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# Appeal Decision

Site visit made on 19 May 2023

**by Alexander Walker MPlan MRTPI**

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

**Decision date: 12 June 2023**

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**Appeal Ref: APP/P4605/C/22/3312408**

**160 Grange Road, Birmingham B10 9QY**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Mustafa Dahir on behalf of Easy Housing Association against an enforcement notice issued by Birmingham City Council.
- The notice was issued on 10 November 2022.
- The breach of planning control as alleged in the notice is (a) the unauthorised change of use to a 58 bed assisted living accommodation (Sui Generis) in the approximate position marked green on the attached plan; and (b) the unauthorised erection of a boundary fence in the approximate position marked in blue on the attached plan.
- The requirements of the notice are to:
  - i. Cease the unauthorised use of the Premises as assisted living accommodation (sui generis).
  - ii. Demolish the unauthorised boundary fence marked in blue on the attached plan.
  - iii. Remove all the demolished materials from the land associated with requirements ii.
- 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. 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 Act.

**Summary of Decision: The appeal succeeds in part and permission for that part is granted, but otherwise the appeal fails, and the enforcement notice is upheld as set out below in the Formal Decision below.**

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## The ground (c) appeal

1. The appeal on ground (c) is whether, on the balance of probabilities, the matters alleged in the enforcement notice (the Notice) do not constitute a breach of planning control. The burden of proof is upon the appellant.
2. There is no dispute that the lawful use of the appeal property is a nursing home, which falls under use Class C2 (Residential Institutions) of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO). The UCO defines Class C2 uses as '*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; Use as a residential school, college or training centre.*'
3. Article 2 of the UCO defines "care" as '*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.*'
4. The appellant contends that the current use of the building provides on-site care for its tenants, through the provision of support workers, by assisting

them in getting them off the streets and back into independent living and integration with the community. With elderly tenants, support is offered to help them with health care needs, including taking them to their GPs for appointments or collecting medication. Emotional support is also available for all tenants. Therefore, it is argued that it falls within use Class C2 and the change of use between the nursing home and the current use is not development, under s55 of the Town and Country Planning Act 1990 (the Act).

5. However, based on the evidence before me, the level of care provided to tenants is not personal care that falls within the definition of care defined in the UCO. Therefore, the current use of the property does not fall within use Class C2.
6. I have had regard to the Planning Use Classes and Extra Care Housing document, published by Housing Learning and Improvement Network, November 2011, as referred to me by the appellant. Notwithstanding the fact this document is now of some age, my conclusion on finding the use does not fall within Class C2 does not conflict with the document. Indeed, the document implies that each case should be assessed on its own circumstances.
7. I have also had regard to the appeal decision<sup>1</sup> referred to me by the appellant. Whilst the specific details pertaining to this case are not before me, the development was to provide for young adults between the ages of 16 to 21 '*assistance in taking care of themselves and specialist support and advice and complementary health services*', which appears to be significantly different to the subject appeal development. Therefore, I cannot draw any direct comparison between the appeal decision referred to me and the appeal before me that weighs in the appeal's favour. Moreover, there is no evidence before me that the question of whether the use in that appeal fell within Class C2 was raised by any parties in the previous appeal. In any event, each case is to be considered on its own merits.
8. The appellant states that the Council consider the use to be a large HMO (*sui generis*) use. However, the matters alleged in the Notice make no reference to HMO. It refers to the use as being a '58 bed assisted living accommodation (*sui generis*)'. Based on the evidence before me, I find no reason to conclude otherwise.
9. As I have found the use of the appeal building to not fall within use Class C2, it has resulted in a material change of use that requires planning permission. As it does not benefit from such permission, the matters alleged in the Notice constitute a breach of planning control. The ground (c) appeal therefore fails.

### **The ground (a) appeal and the deemed planning application**

#### **Main issues**

10. The main issues are as follows:

- Whether the development provides adequate living conditions for existing and future occupants, with particular regard to communal amenity space;

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<sup>1</sup> Appeal reference APP/E2001/W/19/3236395

- The effect of the development on the living conditions of the occupants of neighbouring residential properties, with particular regard to the fear of crime and anti-social behaviour, and noise and disturbance; and
- The effect on the character and appearance of the area.

## Reasons

### *Living conditions of existing and future occupants*

11. The appeal building comprises 58 small, single bedrooms split over two floors. On each floor there are two lounge/dining areas, three small kitchens and seven showers. The residents have full access to all of these communal facilities.
12. The Council calculates that the amount of communal lounge/dining space available for each tenant amounts to approximately 3.5sqm. The bedrooms themselves are also small, approximately 8-10sqm, and therefore provide limited space for tenants to relax and use for recreational purposes. The appellant does not dispute these figures. Furthermore, the kitchens are also small, with the Council stating 3 of them are below 6sqm. It is not clear how mealtimes are managed; however, it appears that residents prepare their own meals. The ratio of approximately one small kitchen per 10 tenants, would likely discourage tenants from preparing proper meals.
13. With regard to outdoor amenity space, the building is set within relatively large grounds with hard and soft landscaping. Moreover, there is an outdoor courtyard area accessible from one of the communal lounge/dining areas. Given the nature of the use, tenants would not be children and therefore would not require larger areas of open space to play on. There is sufficient space for tenants to walk around the site and enjoy quiet contemplation or sit out and relax. However, the adequate external amenity space does not outweigh the wholly inadequate internal communal space.
14. As a consequence of the very limited internal communal space available, the development represents an oppressively confined form of residential accommodation that would be detrimental to the well-being of its tenants.
15. I acknowledge that the building was previously used as a nursing home with up to the same number of occupants. However, the needs of those occupants would have likely differed significantly from the existing tenants. For instance, many would likely have spent more time in their rooms, possibly due to mobility issues, whilst others would likely have been less active in general and therefore not require much communal space time. Also, meals may well have been prepared for the occupants.
16. I find therefore that the development fails to provide adequate living conditions for existing and future tenants, with regard to internal communal space. As such, it conflicts with Policy PG3 of the Birmingham Development Plan 2031 (the BDP) and Policies DM2 and DM12 of the Development Management in Birmingham Development Plan Documents 2021 (the DPD), which amongst other things, seek to ensure development demonstrates high design quality; does not result in unacceptable adverse impacts on the amenity of occupiers; and, provides accommodation and facilities suitable for the intended occupiers. It would also conflict with the Birmingham Design Guide 2022 (the BDG), which seeks to ensure development does not have an unacceptable impact on the

amenity of new residential properties. Furthermore, it would fail to accord with the design objectives of the National Planning Policy Framework (Framework).

*Living conditions of neighbouring residents*

17. Concern has been raised by the Council, neighbouring residents and the MP that tenants from the site have been involved in numerous criminal activities and anti-social behaviour within and around the site, including drug/alcohol abuse and begging.
18. The appellant has provided a list of 18 incidents recorded by West Midlands Police that occurred on or near Grange Road between April 2021 and September 2022. They confirm these incidents had no link to the appeal site or its tenants. The Council dispute this, stating that West Midlands Police have confirmed to them that a total of 14 incidents were recorded between February 2021 and January 2023 that were in relation to the appeal site and its tenants. Whilst the exact details of these incidents have not been provided, the Council confirm they included assault, criminal damage and threatening behaviour. This raises some doubt over the veracity of the appellant's claim that the site has been without incident since 2018.
19. Notwithstanding this, these incidents appear to be as a result of the behaviour and actions of individuals and the management of the site, rather than as a result of the use itself. As the appellant points out, the tenants are not criminals or drug/alcohol addicts and they do not inherently have mental or physical health problems.
20. Nevertheless, the appellant describes them as 'vulnerable homeless people'. Whilst their vulnerability has not been elaborated on, it is reasonable to conclude that some of the 58 tenants would need more support than others. At present, support workers are only available to tenants 9:30-17:30 on weekdays. However, there may well be instances during the evenings and weekends when support is needed to assist a tenant. In such instances, support could assist in preventing tenants from potentially going on to cause anti-social behaviour if they are struggling with their mental well-being.
21. I acknowledge the concern local residents have and their genuine fear of crime as a result of the use, which will have a detrimental impact on their living conditions. However, it appears evident that the management of the site, including security measures, could be improved to alleviate the fear of crime experienced by local residents. Such measures could include increased support worker availability, CCTV, restricting visiting hours, and access control measures for people, including tenants, entering and exiting the site. This would prevent anyone, whether related to the use or not, from having freedom to move within and around the site without having the authority to do so. I am satisfied that such measures could be secured by appropriately worded conditions, if I were minded to allow the appeal.
22. With regard to noise and disturbance, the presence of 58 tenants within a single building such as the appeal site has the potential to generate a significant level of activity through comings and goings as a result of people congregating on the forecourt and conversing, playing music, running car engines etc. Within close proximity to the entrance to the site are residential properties, from which such noise and disturbance would likely be discernible, particularly during the evenings.

23. However, the site is in a built-up, urban area where such densities are commonplace, akin to an apartment block for example. The building has communal rooms and during my site visit I noted a private courtyard accessible from one of the communal rooms. Furthermore, the tenants lead their own individual lives. Therefore, it seems highly unlikely that all 58 tenants would congregate within the forecourt at the same time.
24. I acknowledge that tenants may well congregate in groups on nearby streets. However, I fail to see how this is inherently a problem. If they are causing anti-social behaviour or committing a crime then this is regulated by other agencies. I noted during my site visit CCTV is in place on Baker Street, which would likely deter potential wrong-doers.
25. I have also had regard to local residents' concerns regarding the noise created by the gate opening and closing, particularly during the night. However, this is something that could be controlled by way of an appropriately worded condition to secure measures to ensure that any such noise is reduced.
26. Overall, many of the issues that have arisen in terms of criminal activity and anti-social behaviour appear to be as a result of how the use is managed, rather than the use in general. As I am satisfied that such issues could be sufficiently overcome by way of appropriately worded conditions, subject to such conditions, the development would not have any significant harm on the living conditions of the occupants of neighbouring residential properties, with regard to the fear of crime and anti-social behaviour, and noise and disturbance. As such, it complies with Policy PG3 of the BDP, which seeks to ensure development demonstrates high design quality and creates safe environments that design out crime. It also complies with Policies DM2, DM6 and DM12 of the DPD, which seek to ensure development does not result in unacceptable adverse impacts on the amenity of occupiers and neighbours, including taking into consideration crime, fear of crime, anti-social behaviour and noise. Furthermore, it complies with the guidance set out in the BDG and the general design objectives of the Framework.

#### *Character and appearance*

27. The appeal site is located within a mixed-use area comprising residential properties, shops, commercial units and a number of community facilities, including education facilities, a library and a well-being centre. Grange Road is predominantly a residential road, particularly along the stretch of road from which access to the site is gained. There is a pedestrian gate and a vehicular access serving the site within proximity of each other, with a high metal fence on much of the boundary perimeter of the site.
28. There are a number of other properties within the vicinity of the site that have a boundary fence similar in design and colour to the subject appeal fence. In particular, there is a higher fence surrounding the boundary of the adjacent sports ground on the opposite side of the road to Baker Street as well as a similarly higher fence on Hawkes Street. Furthermore, there is high metal boundary fencing on numerous commercial and community properties along the nearby B4145 and Wright Street. Given the above, high boundary fencing is clearly an established feature within the character and appearance of the area.

29. The appeal fence is green in colour and its mesh design allows a high degree of visual permeability through it. Whilst there are long stretches of the fence, particularly on Grange Road, the backdrop of shrubs and trees within the site help break up its mass. Although the fence prevents physical interaction between the site and the surrounding uses, its visual permeability still enables clear views of the site within from the surrounding public realm. Overall, I find that the fence assimilates well into the setting of the site and the wider mixed-use area.
30. I find therefore that the fence does not harm the character and appearance of the area. As such, it complies with Policy PG3 of the BDP and Policy DM2 of the DPD, which seek to ensure development responds to site conditions and local context and is appropriate to its location. It would also accord with the guidance set out in the BDG and the design objectives of the Framework.

#### *Other matters*

31. The appellant argues there is a significant need for the assisted living accommodation, evident through it being occupied to its full capacity for the last four years. I have had regard to the Framework's objective of boosting the supply of homes. However, I am also mindful that the lawful use of the site is also a residential use. There is no substantive evidence before me that there is no longer a need for nursing homes in the area or that the need for assisted living accommodation, such as the appeal use, is greater. Therefore, I attribute only limited weight to this matter in favour of the appeal.

#### *Conclusion on the ground (a) appeal*

32. I have found that the development does not have any unacceptable harm on the living conditions of the occupants of neighbouring residential residents, subject to improvements to the management of the use, which could be secured by appropriately worded conditions, were I minded to allow the appeal. Furthermore, the development does not have any unacceptable harmful effect on the character and appearance of the area. However, these are neutral matters and do not outweigh the harm I have found with regard to the inadequate living conditions provided for the tenants of the use.
33. Furthermore, this harm is not outweighed by the limited weight I attach to the need for assisted living accommodation in the area.
34. Notwithstanding the above, I find that the boundary fence does not harm the character and appearance of the area. Given that the fence is clearly severable from the use of the building, I shall make a split decision.
35. For the reasons given above, having considered the development plan as a whole and all material considerations, I conclude the ground (a) appeal should succeed in part and planning permission will be granted for the erection of the boundary fence, but refused for the change of use to a 58 bed assisted living accommodation (*sui generis*). Clearly, the fence amounts to operational development physically separate and severable from the material change of use. On the facts and circumstances of the case, a split decision causes no injustice or prejudice to any party.

*Split decision: the effect of section 180 of the Act*

36. S180 of the Act states that where, after the service of a notice, planning permission is granted for any development carried out before the grant of that permission the notice shall cease to have effect so far as it is inconsistent with that permission. In this case, the appeal on ground (a) will be allowed in part without conditions. If the requirements of the notice were varied to exclude that part of the development for which planning permission is being granted, then this could give rise to two inconsistent permissions, one being granted under s173(11) as a variation of cutting down the requirements. To avoid this possibility, I take the view that the requirements should not be varied. Reliance will be placed on operation of s180 to mitigate the effect of the notice in so far as it is inconsistent with the permission.

**The ground (g) appeal**

37. This ground of appeal is that the period for compliance is unreasonably short.

38. The time for compliance with the requirements of the notice is 6 months. The appellant requests a period of 12 months. Given the significant number of people who currently reside at the property, I acknowledge that it would be difficult and time consuming to find alternative accommodation for the 58 tenants, particularly given the level of support some of them may need.

39. However, a condition of the occupation of the accommodation is that tenants will remain there for up to 12 months until they are ready to live independently. Therefore, it is reasonable to conclude that many of the existing tenants would naturally leave the accommodation within 6 months. Therefore, not all 58 tenants would need to be found alternative accommodation. Whilst many would still require assisted living accommodation, possibly for up to a further 6 months, there is no evidence before me why this could not be found within 6 months.

40. From the available evidence I consider the 6 month period of compliance specified in the notice is not unreasonably short, and I do not find justification for extending it. I am also mindful that the Council have the power to vary the period of compliance under section 173A (1)(b) of the Town and Country Planning Act 1990 should they see fit to do so, although this is not to be prejudiced by my decision.

41. I therefore conclude that the ground (g) appeal must fail.

**Overall conclusions**

42. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed in part only, and I will grant planning permission for one part of the matter the subject of the enforcement notice, but otherwise I will uphold the notice and refuse to grant planning permission on the other part. The requirements of the upheld notice will cease to have effect so far as inconsistent with the permission which I will grant by virtue of s180 of the Act.

**Formal Decision**

43. The appeal is allowed insofar as it relates to the erection of a boundary fence at 160 Grange Road, Birmingham B10 9QY and planning permission is granted on

the application deemed to have been made under section 177(5) of the 1990 Act as amended for the boundary fence.

44. The appeal is dismissed and the enforcement notice is upheld insofar as it relates to the change of use to a 58 bed assisted living accommodation (Sui Generis) at 160 Grange Road, Birmingham B10 9QY, and planning permission is refused in respect of the change of use to a 58 bed assisted living accommodation (Sui Generis), on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*Alexander Walker*

INSPECTOR