

## Hyndburn Borough Council – Committee Report

Councillor Khan has requested that the application be brought for the attention of the Committee because of concerns about the proposal.

**Application Ref:** 11/24/0217

**Application Address:** 22 Abbott Clough Avenue, Oswaldtwistle, BB1 3LP

**Description of Proposal:** Certificate of Lawful Use, Proposed: Use as a Supported Living home which includes two young people living at the property and a member of staff on a rota.

[Note – The description of the proposal has been modified on the basis of information submitted by the applicant – the reason is given below]

### **HUMAN RIGHTS**

The relevant provisions of the Human Rights Act 1998 and the European Convention on Human Rights have been taken into account in preparation of this report, particularly the implications arising from the following rights:-

#### **Article 8**

The right to respect for private and family life, home and correspondence.

#### **Article 1 of Protocol 1**

The right to peaceful enjoyment of possessions and protection of property.

### **Description of site**

The application site is shown on the location plan and image of the property as follows.



The application relates to a semi-detached 3-bedroomed dwellinghouse in a residential area. The dwelling has a rear garden and a forecourt formed as a paved hardstanding for two cars.

### **Planning history (as relevant)**

The planning history shows that the land was developed for dwellinghouses under various planning permissions including 11/91/04997 granted 22<sup>nd</sup> September 1992

### **Procedural**

The application is for a certified determination whether or not planning permission is needed for the proposed change of use. The decision has to be on the basis of planning law and the

facts of the case. High Court decisions on the planning law and the facts point to the development needing planning permission.

The planning law relevant to the application includes The Town and Country Planning Act 1990 ['TCPA 1990'] and The Town and Country Planning (Use Classes) Order 1987 (as amended in 2010 and otherwise) ['UCO'].

In the light of concerns raised by local residents and the complexity of the issues raised when considering an application of this type, the Council has sought legal advice on the application of the relevant planning law and the matters that should rightly be taken into consideration. That advice is considered to be privileged information.

It follows from the legal opinion (in which the *North Devon* case referred to below is relevant) that whether or not the persons accommodated are under the age of 18 years is relevant to the consideration. This is addressed below.

Relevant Government advice on the application of the UCO is contained in ODPM Circular 03/2005.

Section 192 (2) of TCPA1990 provides that if, on an application under that section, the Council is provided with information satisfying it that the new use described in the application would be lawful they should issue a certificate to that effect. In any other case the application should be refused. The onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.

The decision is to be based strictly on factual evidence, the planning status/history of the site and the relevant law or judicial authority applicable to the circumstances of the case. The planning merits of the proposed use applied for do not fall to be considered.

#### Note about consultations and representations

There is not a legal requirement to carry out consultations for this application type. Account is only taken of representations regarding legal and factual matters relating to land use planning.

A petition bearing 48 signatures and 8 letters making representations have been received from residents of the area. These refer to the planning merits of the proposed use of the building and should not be taken into account in determining this application.

#### The application

The application includes:

- an application form and Location plan;
- a copy of the applicant's Statement of Purpose.

Section 192(1)<sup>1</sup> requires that the application describes *the use in question*. Article 39(13)<sup>2</sup> requires that:

*Including a case in which the authority modify the description of the use, operations or other matter in the application or substitute an alternative description for that*

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<sup>1</sup> Town and Country Planning Act 1990, Section 192(1)

<sup>2</sup> Town and Country Planning (Development Management Procedure) Order 2015. Article 39(13).

*description the notice of decision must state clearly and precisely the authority's full reasons for the decision.*

The application form states the proposed use as: C3 – *Dwellinghouses* and stated the Grounds of the application as:

*We are a Supported Living company who do not provide care. Auxilium Living should not require C2 planning as this would fall into care. As it states the distinguished features of C2 accommodation is occupants being in 'need of care' as opposed to simply having care available if needed. This explains the clear differences between supported living and the care industry. Auxilium Living have one property named 22 Abbott Clough Avenue, which is a three bedroom semi-detached. Who intend to house 16-18 year olds with a tenancy agreement held by the local authority. This is conducted by all Supported Living companies. Supported Living is now registered with Ofsted, it is important to note that Supported Living has never required any form of planning prior or after becoming registered.*

The application form stated the reason why the Certificate be granted as:

*A Lawful Development Certification should be granted as Auxilium Living do not cross over into C2 planning as the industry does not require this to be obtained. Supported Living is distinguished from children care homes, as they do not provide care as defined via Ofsted. Auxilium Living will only provide support. Young people aged 16-18 can hold a tenancy agreement via a trustee/ third-party, who will hold the lease on trust for the young person. This would be the local authority.*

#### Description of the proposal

The application was registered with the following description:

*“Proposed: use as a Supported Living home which includes two young people living at the property and a member of staff on a rota”.*

There was discussion in which it was indicated to the applicant that the ‘head-line’ description of the proposal should be:

*“Use as a Supported Living Home for two young people of age 16 and 17 years supported by a member of staff on a rota”.*

The applicant responded that the description should be:

*“Use as a Supported Living Home for a maximum of two young people of age 16 and 18 years supported by a member of staff on a rota”.*

The applicant was then requested to provide copy of a statement describing the nature of the proposed use of the property. The applicant submitted the *Statement of Purpose* [‘the SP’]. The SP states that:

*Auxilium Living [the applicant's Company] is a leaving care service, as a company we intend to provide supported accommodation placements and support for vulnerable young people between the ages of 16 and 18 [...] their first supported accommodation provision to ensure the young people we will support are ready for*

*adulthood [...] At our provisions we will offer placements for young people of mixed gender ages 16 to 18. The young people who we will accommodate will be ready to make the next step to independent living.*

It is clear from the SP that the purpose of the use is as a supported living home for the accommodation of young people leaving care when they attain 16 years and that they leave on attaining 18 years. It is understandable that there may be some flexibility at the end of that age band – that the young person may not leave exactly on the 18<sup>th</sup> birthday – but the clear focus of the use is to provide supported accommodation for those aged 16 and 17. This is the very purpose of the applicant's business as a *leaving care service*. This should be recognised in the 'head-line' description which should be: *Use as a Supported Living Home for two young people mainly of age 16 and 17 years supported by a member of staff on a rota.*

It is, therefore, necessary to consider whether or not the identified planning use would remain within use class as the present use.

### **Assessment of the Proposed Development**

#### **Whether the proposed use is in the same use class as the existing use**

1. UCO provides under article 3 that *where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or other land for any other purpose of the same class shall not be taken to involve development of the land.*
2. The Schedule to the UCO in Part C identifies:

#### **Class C2. Residential Institutions**

*Use for the provision of residential accommodation and care to people in need of care (other than a use within Class C3 (dwelling houses)). [see paragraph 11 below for definition of "care"]*

*Use as a hospital or nursing home.*

*Use as a residential school, college or training centre.*

#### **Class C3. Dwellinghouses**

*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, or*
  - b) *not more than six residents living together as a single household where care [see paragraph 11 below for definition of "care"] is provided for residents;*
  - c) *not more than six residents living together as a single household where no care is provided for residents (other than a use within Class C4).*
3. Article 2 of the UCO defines "care" as meaning:

*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.*

## Existing use

4. The applicant states that the present lawful use of the premises is as a dwellinghouse Class C (a). The planning history shows that the building was built as a dwellinghouse when the wider area of land was developed for dwellinghouses under various planning permissions including 11/91/0497 granted 22<sup>nd</sup> September 1992.
5. External inspection of the premises supports, by its external appearance and characteristics, and its setting within a residential area, the conclusion that it is a dwellinghouse within Class C3 sufficient for the balance of probability test applicable to Certificates of Lawful Use. On that basis the Council is satisfied that the house is currently a dwellinghouse that falls within Use Class C3.

## Proposed use

6. The applicant proposes to use the existing dwellinghouse to provide permanent residential accommodation for two young people identified from the information submitted as mainly of age 16 and 17 years. They would be supported by an adult attending on a rota basis but not permanently resident at the property.
7. When the current 1987 UCO was brought into force it was accompanied by an Explanatory Note (not part of the Order) setting out the thinking on which the then new Class C3 was created:

*Class C3 (dwellinghouses) is a new class which comprises use as a dwellinghouse by an individual, by people living together as a family or by not more than six residents living together as a single household. In the case of people living together as a household rather than as a family, the use will continue to be within the class notwithstanding that an element of care (as defined in article 2) is provided.*

8. The *ODPM Circular 03/2005* outlines the grouping criteria of Class C3, in particular the concept of the single household. The relevant paragraphs are copied as follows [bold emphasis added]:

### Class C3: Dwelling Houses

- “66. *This class groups together use as a dwelling house, whether or not the sole or main residence, by single person, any number of persons living together as a family, or by no more than 6 persons living together as a single household. **The key element in the use of a dwelling house for non-family purposes is the concept of a single household.** The single household concept will provide more certainty over the planning position of small group homes which play a major role in the Government’s community care policy which is aimed at enabling disabled and mentally disordered people to live as normal lives as possible in touch with the community.*
67. *In the case of small residential care homes or nursing homes, staff and residents will probably not live as a single household and the use will therefore fall into the residential institutions, regardless of the size of the*

home. Local planning authorities should **include any resident care staff in their calculation of the number of people accommodated.**

68. This class not only includes families, or people **living together** under arrangements for provision of care, but also other groups of people, not necessarily related to each other, who chose to live on a communal basis as a single household.”

9. In *North Devon District Council v First Secretary of State* [2004] [‘Devon’] Justice Collins speaking on the relevance of the single household criteria said:

“Children cannot run a house. They cannot be expected to deal with all the matters that go to running a home. [...] children are regarded as needing full time care from an adult, someone to run their lives for them and someone to make sure the household operates as it should. [...] hence the need for the carer, hence the need for that addition to make it a household within the meaning of the relevant class.

*It seems to me that the concept of living together as a household means that, as I have put it, a proper functioning household must exist and, in the context of a case such as this, that the children and a carer must reside in the premises.*

*The question then arises whether the carers who do not live but who provide, not necessarily through the same person, a continuous 24-hour care can be regarded as living together. In my view, the answer to that is no. Consistent with the approach indicated by the Circular [Circular 13/87] what is required is indeed residential care with a carer living full-time and looking after those in the premises who otherwise would not be able to live as a household.*

*C3 does require at least one residential carer, together with of course those who are being cared for.”*

10. From the relevant law laid down, a lone child (or children – in this instance, *young people*) cannot form a household; and a carer would need to be living full-time to form a household with the young people and be identified as *resident living together*. The submitted information is that the support workers would attend on the basis of a ‘rota’, not, as such, being residents.

11. The proposal would, therefore, make a change of use to an arrangement that would not meet the test *residents living together as a single household*’ identified in the relevant law and the proposed use would not fall within Class C3, including the part C3(b) indicated by the applicant.

12. The applicant has not submitted that the proposed change of use would not be a material change of use of the property.

13. However, for completeness, it is necessary to consider if the new use would involve a material change of the property.

**Whether or not the proposed change of use would be “material”.**

14. To establish whether there would be a material change of use, a comparison between the existing lawful use and the use proposed has to be considered. Government advice is that *“there is no statutory definition of ‘material change of use’; however it is linked to the significance of a change and the resulting impact on the use of land and buildings. Whether a material change of use has taken place is a matter of fact and degree and this will be determined on the individual merits of a case”*.
15. It was early established in *Easts Barnet UDC v British Transport Commission (1962)* that *‘material’* means *‘material for planning purposes’*. In particular, it should be noted that the applicant is not seeking planning permission for the proposed use, but a determination from the Council whether the proposed use can be lawfully carried out. The application is therefore a legal determination, it is not based on whether it acceptably meets / satisfies the policies of the development plan.
16. Circular ODPM 03/2005 advises that the Courts have held that the first thing to consider in determining whether a material change of use has occurred (or will occur) is the existing primary use of the land. Each case will always be a matter for individual determination by fact and degree. The corollary is that the proposed primary use should also be ascertained, which in this case is the provision of residential accommodation for a looked-after child.
17. The applicant describes the use as follows:
- “Each young person will have their own private bedroom and will be provided with a key to their room. Each bedroom will have a bed, wardrobe space, drawers with one being lockable, along with a study desk, whiteboard and a smart TV which will have internet connection.*
- Our staff will complete 24hour shifts, which will start at 10am and finish at 10am the following morning, the shift will consist of a sleep which is between the hours of 22:00 and 8:00. There are always staff at the home, however there will be targeted support time arranged with the young person.”*
18. The purpose of this report is not to examine the worthiness of the applicant’s endeavours, but to consider whether or not a material change of use would be made at the property. The primary purpose of the use would be to provide care [within the identified meaning of *care* referred to in paragraph 20 above] for the young people.
19. The character of occupation would have a focus on the provision of residential accommodation and the provision of support. The property would be a place of work in addition to its residential purpose. It would be materially different in character and use from the use of the dwelling house used by a single household.
20. The proposed use would be materially different from that of likely use by a single household and for the above reasons the application is recommended for refusal

## **Conclusion**

The information submitted by the applicant shows that the proposed use would not fall within the same use class as a dwellinghouse (C3) including part C3 (b)) of the Use Classes Order 1987 (as amended); and, considered on the facts and degree of the matter the proposed new use would be materially different from a dwelling house use within class C3 and a Certificate of Lawful Use cannot be issued.

### **Recommendation**

That a Certificate of Lawful Use be refused for the following reasons:

1. The information provided by the applicant fails to satisfy, on the balance of probabilities, that the new use described in the application would be lawful, in particular, the new use would not fall within use class C3 (including part C3(b)); and, it would make a material change of use of the application site, thereby comprising development requiring the planning permission of the Council.

### **Background Papers:**

<https://planning.hyndburnbc.gov.uk/Northgate/ES/Presentation/Planning/OnlinePlanning/OnlinePlanningOverview?applicationNumber=11%2F24%2F0217>