DELEGATED REPORT

Code No: NP/DDD/0619/0694
Property: The Green, Main Road, Flagg, Near Buxton, Derbyshire. ("the Property")
P.File: P.5302
Applicant: Rite Directions Ltd

1. Application and Preliminary Matters

1.1 The application is submitted under S.191 of the Town & Country Planning Act 1990 (as amended), and seeks a Certificate for a proposed use of the Property as a dwelling defined by class C3(b) of the Town & Country Planning (Use Classes) Order 1987 (as amended). The Applicant has stated the grounds for the application are that there will be no material change of use taking place from the existing lawful use within Class C3(a) of that Order.

1.2 The application site is described by the Agent as a substantial 4-bedroom detached property, set in spacious grounds on the eastern outskirts of the village of Flagg. It is located approximately 100 metres to the south of Main Road at the end of a private access track, which also serves a dwelling[1] known as The Barn. Public Footpath No.7 comes towards the application site from the south, and then runs alongside the track in an easterly direction, past The Barn, and to the north. A third party representation has commented that the footpath actually runs through the Application Site to the north. This was formerly the case, but the footpath was formally diverted to its current route under a Public Footpath Diversion Order confirmed on 11 January 1977.

1.3 With regard to the accommodation provided by the Property, the Planning Statement (PS) states that no external alterations are proposed, with only internal alterations to comprise redecoration, improved insulation, replacement internal doors. In addition, a single first floor door will be relocated further back into a bedroom so that an existing en-suite becomes available for use as a second shared bathroom. On this basis, it appears that proposed building works only relate to internal works, for which planning permission would not be required, and therefore the application only relates to the proposed use of the Property.

2. Submitted Evidence

2.1 Application Form

2.2 Site Location Plan

2.3 Planning Statement

2.4 Appendix A – Site Photographs

2.5 Appendix B - Relevant Local Authority Decisions – only Certificates, no Officer Reports.

2.6 Planning Officer report for Blowell House, Goole – submitted 16/8/19.

3. Evidence on Planning files/Hub

3.1 13/3/50 – BAR 150/3 – PP GRANTED for porch to back door of existing guest house in accordance with submitted plans. Owner: Trustees of Fellowship of Youth.

[1] Although the Agent has referred to The Barn as a "dwelling", the established use of this building is as a bunkbarn/hostel/campsite see 3.2

3.2 Sept 1975 – Correspondence between the PDNPA and The Foy Society which refers to Pre-1949 Established Use rights for the use of the adjacent barn as a bunkbarn/hostel/campsite.

3.3 16/11/1976 – Public Footpath Diversion Order – Public Footpath running through the application site appears to have been diverted to run from south to entrance of The Green and then turn north east, bypassing The Barn until it reaches Main Road

3.4 August 1993 – Correspondence with Trust member regarding proposed use of the bunkbarn. Refers to the barn and associated house at The Green being let to tenants and run as charity by trustees.

3.5 6 June 2019 - Enquiry PE\2019\ENQ\36456 - Enquirer would like to know if planning permission is required to change the property, which is currently a residential dwelling, into a residential childrens home which provides 24hr supervision for children who have fallen out of the care system.

3.6 Aerial Photos dated 1999, 2006, 2011 and 2017. Years 1999 to 2011 show grass cut in southern field.

4. Third Party Representations

No consultation exercise was undertaken, but the following representations have been received.

4.1 19/7/19 - Sinclair

Does not consider that the proposed use falls within Class C3, and it is more akin to a residential institution (Class C2) or a house of multiple occupation Class C4.

- Some work has already been carried out and so the term "retrospective" should be applied.
- The public footpath is in regular use and actually crosses the garden of the property and to their knowledge has never been officially diverted.
- The Barn and associated camping field on the shared track up to the house is in regular use, and the wooded area is used by the nursery School in Flagg for its forest school activities.
- Various considerations are cited which they consider impacts on the suitability of the proposed use at The Green. These are planning considerations and not relevant to the application.

4.2 12/8/19 – Flagg Parish Council

- Do not consider the use of The Green for business purposes is lawful without proper planning permission for change of use.
- The proposed use is a play on the word "residential" .
- Requests the PDNPA to put the application on hold until the Applicant responds to the Parish Council's requests[2] (copy letter to Applicant dated 12 August 2019 attached).

4.3 15/8/19 – Sinclair

- Various considerations are cited which they consider impacts on the suitability of the proposed use at The Green. These are planning considerations and not relevant to the application.
- Subsequent telephone conversation highlighted that Flagg residents were not aware of the diversion of the public footpath, and that the Property has been rented as a private dwelling for at least 15 years.

4.4 16/8/19 – Flagg Parish Council

- The proposed use of the premises fits in with Class C2.
- The proposed use does not fit into Class C3 a, b or c.

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[2] The Parish Council attached a copy of a letter dated 12 August 2019 sent to the Applicant. The Applicant responded to the Parish Council by email 14th August 2019, with copy to the PDNPA.

- The use will be business premises and not a family residence.
- Considers there will be at least 10 carers will need to be employed, even before the children present can be counted.
- If the staff are not included in the "single household of no more than six persons" the applicant should make a case where the children could be considered as a "single household".
- The premises are large enough to accommodate more than three children, and there will be commercial pressure to increase the number of children residents.
- The nature of the proposed HMO, and commercial business use means that the premises firmly falls under the provisions of the Regulatory Reform (Fire Safety) Order 2005.

5. Legal Framework and Guidance

5.1 The key statutory framework to LDC applications is contained in S.191-S.194 of the 1990 Act. S.192 provides so far as relevant......

(1) If any person wishes to ascertain whether—

(a) any proposed use of buildings or other land; or

(b) any operations proposed to be carried out in, on, over or under land;

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(3) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use or operations to be lawful; and

(d) specify the date of the application for the certificate.

(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.

5.2 Guidance for the submission and consideration of lawful use applications is contained in the Lawful Development Certificate category to the Government Planning Practice Guidance ("the Guidance"). Paragraph 5 of the guidance states that the application form must be accompanied by sufficient factual information/evidence for a local planning authority to decide the application... *"An application needs to describe precisely what is being applied for (not simply the use class) and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a certificate. This does not preclude another application being submitted later on, if more information can be produced.".*

5.3 Planning merits are not relevant, and are not an issue the Authority is permitted to consider in the context of an application for an LDC under S.192 of the 1990 Act. The Authority's decision rests on the facts of the case, relevant planning law, and judicial authority alone. The onus of proof rests firmly with the Applicant to demonstrate that, on the balance of probabilities, the proposed development described in the application would be lawful if instituted or begun at the time of the application.

5.4 Paragraph 5 of the guidance states that the application form must be accompanied by sufficient factual information/evidence for a local planning authority to decide the application... *"An application needs to describe precisely what is being applied for (not simply*

the use class) and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a certificate. This does not preclude another application being submitted later on, if more information can be produced." In Gabbitas v Secretary of State for the Environment [1985] JPL 630, the Court have held that the relevant test of the evidence on matters such as an LDC application, is the balance of probabilities. The Applicant's evidence does not need to be corroborated by independent evidence in order to be accepted. If the Authority has no evidence of its own, or from others, to contradict or otherwise make the Applicant's version of events less than probable, there is no good reason to refuse the application, provided their evidence alone is sufficiently precise and unambiguous.

5.5 By virtue of S.191(4) of the 1990 Act, the Authority are under a duty to issue a certificate where they have been provided with information *satisfying them of the lawfulness* at the time of the application of the use.....*described in the application, or that description as modified or substituted by them.* If the Authority is not so satisfied, then there is a statutory duty to refuse the application.

5.6 S.55(1) of the 1990 Act, "*development*" is defined as, the making of any material change in the use of any buildings or other land, or, the carrying out of building, engineering, mining or other operations in, on, over or under land. Under S.57, planning permission is required for the carrying out of any "*development*" of land.

5.7 S.55(2)(f) of the 1990 Act provides that *"(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.".* The relevant order is the Town & Country Planning (Use Classes) Order 1987 **("the Order")**.

5.8 Class C2 of the Order reads -
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)).
Use as a hospital or nursing home.
Use as a residential school, college or training centre.

5.9 Class C3 of the Order reads -
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;
(b) not more than six residents living together as a single household where care is provided for residents; or
(c) 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).

5.10 Article 2 of the Order defines "Care", for the purposes of Class C2 and C3, as *"personal care for people in need of such care by reasons 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.".*

6. Preliminary Matters

6.1 Fundamental to the Applicant's case is that the current use of the Property falls within Use Class C3(a) of the Order, and the Agent has stated *"It is understood that the property is and always has been a dwelling (C3(a) use class).".* However, it is noted on the Authority planning files, that when planning permission was granted in 1950 (see 3.1) the Property was referred to as a Guest House. Such use may or may not have fallen within Class C3, depending on the facts. There is no evidence as to the extent, or longevity of that use, and although it is possible that in more recent years the Property has been let out as a single

family dwelling, the Applicant has not provided any evidence on this point. On this basis, the current lawful use of the Property is not sufficiently clear to demonstrate that there is an existing Class C3(a) use from which to assess any future change of use.

6.2 In addition, the issue of the planning unit is not clear. For the purposes of the application, the Site Location Plan (see 2.2) includes The Green, together with a field lying immediately to the south, and the access track/road that leads north east to Main Road. The Planning Statement says that the Property is owned by the Flagg Trust, and that they have been notified of this application. Documents on the Authority files suggest that the owner may be a group called The Foy Society. The access track/road to The Green runs across adjacent land associated with a building known as The Barn, which has an established use as hostel/bunk-barn/camping, which is run by The Foy Society. Neither the Property, or The Barn and adjacent land, are registered at H M Land Registry, and so it is not possible to check who is the current owner(s) of the land and buildings. The lack of registration suggests that The Barn, The Green, together with the adjacent land and the access track, are all under the same ownership. If this is correct, then it is important to establish whether The Green and The Barn (with adjacent land) are historically separate uses of land, and separate planning units.

6.3 There have been discussions with the Agent on the above points, and other matters concerning the evidence and the initial assessment of C3(b) and C2, or indeed any use within . In particular, whether it is possible for the Authority to come to any meaningful conclusion on these points without further evidence. If the application were to be refused on the basis that the evidence was not sufficiently clear or precise, then it is open to the Applicant to re-submit, with additional evidence. It was agreed that the application would therefore be determined on the current evidence, and this Delegated Report would serve to highlight the areas where there were gaps in the evidence, which would assist with any re-submission if this were to be the case.

6.4 One further point on the planning unit, relates to the field to the south of the dwelling, and whether or not this forms part of residential curtilage of The Green. Aerial photos show that the field has repeatedly had a "grass cut", which suggests that the field has possibly been used for agricultural purposes, rather than as part of the garden to the Property. It is possible that the red line extended to include this field was arbitrary, and for this reason no evidence was provided to demonstrate its use for residential purposes. If this field is to be included in any further application, then this point should also be addressed.

7. Assessment of Evidence and Law

7.1 Information describing the proposed use, is set out in section 3 of the PS. This states that the proposed use of the Property is to provide residential care for children and young people ages 7-17 with emotional issues and attachment disorders. There would be no more than three young people living at the property at any one time, on long term placements. With regard to staffing, the PS says that there will be two support staff present 24 hours per day, and that a typical shift would be 24 hours, starting at 10am until 11pm, and include a sleep over, breakfast and handover with the next 10am shift starting work.

7.2 The Applicants consider that the property is largely what one would expect of any family home containing shared facilities, including a kitchen, lounge, bathrooms and external space. However, no floorplans of the Property have been provided, so it is not possible to tell whether the accommodation fulfils the requirements of the proposed use or not. It is noted that although the Property has four bedrooms, there will be three children and two staff members, who are also said to be "sleeping over" whilst on shift. It is not clear whether this means that one or both of the on duty staff will be sleeping at the premises, and whether they will share bedroom and bathroom accommodation, as would an ordinary family.

7.3 The PS goes on to state that the children will be assisted by staff in the same way as any parent may offer support, and that the children will be expected to complete everyday household tasks and duties as any other young person at home. Also it is intended that the residents will eat communally and undertake trips out together, and generally live much like a family or group of friends would as a single household. The PS states that as there are only two carers at any one time working to a 24 hour shift, the comings and going associated with the use will not be materially different from a typical residential household. No detailed information on the proposed use is provided.

7.4 If the proposed use is considered to fall within Class C3(b), then a change from C3(a) to C3(b) falls within the same class and does not require planning permission. Alternatively, if the proposed use is found to be Class C2, it is necessary to determine whether a change from C3(a) to C2 would involve a material change of use, in planning terms. If the change is not considered to be material, again planning permission would not be required as there would be no development[3] requiring planning permission. Therefore, it is necessary to carry out a two-stage assessment, to determine: (1) whether the proposed use falls within Class C3(b) or C2; and (2) if in C2, whether a material change of use would occur from its current alleged use of C3(a) (although this has not yet been established as noted in section 1 above). Furthermore, for the avoidance of doubt, if the proposed use falls outside of Class C2, and it is sui generis, then our assessment would still be required to determine whether the proposed use comprised a material change of use from its current use.

Does the proposed use fall within Class C3(b)?

7.5 The requirements of Class C3(b) are that there are no more than six residents living together as a single household where care is provided for residents (my emphasis). At present, the application contains no evidence to suggest that the child residents require "care" for the reasons set out in the definition of care in Article 2 of the Order. On this basis, the proposed use more closely resembles a C2 use.

7.6 Even if care was being provided within the definition of Article 2, the current version of Class C3(b) requires that the residents also be living together as a single household.

7.7 In R. v Bromley LBC Ex p. Sinclair [1991] 3 P.L.R. 60 ("Bromley"), a Council's decision to use a house as a family home for three mentally handicapped persons was judicially reviewed. The Council intended to provide 24 hour supervision by social workers attending on a rota basis. They would not be living at the property, although a room would be used as a bedroom by the carer who was there at night. Popplewell J considered that the wording of C3(b) did not import a requirement that that the carers should also live in the household, and the residents living alone (with care) could form a single household. However, in that case the residents were not children.

7.8 However, the approach taken by Popplewell J was subsequently disapproved by Collins J in North Devon District Council v The First Secretary of State [2003] EWHC 157 Admin ("North Devon"). Collins J held that children, by themselves, could not be regarded in the true sense as a household *"Children need to be looked after. They cannot run a house. They cannot be expected to deal with all the matters that go to running a home. Sometimes, of course, one recognises they are forced to do so, but as a matter of principle and approach the whole point of these homes is that children are regarded as needing full-time care from an adult, someone to look after them, someone to run their lives for them and someone to make sure that the household operates as it should. It seems to me that in the context "household" means more than merely the bodies. You have to consider whether the bodies are capable of being regarded in the true sense as a household. The same would apply to those who suffer, for example, from physical or mental disability and who need care in the community. They, if they are not capable of looking after themselves, would not be regarded as a*

[3] as defined in s.55 of the 1990 Act

household, hence the need for the carer, hence the need for that addition to make it a household within the meaning of the relevant class."

7.9 Collins J then went on to the question of the need to be "*living together*" as a single household.... "*One has to have regard to the need that they be living together as a single household. The question then arises whether 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, what is required is indeed residential care with a carer living in full-time and looking after those premises who otherwise would be unable to live as a household.*".

7.10 In R (On the application of Crawley BC) v SST&R and Eve Helberg [2004] EWHC 160 (Admin), the Council challenged an Inspector's decision on the ground that he had failed to consider the North Devon case and/or failed to give adequate reasons for failing to apply it. However the case related to the occupation of a property by four adult residents with learning difficulties, and Richards J held that the application of the criteria in Class C3 is a matter of fact and degree on the facts of each case. He found that the facts of that case were different and he was not bound to follow the principles set out in North Devon.

7.11 The Applicant has provided copies of three decisions where other Local Planning Authorities have issued LDC certificates in this type of application (see 2.5). However, the certificates by themselves do not show the facts of those cases, or how those decisions were reached, and why the approach in North Devon was not followed. On that basis, this evidence does not assist the application. The Applicant has also provided a copy of a Planning Officers Report in the case of Blowell House, Goole, North Yorkshire (see 2.6). The Officer's report discusses the North Devon case, and four appeal decisions where Class C3 was being claimed – Enfield, Fenland, Crewe & Nantwich and Wolverhampton.

7.12 Again the full facts of these decisions are not known, and not all are claiming a change from C3(a) to C3(b).

- Enfield – the residents were not children, and were receiving care within the Article 2 definition.
- Fenland – this decision follows Bromley, but as no reference is made to North Devon, it is possible that it pre-dates.
- Crewe & Nantwich – the facts are similar to this case, but the Appellant accepted the use was C2 and not C3(b), and so the main issue was whether a change from C3(a) to C2 was material.
- Wolverhampton – again similar facts to this case, but the Inspector found use not C3(b) and so issue was whether the change was material different.
- In Blowell the Planning Officer determined that the carers would "effectively" be living at the premises, or (at times) where there was shift work, there would be continuity of care and clear rotas, allowing the children to build close relationships with their carers. Although the planning officer ultimately took the view that the use fell within C3(b), the full facts behind this decision are not known, and there was no reference in the officer's report as to whether the children required care within the definition of Article 2. It is therefore difficult to see how this decision was reached, and its relevance is limited.

7.13 There are a number of other appeal decisions[4] listed which have been considered, but again, not all the facts of these cases are known. However, in general terms they support the application of the findings of Collins J in North Devon.

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[4] PINS Appeal Refs:
App/U5930/C/11/2151319, 2146559
App/P4225/X/18/3198973
App/X3025/C/15/3006355
App/P4225/X/163145074
App/E2205/X/16/3161037
App/J1915/X/12/2187287

7.14 In summary, I do not consider that the proposed use of the Property falls within Class C3(b), as (1) the Applicant has not demonstrated that care for the children will be provided within the definition of "care" found in Article 2 of the Order, and (2) even if "care" was to be provided as defined by Article 2, there is insufficient evidence that the carers and residents would be "living together as a single household". The proposed use therefore more closely resembles a C2 use.

Does the use fall within Class C2, and if so, would that constitute a material change of use.

7.15 The Applicant has not made any case to demonstrate that the proposed use would not be materially different from that under a Class C3(a) use, and as already noted, the Applicant has not been clearly demonstrated that there is an existing C3(a) use of the Property. Although some information has been provided, the is little detail on the operational running of the relating to the operational running of the The information provided does not address any potential planning impacts that the change of use would involve, and therefore it is not possible to determine whether the change would be material or not.

Specific response to Third Party representations

7.16 For the purposes of the Regulatory Reform (Fire Safety) Order 2005, the Authority is not a Fire and Rescue Authority, nor an "enforcing authority" under Article 25 of the Order.

7.17 Planning permission will not normally be required for development which does not result in a material change of use of a property, or where planning permission is effectively granted through permitted development (under the Use Classes Order or the General Permitted Development Order).

7.18 Finally, some of the third party representations have commented that if this application is granted, then the use may increase or change in some way. It is worth saying at this point, that a lawful development certificate only certifies as lawful, the proposed use as described in the application. If the use subsequently changes in some way, or increases, to the point that it was materially different from the certified use, then this would not be permitted under the certificate, and the use may be liable to enforcement action.

8. Conclusion

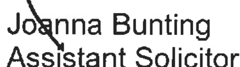
8.1 It is for the Applicant to demonstrate, on the balance of probability, that what he has applied for would be lawful, and the onus is on him to provide evidence that is sufficiently precise and unambiguous in accordance with the test set out in Gabbitas. Unfortunately, the evidence submitted with the current applications is not sufficiently clear and precise to meet the Gabbitas test, as set out above.

8.2 Taking into account all the evidence, on balance, it is considered that the evidence presented in support of the application, does not demonstrate that the proposed use of the Property as a dwelling defined by class C3(b) of the Town & Country Planning (Use Classes) Order 1987 (as amended), would be lawful if it had been instituted on the date of the application. It is therefore recommended that the application should be refused for this reason.

Date:

Case Officer: Jo Hawksworth

Authorised by:



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