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# Appeal Decision

**by S A Hanson BA (Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 21 October 2021**

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**Appeal Ref: APP/P4605/X/21/3275109**

**54 Stoney Lane, Yardley, Birmingham B25 8YP**

- 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 Richard Brooks (Rodor Housing and Support) against the decision of Birmingham City Council.
  - The application Ref 2020/04354/PA, dated 11 June 2020, was refused by notice dated 18 November 2020.
  - The application was made under section 191(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 for is described as "C2 Residential institutions".
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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. It has not been necessary to carry out a site visit as, in this particular case, where all the information needed is included with the application and appeal documents, a decision can be reached on the papers<sup>1</sup>.
3. Under S191(1)(a) of the 1990 Act, any person who wishes to establish whether any existing use of buildings or other land is lawful, they make an application for the purpose to the local planning authority specifying the land and describing the use.
4. Planning merits form no part of the assessment of an application for an LDC which must be considered in the light of the facts and the law. The decision will be based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case. The burden of proof lies with the appellant and the relevant test is 'the balance of probabilities'. However, the Courts have held the evidence of the appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and the evidence alone is sufficiently precise and unambiguous that is enough.

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<sup>1</sup> The Procedural Guide - Certificate of lawful use or development appeals – England, dated November 2020, states at paragraph A.9.4. "Where the appeal concerns a case, which will be decided purely on the basis of technical and/or legal interpretation of the facts, the Inspector may decide the case without a site visit." In addition, Footnote 12 within Appendix F states that a small number of appeals do not require a site visit and can be dealt with on the basis of the appeal documents.

## Main Issue

5. This is whether the Council's decision to refuse to issue an LDC was well-founded. In this case that turns on whether there has been a material change of use of the property from a use which falls within Class C3 of the Town and Country Planning (Use Classes) Order 1987 as amended (UCO), and if so, would that use be excluded from the definition of development by virtue of section 55(2)(f) of the 1990 Act.

## Reasons

6. The appeal property is a modest two bedroom, two-storey, mid-terraced dwelling located in a residential street within an area where there are also commercial properties. It is situated on a service road that runs parallel with the highway and there is on street parking on the road to the front. The property currently forms a unit where care is provided for one child on either a short term or long term basis. There is no dispute that the former lawful use was a single dwellinghouse.
7. Class C2 defines this use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses)); use as a hospital or nursing home; or use as a residential school, college or training centre. Care is defined in Article 2 of the UCO as meaning:  
*"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 class C2 also includes the personal care of children and medical care and treatment."*
8. There is no dispute between the parties that the use of the property as described by the appellant falls within Class C2. Notwithstanding this, the appellant argues that the change in use is not material because the property is used as a household providing a home for one child aged between 8-17 with social and emotional difficulties, who receives 24 hour personal care and support. The appellant's case centres on the C2 use being not materially different from its previous use as a dwellinghouse (Class C3) and reference has been made to the North Devon case<sup>2</sup>, which I acknowledge. To establish whether there is a material difference, a comparison between the lawful C3 use and the use of the property as a care home must be carefully considered. For a material change of use to have occurred the new activity must, as a matter of fact and degree, be significantly different from that which preceded it.
9. The Council considered that the evidence submitted, on the balance of probability, demonstrates that the characteristics of the care home are materially different to the characteristics of a single family dwellinghouse. This is because carers, with a rotational shift pattern, do not live at the premises as their place of residence and the changes/alteration to personnel dictated by commercial employment practices is not usual in a normal domestic context.
10. The information that accompanied the application says that "two staff will be on duty at all times, as well as a manager from Monday to Friday between the hours of 09:00-17:00". The Council's submissions at paragraph 5.11 inform me that the appellant states that care is provided by 2 x staff working (3 x staff during weekdays with a daytime manager). During the day the carers start

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

shifts at 0800 hours followed by one shift change at 1600 hours and one at 2300 hours when the evening carers take over until 0800 hours the next morning. Overall, this equates to carers alternating over 3 shift patterns, one of which being during unsociable hours, with 7 carers coming and going over the space of 24 hours.

11. The carers do not live permanently at the property, which has not been physically adapted or altered, but there is a bedroom/office set aside for respite. The appellant confirms that "members of staff live locally, and many will travel by public transport. A maximum of one vehicle will be at the property for a period of 8 hours per standard shift and up to 15 hours if a double shift". That may be the present position, but it seems unlikely that such arrangements would occur in perpetuity as carers may be sourced from a wider area and public transport may not be suitable especially for shift workers. I am informed that parents visiting the property do so on a planned basis but there are no further details of such occurrences. I also have no further details of staff handovers/staff meetings/visits from other professionals such as medical/health workers etc. to enable a clear understanding about the frequency and intensity of services that are involved in the provision of care for the child.
12. I am not provided with information to explain how the carers and child function and whether meals are taken together and what domestic duties the carers provide. I am also not privy to how many different carers work at the property and whether shift patterns mean that 2 carers work the shift together, both handing over to other members of staff at the same time or whether this is staggered. With the availability of one 'staff' bedroom, it would appear that whilst one carer could rest during the night, the other would be on duty all night, or perhaps a night-time rota exists for those hours.
13. Whatever the arrangements, and although it is likely that elements of a family life may exist, the type of occupation with at least one carer on duty all night, comings and goings more numerous than for a regular domestic property with some during unsociable hours 7 days a week, this demonstrates a pattern of life and use noticeably different to that of a property being used as a single dwellinghouse. The appeal property is, for all intents and purposes, a place of residence and of work, caring for a child who may be at the property on a short term or long term basis. This, I consider to be materially different in character and use to that of a single dwellinghouse.
14. I acknowledge the decision of Cannock Chase District Council to issue an LDC from residential (Use Class C3) to a care home for up to 4 children (Use Class C2). In that case it was explained that the care home would operate on the basis that up to 4 children would receive care 24 hours a day. The type and level of care provided includes personal care and support with activities such as schooling Monday-Friday and activities on a weekend described similarly to the appeal case before me. Care was to be provided by two "waking night staff" overnight and a total of 9 staff would be employed, with no more than 2-3 staff present at any one time during the day (0730-2330hrs) plus a manager, who will visit.
15. Although, I do not have the full details for the application and am not fully aware of the circumstances of that particular case, the use proposed was for up to 4 children with a staff presence on a similar level to the appeal case which is

for one child. Nevertheless, my findings are based on the evidence of the particular case before me.

16. In an appeal such as this, the onus of proof rests with the appellant, and the level of proof is on the balance of probability. Overall, I find that the totality of the appellant's evidence is not sufficiently precise and unambiguous to demonstrate that the use of the site as a care home for one child under the age of 18 years old, with 24-hour care provided by two/three carers on a shift basis is not materially different to that of a single dwellinghouse. I am not convinced that the use does not result in greater levels of activity, noise and disturbance than the lawful use of this two bedroom property. In my view, a material change of use has occurred which constitutes development under s55 of the 1990 Act. Section 57 of the 1990 specifies that, subject to certain exceptions not relevant here, planning permission is required for the carrying out of any development of the land, therefore the current use cannot be confirmed as lawful.
17. For the reasons given above, I conclude that the Council's refusal to issue an LDC in respect of change of use from Class C3 to Class C2 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.

*S A Hanson*

INSPECTOR