The Planning Inspectorate

# Appeal Decision

**by Felicity Thompson BA(Hons) MCD MRTPI**

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

**Decision date: 08 December 2023**

**Appeal Ref: APP/G5180/X/22/3310914**
**1 Cattistock Road, Mottingham, Bromley, London SE9 4AW**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
- The appeal is made by Ms Samantha Waite of OwnLife Residential against the Council of the London Borough of Bromley.
- The application ref 22/01367/PLUD is dated 29 March 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 described as a change of use from a C3(a) residential dwelling to a C3(b) Ofsted Registered Children's Home.

## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. The description in the banner heading above is not the same as that given on the original application form. Under s.192 there is no implied power to modify the description of the proposed development. However, the modified description was agreed by the appellant and since this is the same as that given on the appellant's appeal from, I have determined the appeal on this basis.

3. The appellant's surname in the banner heading above is taken from the appeal form, noting that it is different to that given on the original application form, since this changed between the submission of the application and appeal.

4. The appeal is a result of the Council not giving notice of its decision within the statutory determination period. The Council have submitted a statement including a reason why they would have refused to grant a certificate of lawful use for the proposed development, which I have had regard to.

5. The application sought is a certificate of lawfulness for a proposed development. The purpose of an application made under s.192 of the Act is to find out whether proposed development, as described in the application form and shown on the drawings, 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.

6. 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. Similarly, whilst I note the appellant's misgivings about the Council's handling of the case, these have no bearing on my assessment.

7. In reviewing the file, it appeared that the appeal could be determined without a site visit – without causing prejudice to any party. This is because the parties have submitted sufficient evidence to understand the nature of the site and the proposed development given the points in dispute.

## Main Issue

8. The main issue is whether the proposed use falls within use class C3(b) of The Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO) and, if not, whether the proposed use would be a material change of use.

## Reasons

*Whether the proposed use falls within class C3(b)*

9. There is no dispute that the lawful use of the property is as a dwellinghouse falling within class C3(a) of the UCO.

10. OwnLife Residential are a provider of Ofsted registered children's homes. The appellant stated that the proposal is to change the use of the property to an Ofsted registered children's home, and that there would be no more than two young people (aged between 12 and 17) residing in the home at any time. In terms of staff, there would be a minimum of three qualified adults during the day and a minimum of two overnight.

11. The Council stated that the appellant also confirmed by emails dated 1 and 8 July 2022, that the company use 'night wake' staff as opposed to 'sleeping-in' staff and that the shift pattern usually allows for two 'night wake' staff. It was also confirmed that staff would not be full-time residents.

12. 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, it was held in *North Devon DC v FSS & Southern Childcare Ltd* [2003] JPL 1191 that the definition of 'care' in Article 2 of the UCO restricts the personal care of children to class C2 only. Children cannot form a household without the presence of a caregiver and so a children's care home cannot fall within class C3 unless a caregiver is resident.

13. In this case whilst carers would provide 24-hour care on a rota basis, none would reside at the property. Accordingly, 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.

14. 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 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*

15. Notwithstanding that the LDC application was made to establish whether the use falls within use class C3(b), it would be insufficient for me to dismiss the appeal based on my finding on that proposition. This is because it was also held in the North Devon case that even though the use may have fallen in class C2 rather than C3, planning permission may not have been required if the change of use was not material.

16. 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. 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.

17. There is reference on the appeal form to the current use of the property being to house young people aged over 17 as an outreach service, however, it appears this may have been an error. In any event, other than this statement, the appellant has provided no evidence about this, or the last actual use, as a dwellinghouse.

18. I therefore do not have adequate evidence to demonstrate whether the proposed use would or would not be a material change of use.

19. In this LDC appeal, as stated above, the onus of proof rests with the appellant to demonstrate, on the balance of probabilities that the proposed use does not amount to a material change of use. That burden has not been discharged in a precise and unambiguous manner.

**Conclusion**

20. For the reasons given above, I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of *a change of use from a C3(a) residential dwelling to a C3(b) Ofsted Registered Children's Home* 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.

*Felicity Thompson*

INSPECTOR