



Appeal Decision

Site visit made on 2 May 2024

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 June 2024

Appeal Ref: APP/G2245/X/23/3319440

Elizabeth, Ash Road, Hartley, Kent DA3 8HA

- 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 Diana Chipendo (DMC Consulting Services Ltd) against the decision of Sevenoaks District Council.
 - The application ref 22/03375/LDCPR, dated 5 December 2022, was refused by notice dated 28 March 2023.
 - 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 a certificate of lawful use or development is sought is described as *'The proposed use of this property is to be registered as a Children's Home with Ofsted for occupation of up to 2 Children of 24hr care by staff members on a shift pattern which falls within Use Class C2 of the same Order'*.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. An application under s192(1)(a) of the 1990 Act seeks to establish whether the proposed use would be lawful if instigated or begun at the time of the application. The onus lies with the appellant to make her case on the balance of probabilities.
3. Under s191(2) of the 1990 Act, uses are lawful at any time if no enforcement action may then be taken in respect of them, whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason.
4. Although the appeal form correctly cites the refused planning application reference, it incorrectly refers to the application type as the removal or variation of conditions. The form also indicates that the description in the application form is still correct. That refers to an intention to register the property with Ofsted as a children's home and that it is not required to amend or alter the building, as it is considered fit for purpose as is.
5. In correspondence with the Council the appellant confirms that she was happy with the change of wording to children's home. I do not have the details of the precise wording sent by the Council, which initiated that response, but the description given in the decision notice is *'change of use from supported living and home care to a children's home for care leavers'*.
6. In the appellant's appeal submission she states that *'The proposed use of this property is to be registered as a Children's Home with Ofsted for occupation of*

up to 2 Children of 24hr care by staff members on a shift pattern which falls within Use Class C2 of the same Order' [The Town and Country Planning (Use Classes) Order 1987 (as amended) – UCO]. Given that it is for the appellant to describe the proposed use with sufficient clarity, I have used the same description in the banner heading above. It is further indicated that the proposal is temporary in nature.

7. In her appeal submission, the appellant also states that confirmation is required that the property would be lawful and falls within Use Class C3 (dwellinghouses). Having regard to the clear contradiction with the foregoing, I have assumed that to be a typo and reference was intended to be made to Class C2.
8. I've noted the appellant's understanding that there is a shortage of regulated children's homes for care leavers in the area and her hope to provide this service need whilst being safely regulated by Ofsted. However, planning merits can form no part of an assessment of an application for a LDC, which must be considered in the light of the facts and the law.

Main Issue

9. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded.

Reasons

10. The appeal relates to an extended dormer bungalow building. The application form states that the proposal does not consist of, or include, a change of use of the land and buildings and that the existing and proposed use fall under Class C2 (residential institutions) of the UCO.
11. Use Class C2 (residential institutions) is use for the provision of residential accommodation and care to people in need of care (other than a use within Class C3), as well as use as a hospital or nursing home and use as a residential school, college or training centre.
12. Article 2 of the UCO states that 'care' means '*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*'.
13. The proposed use of the property as a registered children's home for up to two children aged between 10-17, with 24-hour care by staff members on a shift pattern, would, as a matter of fact and degree, and on the balance of probabilities, fall within Class C2.
14. S55(2)(f) of the 1990 Act excludes from the definition of development (and hence from planning control) any change of use where both the existing and proposed uses fall within the same use class. Therefore, the use of a property which is lawfully used for Class C2 purposes for another use falling within Class C2 would not amount to development requiring planning permission.
15. However, the Council raise issue with the existing lawful use of the building. It states that it may well fall within the definition of Class C2 but a review of the planning history shows there to be no planning record for a change of use of the property from dwellinghouse to a residential home with care provision.

16. Whilst the appeal relates to the proposed use of the building, it is necessary in the circumstances of this case to understand the existing use to determine whether the proposed use would be exempted from being development by virtue of s55(2)(f) of the 1990 Act.
17. In the Council's application report, it states that planning permission was granted in 2010 for a change of use of the building from office to residential (Class C3). I have not been provided with a copy of that permission and I'm concerned that the Council incorrectly describe the site as being on the northern side of College Road when it is located on the western side of Ash Road.
18. Moreover, there is no mention of a 2010 planning permission in the relevant planning history section of the Council's report and there is no further reference to it in the subsequent assessment.
19. The three permissions that are listed relate to the '*rebuilding of existing side extension and new garage*¹, the '*conversion of loft, installation of dormer window and roof lights*², and '*extension of kitchen and erection of garage*³. I have been provided with those decisions which date from 2001, 1987 and 1956 respectively. Taken on face value, those appear to be householder type developments. Indeed, the conditions imposed on the most recent permission from 2001 evidently relate to a dwelling.
20. That, therefore, broadly corresponds with the Council's submission that based upon the information available, it appears that up until at least 2000 the property was a Class C3 dwellinghouse. Although the appellant asserts that the existing use is Class C2, no evidence is provided in that regard.
21. It is therefore unclear when the dwelling began to be used for Class C2 purposes and whether enforcement action may be taken against it.
22. In correspondence with the Council, the appellant confirms that there would be no change to the layout, presumably of the building. The floor plans for the same show it to have six bedrooms, a lounge, kitchen, family area and study. Although that does not necessarily mean that it was not being used for Class C2 purposes, there is nothing in the layout which indicates anything other than a conventional Class C3 use as a dwellinghouse. That is similarly so with the photographs provided.
23. Whilst there are no permitted development rights to change a Class C3 use to a Class C2 use, it does not necessarily follow that a change from one to the other amounts to development requiring planning permission. The key issue is whether the change is material. For a material change of use to have occurred, there must be some significant difference in the character of the activities from what has gone on previously, as a matter of fact and degree. So, a LDC could be granted for a Class C2 use on the basis that it would not be materially different to a Class C3 use.
24. However, I am unable to make such a comparative judgement as there is ambiguity over the existing use and limited information on the proposed use.

¹ Ref: 00/02808/FUL

² Ref: 87/00877/HIST

³ Ref: TH/5/56/326

25. I note the appellant seeks to highlight that she provided all of the information requested by the Council, despite the reason for refusal stating that no other evidence was submitted other than the plans. She also says that no other evidence was requested and that all queries were answered promptly with no correspondence or acknowledgement back. Nevertheless, it is the applicant who is responsible for providing sufficient information to support the application.
26. Whilst the additional information provided with the appeal is sufficient, on the balance of probabilities, to demonstrate that the proposed use would fall within Class C2, the evidence before me is not sufficiently precise and unambiguous to demonstrate that the existing lawful use of the property is also for Class C2 purposes. It follows, that it has not been demonstrated, on the balance of probabilities, that the proposed use is exempted from being development by virtue of s55(2)(f) of the 1990 Act.

Conclusion

27. For the reasons given above, I conclude that the Council's refusal to grant a LDC 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.

Richard S Jones

INSPECTOR