



Appeal Decision

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

an Inspector appointed by the Secretary of State

Decision date: 9 March 2023

Appeal Ref: APP/C4615/X/22/3301567

4 Perrins Rise, Wollescote, Stourbridge, West Midlands DY9 8XP

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Ms Jules Tustin against the decision of Dudley Metropolitan Borough Council.
- The application ref P22/0195, dated 9 February 2022, was refused by notice dated 22 April 2022.
- 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 to C3(b).

Decision

1. The appeal is dismissed.

Preliminary Matters

2. It is common ground that the lawful use of the premises is a single dwellinghouse Class C3 use. The proposed use, as described in the LDC application form, is as a dwellinghouse by not more than six residents living together as a single household, with care provided by not more than one member of staff throughout the day and night. The appellant considers that as this would be a use that would fall within Class C3¹ of the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO) and, by virtue of the provisions of section 55(2)(f) of the Town and Country Planning Act 1990 (as amended) (the 1990 Act), the proposed use would not amount to development.
3. Notwithstanding the description of development in the application form, the appellant's submissions suggest that while they accept that the proposal would not constitute a household as referenced in the *North Devon*² judgement, and that the use could fall within C2, a change from Class C3 to C2 would not require planning permission. This is because they consider the change of use would not be material. I will therefore, in the interests of certainty, address whether the use would fall within Class C3(b) and, if not, whether the change to the proposed use would be material in planning terms.
4. 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 onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.

¹ Class C3 is defined as the use as a dwellinghouse (whether or not as a sole or main residence) 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.

² *North Devon District Council v First Secretary of State* [2003] EWHC 157 (Admin).

5. 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.
6. It has not been necessary to visit the site. This is because all the required information is included with the application and appeal documents, and a decision can be reached on the papers. Both parties were contacted regarding this matter and given the opportunity to comment on the appropriateness of the proposed approach. No comments were received.

Main Issue

7. This is whether the council's decision to refuse to issue an LDC was well-founded. This will turn on whether the proposed use as a home for up to three children up to the age of 18 where care is provided by staff, would come within the terms of Class C3 of the UCO and would thus be excluded from the definition of development by virtue of section 55(2)(f) of the 1990 Act, or, if not, whether the use proposed would be materially different to the existing C3 use.

Reasons

Whether the use falls within Class C3(b)

8. The Council consider that the proposal would go beyond a residential C3 use as a single household and would instead reflect the operation of a C2 care facility, and thus be a material change of use.
9. 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. Article 2 of the UCO provides a specific definition of care for the purposes of this class:

"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."
10. Established case law provided for by the *North Devon* 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.
11. In the *North Devon* case, 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). 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.

12. The proposal before me is for the premises to be a home for up to three children who require personal and professional care. Accommodation would be provided for children with complex needs such as learning disabilities, sensory issues such as sight or hearing needs, autism and some may have mobility needs. Care would be provided by a carer/manager who would live-in 24 hours a day for 7 days a week. Assistance would be provided by a further support worker/housekeeper who would arrive at 17:00, sleep overnight and leave the premises at 09:00. A further part-time support worker/cleaner would be present at the premises 4 days per week for a period of 3 or 4 hours on each of those days. There would be no more than five people sleeping at the premises overnight. Days off and leave would be covered by others in a similar manner.
13. The home would provide long term placements, and each child would have their own bedroom and bathroom on the first floor along with the support worker/housekeeper's bedroom. The live-in carer/manager would have an office, bedroom and bathroom on the ground floor. The remaining areas would be used communally.
14. Class C3 allows for the use as a dwellinghouse by not more than 6 residents living together as a single household where care is provided for residents. While it is proposed to have a constant presence of one carer/manager at the home, the premises is unlikely to provide permanent accommodation for that person. The employee would work on a form of rota, albeit with possible longer periods on duty than that provided by staff on a daily/night-time rota. On days off and when leave is taken, the carer/manager would require accommodation elsewhere as their private space at the premises would be occupied by a replacement carer/manager. Furthermore, the two additional support workers would be employed on a shift basis, with the care undertaken by different members of staff coming and going to the premises.
15. The circumstances before me propose a use based on complex care provided by the adults in the household who would be various staff working at the premises on a shift pattern with one live-in member of staff. I therefore find that on the balance of probabilities the use of the premises would not fall within Class C3(b). It would provide residential accommodation and professional support for three children in need of care, with carers who would work for the provider and use the premises in which to reside during working periods. The children and staff would not, as a matter of fact and degree, live as a single household and the use would therefore fall within Class C2.

Whether the proposed use constitutes a material change of use

16. The UCO should not be interpreted as meaning that some change between use classes is necessarily development within the meaning of Section 55(1)³ of the 1990 Act. The key issue is whether the change is 'material'. Although there is no statutory definition of 'material change of use', to establish whether there is a material difference is linked to the significance of a change between the existing primary use and the resulting impact of the proposed use on land and

³ "Development" means 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.

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.

17. The appeal premises is a two-storey link-detached dwellinghouse positioned at the end of a cul-de-sac with 5 neighbours. The site is surrounded by residential properties. There is off-road parking to the front for 5 vehicles. The existing plans show that the dwellinghouse has an integral garage and a living room, dining room/kitchen, wc and office on the ground floor and four bedrooms (one with ensuite) and a bathroom on the first floor.
18. Internal re-arrangements to accommodate the proposed change of use would provide a living room, dining room/lounge/kitchen and wc, with a separate area created from the converted garage and existing office to provide a smaller office, utility, wc, bathroom and bedroom on the ground floor. On the first floor there would be four bedrooms (two with ensembles) and a bathroom. Externally the house would remain physically unchanged. The appellant contends that there would be no material change of use as the children's home would operate in a way that is similar to a normal family home where householders would share communal facilities and live as a family. They consider that the character of the proposed use in terms of activity and comings and goings would not be materially different to that of a typical residential household.
19. Notwithstanding this, the starting point for analysis is to decide whether or not, as a matter of fact and degree, the character and nature of the proposed use would be materially different from the present or last use as a dwellinghouse. A dwellinghouse used by a family or other single household, especially where there may be children or an extended family, might well include an element of care of children or the elderly. A dwellinghouse may well be occupied by a very large family or just by a single person living as a single household.
20. Except for the plan drawings, no further information has been provided to describe the present or last use of the premises. Although it is common ground that the present or last use was as a dwellinghouse, how many people lived there does not appear nor do I have any details concerning how the premises was actually used. In the absence of such information, it is difficult to ascertain the actual level of activity at the appeal site for a comparison to be made with the proposed use.
21. Nevertheless, the appellant has provided information to suggest how the proposed use would operate. As described above, 3 children would live at the premises and 1 carer/manager would be at the premises 24/7. There would be an additional support worker/cleaner visiting the premises on 4 days, for between 3 – 4 hours at a time and a support worker/housekeeper from late afternoon, through the night and into the morning. I note the council's view that the staffing proposed is likely an underestimate given the complex needs of the children, but my determination is based on the evidence provided.
22. It is proffered that a social worker would visit the home once every 6 weeks. Professionals are said to visit no more than any other ordinary family who may require intervention from Social Services, District nurse or Community nurse. Although this would likely depend on the needs of the individual child and could be difficult to quantify, there is no indication as to what this could involve. Furthermore, 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.

23. There is no information concerning whether the children would be educated at home or in school and if home schooled, whether this would be provided by external professionals. While it is not factored into the pattern of comings and goings, each child who is being cared for may be visited by family members. Any resultant comings and goings, by additional staff and visitors, would be another factor that could affect the character of the proposed use.
24. While the level of activity, as proposed above by the appellant, may not be dissimilar to that of a residential dwellinghouse occupied by a single family consisting of two parents and 3 children, the premises could previously have been occupied by one elderly person such that there would likely be a significant difference in the level of activity at the appeal site.
25. Overall, the appellant's case lacks clarity, and this creates an element of uncertainty. This makes it difficult to properly evaluate the precise character of the proposed use and, more importantly, whether, how, or to what extent, it would be different from the current, or last use of the appeal premises as a single dwellinghouse. I consider that the appellant's evidence falls short of demonstrating that the use in question would not constitute a material change of use for the purposes of s55 of the 1990 Act. Accordingly, I am not satisfied that the burden of proof, which rests with the appellant, has been discharged in a precise and unambiguous manner.

Conclusion

26. For the reasons given above I conclude, on the evidence available, that the council's refusal to grant an LDC 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