
Appeal Decision

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

an Inspector appointed by the Secretary of State

Decision date: 26 November 2021

Appeal Ref: APP/V4630/X/21/3279430
26 Banks Street, Willenhall WV13 1SP

- 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 Manjit Viridi (Hazelmont Social Care Limited) against the decision of Walsall Metropolitan Borough Council.
 - The application Ref 20/1539, dated 4 December 2020, was refused by notice dated 10 May 2021.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The use for which an LDC is sought is described as: The existing use of the site is as a small care home, which has been confirmed by the LPA to be lawful under use class C3(b). It is proposed to increase the number of children receiving care at the property from 3 to 4. The application seeks confirmation, via the issuing of an updated LDC, that the use would remain lawful under use class C3(b).
-

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 papers¹.
3. Section 192(2) of the 1990 Act indicates that if, on an application under that section, the Council is provided with information satisfying it 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. In any other case they shall refuse the application. The onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.
4. For the avoidance of doubt, the planning merits of the matters applied for do not fall to be considered. 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.

¹ 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 the proposed use would remain within Class C3(b)² of the Town and Country Planning (Use Classes) Order 1987 as amended (UCO), and would be excluded from the definition of development by virtue of section 55(2)(f) of the 1990 Act.

Reasons

6. There is no dispute between the parties that the current lawful use of the property is classed as C3(b). The Council's view is that the increased numbers in children and carers would extend beyond the limitations as defined by the use. Consequently, the appeal proposal would result in an increase in activity which would reflect the operation of a C2 care facility and thus be a material change of use. The appellant provides that the property would be run as a household, and that the experience of the occupiers would be akin to that of a household, rather than that of a care home.
7. Use 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. Established case law provided for by the *North Devon*³ judgement in respect of a house used to care for children is applicable to the circumstances of this appeal. This case considered whether a dwellinghouse used to provide residential care for two children fell within Class C2 or C3(b). Only the children would live permanently on the premises; the carers being resident elsewhere and providing care on a shift rota system. The circumstances considered in the case, to all intents and purposes, are similar to the appeal before me.
9. In the *North Devon* case, the property was being used as a home for two children and two non-resident staff were on duty at all times with a shift system operated by 6 to 7 carers to maintain the requisite cover. The application was based on the premise that the children by themselves would constitute a single household with the use falling within Class C3(b).
10. Crucially, the Judge found that the children could not be regarded as constituting a household by themselves. The question also arose as to whether carers who do not live on the premises but who, between them, provide 24 hour care can be regarded as living together as part of the household. The court held that the concept of living together as a household means that a proper functioning household must exist and thus, for the use to fall within Class C3(b), the children and carers must reside in the premises. Otherwise, the use falls within Class C2.

² Use as a dwellinghouse (whether or not as a sole or main residence) by: (b) not more than six residents living together as a single household where care is provided for residents.

³ *North Devon District Council v First Secretary of State* [2003] EWHC 157 (Admin).

11. From the evidence before me, it is clear that the proposed use of the appeal property would fall within Class C2. Nevertheless, it is my duty to consider whether planning permission would be required for the proposal. The question for this appeal is therefore, would an increase from 3 to 4 children being cared for, and an additional carer in the property between the hours of 07:30 and 22:30 seven days per week be material in planning terms?

Material change of use or not

12. To establish whether there is a material difference, a comparison between the existing lawful use and the use of the property as proposed must be considered. Although there is no statutory definition of 'material change of use'⁴, 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 would occur is a matter of fact and degree and this is determined on the merits of a case.
13. According to the building plans⁵, the detached property has four bedrooms and a bathroom on the first floor. On the ground floor, a kitchen/diner with a utility/w.c; 3 reception rooms; a shower room and an office. Internally the house would remain physically unchanged to accommodate an additional child.
14. An LDC⁶ granted in March 2020 confirmed the use of the property "for no more than 3 children and no more than 3 carers between the hours of 07:00 and 22:30 and no more than 2 carers between the hours of 22:30 and 07:30 Monday to Saturday. A manager between the hours 09:00 and 17:00 Monday to Friday. With a shift pattern comprising the two changeovers as detailed in the planning statement submitted and approved under 19/1338 on the basis that it is akin to a six person household. The occupancy of the premises on a regular basis does not exceed 6 people."
15. Currently, the carers operate with the 2 night-time staff taking their turn to sleep at the property. No carers or other members of staff reside at the property. The appeal proposes the addition of a fourth child to the property. The change in how the property would operate is as follows:

There would be an additional child at the property 24/7.

One additional carer would be at the premises providing one-to-one care for the child between the hours of 07:30 - 22:30.

The two 'existing' overnight carers would be present between the hours of 22:30 - 07:30, but these would be "waking shifts" and no carer would sleep during the shift.

16. From the evidence provided, the children are described as being usually unable to live with their natural parents or other guardians due to mental health issues or other conditions or having experienced emotional trauma. The care provider acts as "corporate parents for the residents, and in the way that conventional parents would, the staff who support and look after the residents of the home provide them with guidance and devoted attention, nurturing them and helping

⁴ 'Development' defined within s 55(1) of the 1990 Act as 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.

⁵ Drawing no: 125 dated 25/01/2019

⁶ 19/1338

them develop their skills in developing successful relationships and social interactions”.

17. The appellant provides that the care home operates in a similar manner to a domestic home with the children interacting with the care staff through a variety of activities. The children each have their own bedroom and are encouraged, wherever possible, to live independently and to undertake daily household tasks. They wash and dress themselves and have a role in the day-to-day life within the household, including cooking and other chores. They eat together and, outside of their bedrooms, they share the other facilities within the property, including the lounge and other sitting rooms, bathroom facilities, and the rear garden. The children attend school or college with transport provided by a member of the care staff.
18. From the information I understand that the children, due to their troubled backgrounds receive high levels of one-to-one care which means that the administration of the home is not typical of normal family life. Carers have a professional role, it is their job and accordingly, while they no doubt build up relationships with the children, they only have a quasi-parental role that is materially different from a usual family. The meeting of certain regulatory standards and the involvement of external agencies is also much more typical of the way that a care home is run rather than a conventional house.
19. Nevertheless, the lawful use of the property is to provide care for 3 children. The LDC appeal looks to increase the occupancy of the home to 4 children with the required additional carer. The shift patterns would remain the same, but the night-time care would change with the switch from sleep-in carers to wake-in overnight care. This, in my opinion, would alter the nature of the care being provided and to an extent, how the property would be used.
20. Although I am not aware of any detrimental impact to neighbours through noise or any other disturbance, an additional carer would mean that during the day 4 carers would start their shifts at 07:30 hours followed by one shift change at 22:30 hours when the 2 ‘existing’ evening carers would take over until 07:30 hours the next morning. Overall, this equates to carers alternating 2 shift patterns of 15 working hours and 9 working hours, with one of the change overs being during unsociable hours and 12 carers in total coming and going over the space of 24 hours, in addition to the general manager. The total number of people at the property would be 9 during the ‘day shift’ and 6 overnight.
21. While it is not factored into the pattern of comings and goings above, an additional child could lead to more visits by parents, social workers and clinicians, although this would depend on the needs of the child and is therefore difficult to quantify. While emotional or behavioural problems on the part of a resident child may call for additional planned, ad-hoc or emergency visits, this is also not quantified. Nevertheless, the increased level of activity brought about by the proposed use would, 7-days a week, generate additional pedestrian and vehicular ‘comings and goings’. A changeover of a total number of 6 carers at unsociable hours, generating at least an extra 14 vehicle movements per week, not taking account of potential visits by a social worker, clinician or parental visit or the additional school trips or household activities would likely be more intensive than that which is presently experienced.

22. Moreover, in the absence of further details regarding the range of activities that would be undertaken and the requirements for external professional support, the appellant's case lacks clarity to the extent that it makes it very difficult to properly evaluate the precise character of the proposed use. More importantly, and notwithstanding the views I have expressed above, this makes it difficult to determine with certainty whether, how, or to what extent, it would be different from the use of the property as currently exists. The appellant's evidence therefore falls short of demonstrating that, on the balance of probabilities, the proposed use would not constitute a material change of use, and consequently the burden of proof that rests with them has not been discharged.

Conclusion

23. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant an LDC to increase the number of children receiving care at the property from 3 to 4 was well-founded. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

S A Hanson

INSPECTOR