

**Hyndburn Borough Council – Committee Report**  
**Application for lawful Development Certificate - S192 Proposal**

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

**Application Ref:** 11/24/0236

**Application Address:** 2a Allsprings Drive, Great Harwood, BB6 7RN

**Description of Proposal:** Certificate of Lawful Use; Proposed: Change of Use from Dwelling to Children's Home providing accommodation for two children with care provided by staff attending 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 as follows.

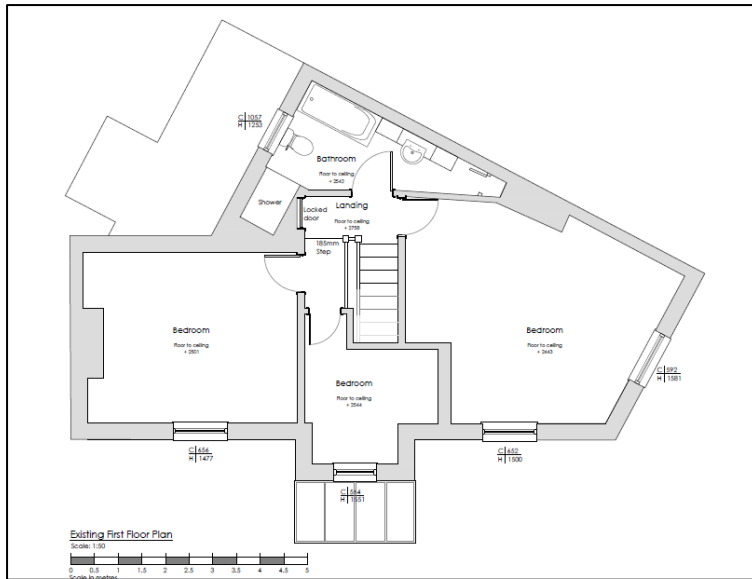


***Location Plan: Application site***



***image of the property***

The application relates to a semi-detached 3 bed roomed dwellinghouse in a residential area. The dwelling has a garden with a driveway and hardstanding space for one car. The submitted floor plans are copied as follows for ease of description.



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

No relevant planning history.

### **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

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.

### The application

The application includes:

- an application form and Location plan;
- Floor Plans;

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

The application provides little information. The application form gives the following description of the proposal:

*"There will be no structural works carried out to the building. We are requesting a certificate of lawfulness to allow us to operate the premises as a children's home looking after children under the care of the local authority".*

In discussion the applicant stated that accommodation would be provided for two children with care being provided by a team of 6 staff working on a rota with 2 staff being at the premises at all times. It follows that a proper description of the proposal would be:

*"Change of Use from Dwelling to Children's Home providing accommodation for two children with care provided by staff attending on a rota".*

This is used for the purpose of the application.

The application for states that the proposed use would be within Class C2 and gives the grounds of the application as:

*We believe the certificate should be granted in order to support young people achieve optimum outcomes and give them a start in life that every child deserves. Our team has a wealth of experience in looking after children & young people and ensuring their needs are met. The young people will be afforded quality care allowing them to flourish into young adults. We will also be providing local people with employment opportunities and continued professional development.*

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

1. Whilst the application accepts that the use would not remain within use class C3, for completeness it is necessary to consider that matter. In considering this application, it is therefore necessary to consider two things:

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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).

- a. Whether the proposed use is in the same use class as the existing use, and, if not;
- b. Whether or not the proposed change of use would be “material”.

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

2. 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*’.
3. 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).*
4. 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**

5. The applicant states that the present lawful use of the premises is as a dwellinghouse Class C (a). There is no helpful planning, however, 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 children and up two adult carers working on a rota basis.
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) cannot form a household; and a carer would need to be living full-time to form a household with the children and be identified as *resident living together*. The submitted information is that the carers 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 *resident 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. It is therefore, necessary to consider if the new use would involve a material change.

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

13. 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*”.
14. It was early established in *East's 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.
15. 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.

16. As set out above, the onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful. The applicant has not provided evidence in this respect. The Grounds of the Application identify the worthy intentions as regards child care; information is given that there would be no structural works; otherwise, no information is given.

17. There is the probability that a children's home would be materially different in the character and impacts of its use compared with a dwellinghouse occupied by a single household. The application fails to demonstrate, on the balance of probabilities, that the proposed use would be lawful.

### **Conclusion**

The information submitted by the applicant, whilst indicating good intent as regards care of children, does not demonstrate that the proposed use would be Lawful 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, whether by falling within the same Use Class or by not making a material change of use of the property or otherwise.

### **Background Papers:**

<https://planning.hyndburnbc.gov.uk/Northgate/ES/Presentation/Planning/OnlinePlanning/OnlinePlanningOverview?applicationNumber=11%2F24%2F0236>