (1) is not a house in multiple occupation if it is listed in Schedule 14. Schedule 14 includes buildings controlled or managed by bodies registered as social landlords. As a housing association controls the appeal property the use of it cannot be treated as a HMO falling within Class C4 of the UCO.
21. I acknowledge that the original completed PCN states that the property is used as a 'hostel'. The appellant has stated that this was completed without the assistance of a professional advisor and that the term 'hostel' was used in a colloquial fashion. A hostel is also not defined in planning law and use as a

hostel was originally included in Class C1 of the UCO but in an amendment in 1994 it was explicitly excluded from any use class.

22. The cancelled Circular 03/2005 indicated that '*A hostel usually provides overnight or short term accommodation which may be supervised, where people (including sometimes the homeless) can usually stay free or cheaply. Hostels may provide board, although some may provide facilities for self-catering. The element of supervision should not be relied upon as a determining factor but as a factor to take into account in considering the use class of the premises ...*'.
23. The question of whether a property is a hostel or another use is a matter of judgement to be determined on a fact and degree basis. In the High Court judgement in the case of Panayi⁵, it was argued that the presence of a number of features combined to distinguish the use of the premises as that of a hostel. In this case, there are no dormitories within the property but there are shared facilities. The occupiers have been referred to the property by a number of bodies due to issues surrounding homelessness. As stated above, the occupiers are provided with some support, but they appear to live relatively independently. Supervision of the property is through visits from members of staff twice a day.
24. It is not entirely clear who or how the occupiers pay for the supported accommodation other than they are in receipt of housing benefit. The accommodation is not permanent or for a set period, but the licence agreement can be terminated at short notice and there is no set period of stay indicated within the licence agreement. Furthermore, the number of occupiers is restricted to six, they are able to register on the electoral roll and have private mail delivered to the property. Consequently, as a matter of fact and degree I do not consider that the use of the property can be treated as a hostel with regard to the UCO.
25. The use of the appeal site in the terms described in the evidence before me has elements in common with that of an HMO even though the use cannot be treated as falling within Class C4 of the UCO. A change of use of land or buildings requires planning permission if it constitutes a material change of use. There is no statutory definition of 'material change of use'; however, it is linked to the significance of a change and the resulting impact on the use of land and buildings. Whether a material change of use has taken place is a matter of fact and degree.
26. Even though, I have found that the use cannot be treated as a hostel the occupiers live within a form of accommodation that is described as specialist residential accommodation within emerging DMB Policy DM12. Paragraph 4.27 of the explanatory text to this policy states that '*Specialist residential accommodation is a generic description used to describe housing that meets the needs of specific groups of people. This can comprise of hostels, shared housing, care homes and supported accommodation for ... people with mental health, and drugs and alcohol dependency.*' The policy itself states, amongst other things, that specialist accommodation will be supported where it will not lead to an unacceptable adverse impact on the amenity of the area and the scale and intensity of the proposed use is appropriate to the size of the building.

⁵ *Panayi v SSE & Hackney LBC* [1985] 50 P&CR 109; [1985] JPL 783

27. Therefore, the use as supported accommodation can have implications in relation to planning policy. The use of the property as a Class C3 dwellinghouse could result in it being occupied by a similar number of persons as its current use. Nevertheless, as stated above, it is more likely than not that the occupiers are not living as a single household. Consequently, there is the potential for the six occupants to have independent lifestyles.
28. Those independent lifestyles could potentially lead to additional comings and goings which can significantly differ to a Class C3 dwellinghouse where many activities are combined as well as shared. There is therefore more likely to be a higher level of noise and disturbance arising as individuals come and go independently of one another for everyday activities. Moreover, there is likely to be an increase in noise arising from multiple audio or visual media operating at any one time in a confined space.
29. Furthermore, with separate persons occupying the property as individuals, there is a much greater potential for several visitors to come to the property at any one time and increased potential for use of the garden areas. This results in the potential for greater noise and disturbance through voices, opening and closing of doors and vehicles, including from more visits by delivery vehicles than may be the case for a single household. In addition, there are the additional daily visits to monitor the property.
30. I note that some of the incidents cited within the evidence before me relate to the previous use of the property as a children's care home. However, it is clear that the level of activity resulting from the current use has, on the balance of probability, resulted in more frequent comings and goings, differing patterns of behaviour and an increase in noise and disturbance experienced by the adjoining occupiers. These differences, while not necessarily negative, are significant.
31. As a result, as a matter of fact and degree a material change of use to supported living accommodation, a sui generis use, has occurred. That material change of use amounted to development requiring planning permission and it has not been authorised by the granting of planning permission. It follows that a breach of planning control has occurred. The appeal does not succeed on ground (c).

The ground (a) appeal and deemed planning application

Main Issues

32. The main issues are the effect of the development on the living conditions of adjoining occupiers with respect to noise, disturbance, incidents of crime and the fear of crime.

Reasons

33. Policy PG3 of the Birmingham Development Plan (BDP) states, amongst other things, that all new development will be expected to demonstrate high design quality and new development should create safe environments that design out crime. BDP Policy TP37 states, amongst other things, that the City Council is committed to improving quality of life by promoting safe residential environments and addressing the fear of crime.

34. As stated above, emerging DMB Policy DM12, states that specialist accommodation will be supported where it will not lead to an unacceptable adverse impact on the amenity of the area and the scale and intensity of the proposed use is appropriate to the size of the building.
35. The use as supported accommodation began in September 2019 therefore, the incidents of noise and reports of possible crimes reported prior to that time can be given little weight. I acknowledge that the surrounding area consists of a range of residential accommodation. In addition, the specific occupiers/visitors and their lifestyles would have an impact on the noise and disturbance generated at the appeal property. Furthermore, some families are capable of generating a good deal of activity and associated noise and disturbance. Nonetheless, I have found above that the level of activity resulting from the current use has, on the balance of probability, resulted in more frequent comings and goings, differing patterns of behaviour and an increase in noise and disturbance experienced by the adjoining occupiers.
36. No 3 is a mid-terrace dwelling, therefore the potential impacts of the material change of use, with respect to noise and disturbance, upon the occupiers of adjoining dwellings are intensified by the close proximity of them. As such, the property shares party walls with both adjoining dwellings and No 3's windows and doors are close to those adjoining properties. The appellant has stated that a soundproof wall has been installed to the party wall of the former garage and carpets have been laid in the hallway, stairs and bedrooms.
37. However, noise and disturbance can also be generated by general activities that take place outside of the property, such as those associated with the coming and goings of residents and their visitors. These include disturbance from car engines and audio noise, the emptying of bins, people conversing and the opening and closing of doors at varying times throughout the day and night. Furthermore, the increase in noise arising from multiple audio and visual media, cited above, would also lead to the emission of noise through open windows or doors during summer months.
38. The incidents log, from West Midlands Police, for September 2019 through to June 2020 indicate that the majority of those incidents were linked to noise and disturbance. Moreover, the restorative justice meeting facilitated by West Midlands Police also appears to have focused on noise and disturbance. Whilst details of each incident on the log is limited, I have no reason to believe such incidents have not occurred. It appears that the soundproofing measures were installed as a result of the restorative justice meeting. Yet, as stated above, the soundproofing would only assist with mitigating noise arising from inside No 3 when doors and windows are shut.
39. The third-party representations indicate that noise and disturbance was still occurring outside the building in the late evening period when they submitted their representations. The neighbours are entitled to a reasonable degree of peace and quiet in their homes, particularly in the late evening period when they can expect to be asleep or relaxing. Moreover, the overall evidence supports the view that the current use, with six residents, gives rise to a greater level of comings and goings than would occur were the property in use as a single dwellinghouse. As a result, the evidence leads me to believe that the levels of noise and disturbance experienced by neighbouring occupiers are

likely to be having an unacceptably adverse impact on the living conditions of neighbouring occupiers.

40. The appellant has stated that he has asked the occupiers of No 3 to limit late night movements and to discourage visitors after 22:00. Moreover, he has provided a copy of the licence agreement that the occupiers are asked to sign and comply with throughout their stay. I note that a management plan dated December 2020 has also been provided and that compliance with that plan could be imposed by a condition. However, whilst such measures could help temper the impact of the use to some extent, they are not sufficient to allay my concern in these respects. Furthermore, such measures would not overcome the increased levels of noise and disturbance that arise simply from the daily activities and comings and goings of the number of individual households living in this terraced property. Thus, I am not satisfied that suitably worded conditions would overcome the harm identified.
41. The number of recorded police incidents attributable to the appeal property is claimed by the Council to demonstrate an increase in crime levels that has raised the fear of crime in the local area. Nonetheless, there is no dispute that the existing use began in September 2019 and that the incidents logged prior to that date relate to the use as a children's care home.
42. The incident logs do confirm a number of incidents and anti-social behaviour were reported to the police between October 2019 and June 2020. There has also been a restorative justice meeting facilitated by the police. From the data provided most incidents appear to relate to noise and disturbance generated by the occupiers of the property and/or their visitors. A potential crime, fraud, appears to have been generated by residents of the appeal building. There are references to drug taking within the garden of the appeal property and drugs being sold in the vicinity of the appeal site.
43. Nevertheless, there is little evidence that any occupiers of the property have been prosecuted of a crime whilst residing at No 3. In addition, it appears that it is the activities and lifestyles of some residents and some visitors that generate the incidents that are responsible for generating any fear of crime, not necessarily the unauthorised use in itself. The activities generated by the residents or visitors appears to be difficult to predict and control. If implemented in an effective way the proposed management plan could make a positive contribution to addressing and mitigating the fear of crime.
44. However, I have found that the material change of use to supported living accommodation, more likely than not, is having an unacceptably adverse impact on the living conditions of the adjoining occupiers with regard to noise and disturbance. That harm cannot be mitigated by suitably worded conditions. As such, it does not comply with BDP Policy PG3 and emerging DMB Policy DM12. The conflict with BDP Policy PG3 has full weight. With regard to the emerging DMB Policy, in relation to paragraph 48 of the National Planning Policy Framework (the Framework), the conflict with that policy has considerable weight given the advanced stage of the document, the lack of unresolved objections to the policy and that it is consistent with the Framework.

Other Matters

45. Both parties have cited appeal decisions⁶ relating to other developments in support of their cases. However, other than the appeal decisions themselves no further details of the cases have been provided. From those decisions themselves it appears that there may be some similarities to the case before me in relation to the issues raised. However, I cannot be certain that the circumstances relating to these developments are the same as that before me. In any case, I am required to determine the appeal on its individual merits.
46. The references to other development plan policies have been noted. However, the development plan policies to which I have referred are considered the most relevant to this appeal.
47. I accept that if the material change of use had to cease that this would mean that the occupants would need to find/be found alternative accommodation. The Council's statutory duties with regard to homelessness have been reinforced by the Homelessness Reduction Act 2017, which places duties on Councils to intervene at earlier stages to prevent homelessness in their areas and by requiring Councils to provide homelessness services to all those affected, not just those who have 'priority need'. One of those services is the provision of assistance in securing that sufficient accommodation and support are available.
48. I accept that it appears that there is a shortage of this type of specialised residential accommodation within the City Council area. Moreover, emerging DMB Policy DM12 highlights the need for this type of accommodation but I have found that in this particular location it does not comply with that policy. Additionally, there is little specific evidence before me to indicate that the occupiers would be required to move into inadequate, temporary accommodation as suggested by the appellant. I have sympathy that the occupants of the property may find it distressing that they need to find alternative accommodation given their past circumstances. Nevertheless, the occupants would be aware that they would need to seek alternative accommodation at some stage to enable them to live independently. Whether the time period for compliance with the requirements of the notice are reasonable is dealt with under the ground (g) appeal.

Conclusion

49. The development is contrary to the development plan as a whole and material considerations do not indicate that the appeal should be determined other than in accordance with the development plan. For the reasons set out above, and taking into account all other matters raised, I conclude that the appeal on ground (a) should not succeed. I shall refuse to grant planning permission on the deemed application.

The ground (g) appeal

50. This ground is that the period for compliance falls short of what should reasonably be allowed. This involves consideration of what the recipient of the enforcement notice will have to do in practice to carry out the remedial steps and consequently how much time should be allowed for that purpose. A

⁶ Ref Nos: APP/C4235/A/11/2162636; APP/P4605/C/18/3213103; APP/P4605/C/18/3213104; APP/P4605/C/18/3213105

balance needs to be struck between the public interest in ensuring the notice is complied with expeditiously and the private interests of the appellant and the occupiers of the appeal property.

51. Save for the disruption that finding alternative accommodation would cause the residents, with which I have sympathy, I have not been presented with any substantive evidence to suggest that alternative accommodation could not be found within the 6-month compliance period of the notice. The 6-month compliance period would not place undue burdens on the Council as a result of the Homelessness Reduction Act 2017.
52. In the absence of evidence to the contrary, I cannot therefore be certain, on the basis of the information before me, that a period of at least 12 months is necessary to secure compliance with the notice, which requires only the use to cease, or that the period of six months specified in the notice is not proportionate to the breach of planning control that has occurred. I find the 6-month period specified for compliance in the notice to be reasonable. Accordingly, the appeal on ground (g) fails.

Formal Decision

53. It is directed that the enforcement notice is corrected by deleting the word '*temporary*' and replace it with '*supported living*' within the description of the alleged breach and the requirement of the enforcement notice. Subject to these corrections the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.

D. Boffin

INSPECTOR