



Appeal Decision

Site visit made on 2 November 2021

by Felicity Thompson BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 December 2021

Appeal Ref: APP/P4415/X/21/3273416

6 Barbot Farm Mews, Car Hill, Barbot Hall, Rotherham S61 4NZ

- 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 Mrs Tamsin Silver against the decision of Rotherham Metropolitan Borough Council.
 - The application Ref RB2021/0419, dated 2 March 2021, was refused by notice dated 9 April 2021.
 - 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 C3 - Dwellinghouses.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of the proposed development in section five of the application form is *C3 – Dwellinghouses*. In the supporting evidence section the appellant stated that *Where a property's lawful planning use falls within Class C3(a) it can be brought into a use falling within Class C3(b) without the need for planning permission as long as such a change would not be in breach of any planning condition relating to the use of a property.*
3. There is no dispute that the lawful use of the property is as a class C3¹ dwellinghouse. However, it is evident from the appellant's subsequent submissions that what they seek to establish is that the proposed use, which they acknowledge would fall within class C2, is not materially different from the lawful class C3(a) use. I have therefore, in the interests of certainty, addressed whether the use would fall within class C3(b) and if not whether the proposed use would constitute a material change of use.
4. In section four on the application form the appellant confirmed that the proposal has been started and I note that the appellant indicated on the appeal form that the application was made under section 191 of the Act. However, the information contained at section five sets out how the proposed use will operate. The appellant was asked to confirm on what basis they wanted the appeal to be determined either under s191(a) or s192 of the Act. In response

¹ The Town and Country Planning Use Classes Order 1987 as amended (UCO)

they stated that they were *happy for the Inspector to consider the application under S191 or 192, whichever is most appropriate.*

5. In reviewing the submissions, it appears that the property is currently being used for the short-term accommodation of a single child during their period of assessment, with remarks in the Council's officer report suggesting this is a period of 28 days. Based on the evidence before me, it seems that whilst similar, this is not entirely consistent with the proposed use. Consequently, and since the appellant's submissions relate to how the proposed use would operate, I will determine the appeal in relation to the application as made, under section 192(1)(a).
6. The purpose of an application made under s192 is to find out whether proposed development would be lawful if instituted or begun at the time of the application, it is not the equivalent, in law, of a planning permission. The burden of proof rests with the appellant and the appropriate test of the evidence is the balance of probabilities.
7. The planning merits of the proposed development are not relevant to this appeal. My decision rests on the facts of the case and the interpretation of any relevant planning law. As such, whilst I have had regard to representations made by local residents, the merits or otherwise of the use as a children's home are not within my remit. Similarly, whilst I note the Council's pre-application advice this has no bearing on my own assessment.

Main Issue

8. The main issue is whether the proposed use falls under use class C3(b) and, if not, whether the proposed use would be a material change of use of the property.

Reasons

Whether the use falls within class C3(b)

9. The lawful use of 6 Barbot Farm Mews falls under class C3 of the UCO. It is a detached dwelling with five bedrooms and off-road parking to the front and side.
10. The appellant stated that the proposal is to register the property as a registered children's home for a maximum of two children aged up to 18 years. They would be looked after by two carers working on a rota basis, sleeping overnight (either three days on and three days off, or four days on and four days off), with a further one or occasionally two carers visiting during the day. A manager would be on site during weekdays from 9am to 5pm.
11. In order to form a *household* for the purposes of class C3(b), the persons who live together need not be related as family members. However, Article 2 of the UCO indicates that, for the purposes of the Order, *care* means personal care for people in need of such care, and in class C2 also includes the personal care of children. It was held in *North Devon DC v FSS & Southern Childcare Ltd* (QBD 30.1.03 Collins J) that Article 2 restricts the personal care of children to class C2 only. Children cannot form a household without the presence of a caregiver and a children's care home may not fall within class C3 unless a caregiver is a resident.

12. Whilst the two carers would sleep over during their shifts there is a difference between *residing* in a property and sleeping over as part of a duty of work. Since the property would not be the carers main residence, they would not form a household with the two children for whose care they are employed.
13. I therefore find that on the balance of probabilities the use of the property would not fall within class C3(b). It would provide residential accommodation and care for two children, with carers who work for the appellant's company and sleep over during their shifts but who would not use the property as their main residence, a use which would fall within class C2.

Whether the proposed use constitutes a material change of use

14. It is an established principle that to determine whether what is proposed would constitute a material change of use, it is necessary to compare the proposed use with the actual existing use, and not with some notional use that might be lawful. As such, whilst noting the appeal decisions referred to, the appropriate comparison is an analysis of the actual lawful use of the property as a dwellinghouse, at or when last occupied before the date of the application.
15. The appellant essentially seeks to demonstrate that the activity and movements associated with the proposed use would not be materially different from a typical residential household. They also pointed out that it would be possible to use this property as a class C4 HMO without an application for planning permission. However, other than reference on the appeal form to use as an Airbnb, they have provided little of substance in relation to the last actual use as a dwellinghouse.
16. The fact that the dwelling could be used by a family consisting of two parents and possibly one or two children all with cars, within class C3, would be relevant as a fallback position if planning permission was being sought for the C2 use. However, a LDC appeal is concerned solely with whether, on the facts, the change from the existing to the proposed use would be material; no account can be taken of the extent to which the existing use could alter without the need for permission.
17. 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 set out above, the Council's decision to refuse to grant a LDC was well-founded, and the appeal fails.

Felicity Thompson

INSPECTOR