

Appeal Decision

Site visit made on 26 March 2024

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

an Inspector appointed by the Secretary

Decision date: 24 May 2024

Appeal Ref: APP/Z5630/X/23/3318074

Red Thorns, 98 Westbury Road, Kingston Upon Thames, New Malden, KT3 5AN

- 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 Charisma Hyman (St. Christophers Fellowship) against Royal Borough of Kingston Upon Thames.
 - The application reference 22/01947/CPU is dated 10 June 2022.
 - 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 'change of use from C3 dwelling to C2 but a C2 use that is not materially different to a C3(b) for use of premises as a home for up to six children or young people with up to 1 full-time carer sleeping overnight'.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed use which is found to be lawful.

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. The Council raise issue that part of the application should be considered in relation to s191(1)(a) of the 1990 Act, which seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. However, the application did not specifically seek to confirm the existing use of the annexe under S191; that is an issue which appears to have been raised by the Council. Nevertheless, in some cases it will be necessary to investigate the lawfulness of the existing use before deciding whether what is proposed is lawful. In any event, I am able to determine an appeal under s191 in part or in whole, even if the application was made under s192.
4. The use for which the LDC is sought is described in the application form as the '*change of use from C3 dwelling to C2 but a C2 use that is not materially different to a C3(b) for use of premises as a home for up to six children or young people with up to 1 full-time carer sleeping overnight*'.
5. The supporting grounds for making the application clarifies that the LDC is sought to confirm that the proposed use is lawful either because:

- it falls within Class C3(b); or
 - it falls within Class C2, but the C2 use is not materially different to a Class C3 use and is therefore lawful without further planning permission.
6. The supporting grounds further state that the LDC is sought for the use of the property as a home for up to six young people in which the following limitations would form part of the use certified as lawful:
- i. The young persons living there shall only be between 16-18 years of age;
 - ii. All staff or visitors arriving by car will be required to park on site at the property (and not on the street) unless, exceptionally, the driveway on the property is full and on street parking is required to meet individual needs;
 - iii. there are no more than:
 - (a) two staff on duty between 08:00-11:00 and 17:00 – 22:00, unless exceptionally a further member of staff is required to meet individual needs
 - (b) three staff on duty between 11:00 - 17:00, unless exceptionally a further member of staff is required to meet individual needs
 - (c) two staff on duty at weekends in the daytime period 08:00 – 22:00, unless exceptionally a further member of staff is required to meet individual needs and
 - (d) one waking staff on duty in the night time period (22:00 – 08:00) unless exceptionally a further member of staff is required to meet individual needs;
 - iv. no activity in relation to staff vehicle movements takes place before 08:00 or after 22.00;
 - v. no young person's personal advisor, social worker or medical professionals shall regularly visit the young person at the property;
 - vi. no young person's family will visit when another young person's family is visiting;
 - vii. the annex shall not be used at any time that the proposed use is occurring save for storage;
 - viii. the management plan provided shall be implemented and complied with.
7. The description of the proposed use given in the appeal form is '*Use of Property as semi-independent accommodation for up to 6 young persons to be subject to proposed limitations in appeal statement para 4.12*'. Those limitations are the same as those listed above.
8. The appellant's grounds of appeal also add further options in that the use could fall within Class C3(c) or within Class C4 (but the C4 use is not materially different to a C3 use and is therefore lawful without further planning permission and/or that change is permitted development).

9. As an LDC cannot be subject to conditions, it cannot require, for example, the implementation and adherence to a management plan, as set out in the proposed limitations above. Nevertheless, the Planning Practice Guidance advises that precision in the terms of any certificate is vital, so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it¹. Although there is precision in much of the above, there is some variation in terms of how the proposal is worded.
10. There is no equivalent power to that set out under s191(4) of the 1990 Act for me to modify the terms of the LDC sought; it is for the appellant to propose the use and that in practice may be modified by the appellant or where they agree. I therefore sought, without prejudice, the views of the parties on a description which encapsulates the various aspects of that set out above, and including another aspect relating to an assessment of the young persons, in the terms described by the appellant in the grounds for making the application.
11. In formulating that description, I have been mindful that s192(3)(b) provides that where the use in question is within a class specified in an order under s55(2)(f) – meaning the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO) – the LDC should describe the use by reference to that class. However, the use should not be described solely or entirely on that basis.
12. In response, the Council set out its concerns over my approach, stating that it is not for me to advise the appellant and to rebadge the proposal to fit a particular narrative. The Council say I should deal plainly with the facts of the case and make a decision based on the case presented to them at the time of the submission of the appeal [I presume that should be at the time of the application] on which the Council based its decision [the Council did not make a decision] and on how the applicant presented their case. The Council's view is that I am attempting to reengineer the proposal in the favour of the appellant and thus does not accept any changes to the description of development.
13. However, those assertions are factually incorrect. The application was plainly made in the terms set out above. Whilst the Class C3(c) and Class C4 options were added at appeal stage, those were not included within the description which I sent to the parties, which merely sought to consolidate the various parts to the application as made, as per the application form and the supporting grounds for making the application. The description is not different to how the application was made and has not been amended to suit the end needs of the appellant, thereby bypassing the proper process of the planning system where a new application should be made, as suggested by the Council.
14. In any event, notwithstanding that the appellant has agreed to the consolidated description, my reasoning has led me to utilise the description given in the application form, with some grammatical changes and the inclusion of the additional limitations set out in the grounds for making the application.

Main Issues

15. The appeal follows the failure of the Council to give notice within the prescribed period of a decision on the LDC application. The Council has subsequently clarified that had it issued a decision, it would have been refused for the following reasons:

¹ Paragraph: 010 Reference ID: 17c-010-20140306

- (i) Insufficient information has been submitted to demonstrate that, on the balance of probability, No. 98A Westbury Road is ancillary to the residential use of the main dwellinghouse and that Nos. 98 and 98A Westbury Road are a single planning unit, contrary to Section 191 and 192 of The Town and Country Planning Act (1990), as amended.
 - (ii) Insufficient information has been submitted to demonstrate that, on the balance of probability, the proposed change of use would not amount to a material change of use that would not amount to development which would require planning permission, contrary to Section 55(2)(d) & (f) of The Town and Country Planning Act (1990), as amended.
16. The main issue is whether that position is well-founded. Having regard to the evidence, that turns on:
- whether No 98 and 98A Westbury Road form single or separate planning units;
 - whether the proposed use would fall within Class C3(b) or C3(c) of the UCO;
 - if not, whether the use falls within Class C2 of the UCO and, if so, whether that use would be materially different to a Class C3 use; or
 - whether the use falls within Class C4 of the UCO.

Reasons

17. The appeal site includes No 98 Westbury Road, which is a very large two storey detached house with additional accommodation in the roof. It has seven bedrooms, three bathrooms, three reception rooms, an attached garage, a large rear garden and curved double access drive to the front. It is undisputed that the existing lawful use of No 98 is as a Class C3 dwellinghouse.
18. The appeal site also includes an adjoining annexe at No 98A Westbury Road, which has three bedrooms, a kitchen, two bathrooms (one being ensuite) and a reception room, as well as its own access to a front drive/parking area, separated from No 98 by a brick wall.
19. There is no internal connection between the main house and the annexe so to get from one to the other would require going out onto the public footway and then entering the other driveway, as per a conventional neighbouring property arrangement. The Council also highlights that the two parts have separate addresses (No 98 and No 98A) and are separately registered for Council Tax purposes.
20. Clearly therefore, No 98A has the facilities for day-to-day private domestic existence and is capable of being used as a separate, self-contained dwelling, and forming a separate planning unit from No 98. Indeed, the foregoing points towards that arrangement.
21. However, planning permission was granted in 2004 for the change of use from doctors surgery to granny annex with use of the loft for habitable purposes². The appellant highlights that condition 5 of the same states that the accommodation *'shall be occupied solely for the purposes of a 'granny annex' in association with 98 Westbury Road and shall not be used as an independent*

² Ref: 04/14352/FUL

- unit of accommodation'*. The permission therefore specifically requires Nos 98 and 98A to be used as a single planning unit.
22. The estate agents sales particulars also refer to the property as having a self-contained studio/annexe and the floor plans for the same show it arranged as such rather than as a doctors surgery. The sellers' Property Information Form, completed prior to the appellant's purchase, also confirms that the annexe was initially used as a GP surgery and then later as habitable room accommodation. The sellers say it was being used for storage and occasional family stays.
23. It is therefore likely that the planning permission for the change of use was implemented. Against that, I have no evidence which suggests that No 98A was used other than in accordance that planning permission, including Condition 5, such that a material change of use has taken place arising from the sub-division of the main dwelling and annexe.
24. Therefore, on the balance of probabilities, the annexe (No 98A) forms part and parcel of the main house (No 98) and the two parts form part of a single planning unit. Accordingly, the annexe at No 98A can be used for purposes incidental to the use of the main dwelling at No 98, including incidental storage, as proposed.
25. For the purposes of the UCO, Class C3 dwellinghouses are formed by three parts. Class C3(a) is use by a single person or by people to be regarded as forming a single household. The term 'single household' is to be construed in accordance with s258 of Housing Act 2004 as including persons who are all members of the same family or persons whose circumstances are described in regulations.
26. Class C3(b) is use as a dwellinghouse by not more than six residents living together as a single household where care is provided for residents. Class C3(c) is not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4).
27. 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.
28. Class C4 is the use of a dwellinghouse by not more than six residents as a house in multiple occupation (HMO). For the purposes of Class C4, a HMO has the same meaning as in s254 of the Housing Act 2004. Broadly that equates to occupation by between three and six individuals who do not form a single household and that two or more of the households share one or more basic amenities. The change of use from Class C3 to C4 and vice versa is permitted development under Schedule 2, Part 3, Class L of the GPDO³.
29. The presence or absence of care is central to distinguishing between Class C3(b) and C3(c) uses. Article 2 of the UCO states that '*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*'. To fall within Class C3(b), the care provided must accord with that definition.

³ The Town and Country Planning (General Permitted Development) (England) Order 2015

30. It is explained that the property would provide semi-independent supported accommodation for up to six young persons who are about to leave the care system who would typically stay between two months and two years.
31. It is stated that the young persons would be expected to progress their skills during the time they live at the property in all matters needed to run a home and to live independently, as opposed to being cared for. On that basis the appellant states that support will be targeted and minimal, and support workers would not be there to run the lives of residents, or look after them as younger children would require, but to assist with life skills such as shopping, cleaning, signposting and budgeting.
32. No medical or psychiatric care would be provided but there would be an aspect of personal care in the form of emotional and practical support, which would be given to the young persons as they make their transition to independent living. There would always be between one and three members of staff at the property to provide that support.
33. It is not suggested that the young persons would have (or had) any dependence on alcohol or drugs or a past or present mental disorder. Indeed, it is stressed that prior to being accommodated at the property, residents would be assessed, in conjunction with the local area Leaving Care professionals acting on the Council's behalf, to establish whether they can live independently.
34. Therefore, whilst in broad terms the emotional support to be offered to the young people could be described as 'care', it would not be *'by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder'* and thus would not fall within the above definition given in Article 2 of the UCO, as it applies to Class C3(b). The use cannot therefore fall within that class (C3(b)).
35. Those findings differentiate the proposal from the appeal decision⁴ referred to by the appellant for a case in Stockport where the low level of care to assist in the recovery from a variety of mental health issues would have fallen with the Article 2 definition of care.
36. I note residents will be expected to cook their own meals, run their own financial budgets and apply for further training/jobs themselves albeit with direction, support and guidance. The stated aim is to *'foster lifestyles akin to a group of young adults who are friends all living together sharing resources to manage the household chores and matters'*.
37. Nevertheless, the maximum age of residents would be 18. Whilst the appellant correctly refers them as young persons, it is not shown that those below the age of 18 should not still be defined as children. Moreover, it may well be that circumstances dictate that all of the residents in a given period might fall below the age of 18. Indeed, the description given in the application form refers to *'children or young people'*.
38. In that context I am mindful of the findings of *North Devon DC*⁵ 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

⁴ Appeal Ref: APP/C4235/X/17/3170427

⁵ *North Devon DC v FSS & Southern Childcare Ltd* [2003] JPL 1191

- caregiver (since they are not capable of looking after themselves and need to be looked after) and so a children's care home cannot fall within Class C3 unless a caregiver is resident (non-residential carers could not be regarded as living with the children in a single household).
39. However, in *R (oao Crawley BC)*⁶ it was held that *North Devon DC* is not to be read as laying down the principle that those who suffer from disability and need care in the community can never constitute a household for the purposes of Class C3, and that if the carers are not resident, there remains a perfectly sensible question whether those who are resident (in receipt of care), themselves constitute a single household.
40. In principle therefore, because no care would be provided in the terms defined in Article 2 of the UCO, the use could fall within Class C3(c) - if I were to determine, as a matter of fact and degree, that the young persons would form a single household on their own. However, the definition of care in Article 2 is specifically extended for Class C2 to include the personal care of children.
41. Although, as noted, no medical or psychiatric care would be provided, there would be an aspect of personal care in the form of emotional and practical support, which would be given to the young persons/children as they make their transition to independent living.
42. Therefore, as a matter of fact and degree, and on the balance of probabilities, the proposed use falls within Class C2 and the proposal would result in a change in the use of the property from Class C3 to Class C2.
43. Whilst there are no permitted development rights to change the existing 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 as a matter of fact and degree. 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.
44. The proposed mode of care in this case seeks to replicate that of a typical family home. Persons visiting the property would be largely restricted to staff members on a rota basis, with shift changes avoiding anti-social hours. Staff numbers would be between one and three depending on the time of day.
45. It is proposed, by way of limitation, that family visitation would be rare and would be on an appointment basis to ensure there is no crossover with another family. It is also proposed that no young person's personal advisor, social worker or medical professionals would regularly visit the property.
46. For the most part therefore, there would be up to six residents in occupation and between one and three members of staff. Those numbers and the associated pedestrian movements are unlikely to be materially different from that which could reasonably be expected to be generated by the occupants of such a large, seven bedroom dwelling, as they come and go for work, school, shopping and social purposes.

⁶ *R (oao Crawley BC) v FSS & the Evesleigh Group* [2004] EWHC 160 (Admin)

47. Given the above visitation restrictions, and that no activity in relation to staff vehicle movements would take place before 0800 or after 2200 hours, vehicular movements are similarly unlikely to significantly differ from that which would typically take place to and from a very large family dwelling.
48. As further set out, all staff or visitors arriving by car would park on site unless exceptionally the driveway at the property is full and on street parking is required to meet individual needs. Given the extent of off-street car parking available at the site, the proposal is unlikely to result in an increase in parking stress and associated annoyance and inconvenience for existing residents in the area, compared to a very large seven bedroom dwelling house, which could easily generate parking requirements for at least three to four cars. Moreover, the double driveway would largely negate any need for moving cars around and/or reversing manoeuvres onto the highway.
49. The appeal property is also detached with an annexe to be used for storage purposes between it and the neighbouring property at No 96 Westbury Street. The depth of the garden would also separate the use of the house from No 2 Nelson Road. Consequently, levels of noise and disturbance experienced by the closest neighbouring residents are unlikely to materially change. Moreover, no structural changes are proposed and it is intended that externally the property would retain its appearance as a dwellinghouse.
50. It is therefore unlikely that the proposed use would result in a significant difference in the character of the activities from what has gone on previously, as a matter of fact and degree.
51. Consequently, the proposed Class C2 use would not result in a material change of use from the existing Class C3 use as a dwellinghouse. The change of use would not therefore amount to development for which planning permission would be required.

Other Matters

52. I note the concern that the property could be used for a 7 person HMO, however, this certificate applies only to the extent of the use described in the First Schedule. Any use which is materially different from that described may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Conclusion

53. For the reasons given above I conclude that it would not have been well-founded had the Council refused to grant a LDC, and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Richard S Jones

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 10 June 2022 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reasons:

On the balance of probabilities, Nos 98 and 98A Westbury Road fall within the same planning unit.

The existing use of the planning unit, comprising Nos 98 and 98A, falls within Use Class C3 of the Town and Country Planning (Use Classes) Order 1987 (as amended). The proposed use would fall within Class C2.

In the circumstances of this case, the change of use from Class C3 to Class C2 would not constitute a material change of use and would not, therefore, require planning permission.

Signed

Richard S Jones

INSPECTOR

Date 24 May 2024

Reference: APP/Z5639/X/23/3318074

First Schedule

Change of use from Class C3 to Class C2, but a Class C2 use that is not materially different to a Class C3 use of the premises, for a home for up to six children or young people with up to 1 full-time carer sleeping overnight, and which:

- i) the young persons living there are only between 16-18 years of age and have been pre-screened as being capable of living independently;
- ii) all staff or visitors arriving by car, park on site unless exceptionally, the driveway on the property is full and on-street parking is required to meet individual needs;
- iii) there are no more than:

- a. two members of staff on duty between 08:00 - 11:00 and 17:00 – 22:00, unless exceptionally a further member of staff is required to meet individual needs;
 - b. three members of staff on duty between 11:00 - 17:00, unless exceptionally a further member of staff is required to meet individual needs;
 - c. two members of staff on duty at weekends in the daytime period 08:00 – 22:00, unless exceptionally a further member of staff is required to meet individual needs; and
 - d. one waking member of staff on duty in the night time period 22:00 – 08:00 unless exceptionally a further member of staff is required to meet individual needs;
- iv) no activity in relation to staff vehicle movements takes place before 08:00 or after 22.00;
- v) no young person's personal advisor, social worker or medical professionals regularly visits the young person at the property;
- vi) no young person's family visits when another young person's family is visiting; and
- vii) the annexe is used for storage purposes only.

Second Schedule

Land at Red Thorns, 98 Westbury Road, Kingston Upon Thames, New Malden, KT3 5AN

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 24 May 2024

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

Land at: Red Thorns, 98 Westbury Road, Kingston Upon Thames, New Malden, KT3 5AN

Reference: APP/Z5639/X/23/3318074

Scale: not to scale

