The Planning Inspectorate

Appeal Decision

Site visit made on 9 November 2010

by John Whalley CEng MICE

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 19 November 2010

Appeal ref: APP/C4235/X/10/2132351
73 The Crescent, Stockport SK3 8SL
Appeal made by Mr Gavin Mackay

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a failure to grant a certificate of lawful use or development, (LDC).
- The appeal is made by Mr Gavin Mackay against the failure of Stockport Metropolitan Borough Council to determine an application for a certificate of lawfulness.
- The application, No. DC/044060, was dated 9 March 2010.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is for the proposed use of the premises as a dwellinghouse for not more than six persons living as a family unit.

Summary of Decision: The appeal fails. An LDC is not issued.

Procedural matter

1. The appellant, Mr Mackay, made an application for an award of costs against the Council. That is the subject of a separate decision.

Scope of the application and appeal

2. This was an application for a Certificate of Lawful Use made under s.192(1)(a) of the Act. It was an application to the Council to determine whether the use described in the application would be lawful if instituted or begun at the time of the application.

3. No. 73 The Crescent, Stockport, is a large detached dwelling set amongst similar houses. The Council confirmed the appellant's statement that the lawful use of No. 73 was as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987; Class C3(a).

4. The application for a certificate of lawfulness proposed the use of No. 73 as a dwellinghouse for not more than six persons living as a family unit. That does no more than describe a Class C3(b) use, a use which comes within Class 3. If that was all there was to it, such a change of use within the same Class would not be development requiring planning permission. But what the appellant wanted to find out was whether the use as a children's home, as described in part of the application, needed planning permission. The supporting information sent in with the application set out details of the intended use. So I am dealing with this appeal on the basis of the proposed use as a children's home with up to 4 resident children aged between 8 to 17 years and with 2 carers working on a shift basis being there at all times.

5. The subject of this application for the proposed use as a children's home, has started. But I must deal with the appeal as a proposed use and in accordance with legislation applicable on 9 March 2010.

Appellant's case

6. The application to the Council for a certificate of lawfulness, (LDC), was submitted by "Choices Homes for Children". Mr Mackay, for the applicant company, referred to the company operating at No. 73 as "Choices". It was a registered home providing care to young people. They offered a nurturing environment where young people were encouraged to address specific behaviours which were problematic to themselves and others. The company had been established for more than 17 years. They had an outstanding record in providing care for children throughout that period.

7. The appeal property, No. 73 The Crescent, would provide comfortable and well maintained surroundings for up to 4 young people aged between 8 and 17 years. Each would have use of this fully furnished detached house. They would have their own room, with access to a communal kitchen, living room and dining room. Two members of staff would be available all the time.

8. No. 73 had a family bathroom with a shower, a bath and a toilet. The kitchen provided facilities for cooking, making snacks and dining along with making drinks and washing and drying clothes. Choices sought to emulate the care and support a young person would normally have in a family home environment.

9. No. 73 was an established dwelling within Class C3(a) 'Dwellinghouses' Town and Country Planning (Use Classes) Order. Use Class C3(a) permitted the residential use of a property by a single person or by people living together as a family. Use Class C3(b) permitted use as a dwellinghouse by not more than six residents living together as a single household, (including a household where care is provided for residents).

10. The only difference between the use by Choices and a normal family dwelling would be that the 2 adult carers would not reside at No. 73 permanently. They would instead rotate on a shift basis with other Choices staff every 2 days. But there would be 2 staff at No. 73 at all times.

11. The main consideration for the appeal decision was whether the manner of the carers living at No. 73 would mean the use would fall within Use Class C2 'Residential Institutions' to provide to people in need of care. It was accepted the point was debatable. The Council said the intended use fell within a C2 use. But, as proposed to be carried out, it would be tantamount to the same operation as a C3 use. As such, the appeal should succeed and a certificate of lawfulness should be issued.

Council's case

12. The Council said the lawful use of No. 73 The Crescent was a dwellinghouse within Class C3 of the amended Order; C3(a). But the use of No. 73 as a children's home would not fall within Class C3. It would be a Class C2 use.

13. The Council's inspection of No. 73 showed the appeal use had started. They looked to see if the use had intensified to such an extent as to amount to a material change from that of a normal household. They said there was a fire

alarm panel on the ground floor as well as a health and safety notice. There was an office and a bedroom for use by residential carers. The office comprised filing cabinets, a safe, 2 desks, computers, sofa beds and an easy chair. That room had a lock on it. All the bedrooms had door locks.

14. The Council said they were aware that the police had been asked to attend No. 73 on several occasions since the use started. They said the use of No. 73 as a children's home was likely see an increase in coming and goings from the premises, materially intensifying the use. Those factors clearly demonstrated the materiality of the use. It confirmed that planning permission was required for a change of use.

Reasons for decision

15. As I indicated earlier, I must determine this appeal on the basis of legislation applicable at the time of the s.191 application and, in particular, the Town and Country Planning (Use Classes) Order 1995, without considering the amendments to that Order which came into force later in 2010. Most pertinent, therefore, is Statutory Instrument 2005/84, which amended the Town & Country Planning (Use Classes) Order 1987, and came into force on 21 April 2005 and by Statutory Instrument 2005/85. Guidance on this legislation came in ODPM Circular 03/2005. (I note, however, that changes after March 2010 would not have materially affected the appeal proposal. For example, post - 9 March 2010 amendments changed the description of uses similar to the appeal application: Class C3: Dwellinghouses, included use as a dwellinghouse by …. (b) not more than six residents living together as a single household where care is provided for residents. Later, CLG Circular 08/2010 of November 2010, which replaced Circular 05/2010 of 31 March 2010, advised that Class C3: Dwellinghouses consists of 3 parts: (including) C3(b): those living together as a single household and receiving care, (the limit for C3(b) was no more than six people)).

16. I inspected the house at No. 73 The Crescent on 9 November 2010. I bear in mind that the appeal before me seeks to discover whether the use as proposed in the 9 March 2010 s.191(a) application would have been lawful on that day. Nevertheless, I think it reasonable to consider the layout as I saw it to help assess the nature of the then proposal.

17. My inspection of the appeal property showed it to be a large, well furnished and decorated house. There was a room used as an office, a large fully equipped kitchen, a lounge, dining area and w.c. on the ground floor. There were 4 bedrooms and a bathroom on the first floor. There was another bedroom with an en-suite bathroom on the second floor. The top floor bedroom was for use by a carer; the 4 first floor bedrooms were separate rooms for the resident children.

18. The lawful use of No. 73 is as a single family dwelling, a use within Class C3(a) of the Order. There is no limit on the number of members of a single household. Also within Class C3, C3(b) was then defined as "use as a dwellinghouse by not more than six residents living together as a single household, (including a household where care is provided for residents.)". So, if the then proposed use of No. 73 The Crescent fell within that Class then, by virtue of Article 3(1) of the Order, that change would not have been development requiring planning permission.

19. In my view, the decision on that point turns on whether the children could live together as a household. If not, would the carers who occupy No. 73 do so as

residents who form part of a household? I also look at whether a change of use class would itself amount to a material change of use of the property.

20. The Council had pointed to the case of *North Devon District Council v The First Secretary of State and Southern Childcare QBD 30.1.03 Collins J [2003] JPL 1191*. In that, the Court said that 2 children aged between 10 and 17, supported by non-resident carers, could not constitute a household for the purposes of Class C3(b). Collins J said a household needed more than just children, as 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 … 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.".

21. In *North Devon* there were carers on the property at all times. But they came and went. They were not residents of the house. They lived elsewhere. *North Devon* decided that carers who provided 24 hour care but were not resident could not be regarded as living together in a household. As Circular 13/87 indicated, what was required was residential care with a carer living in full time, and looking after those in the premises who otherwise would be unable to live as a household. The concept of living together as a household meant that a proper functioning household must exist. It meant the children and a carer must reside in the premises. Otherwise, the use would clearly fall in Class C2.

22. I consider that to be the case here. That view is reinforced by the proposed manner of occupation of No. 73. In *North Devon*, the Judge said that the children could not be said to be a household, that is, not unless they were looked after by adults. It was accepted that the 2 carers at No. 73 would not reside at No. 73 permanently. They were to rotate on a shift basis every 2 days with other Choices staff. So, whilst there would be 2 staff at No. 73 at all times to care for up to 4 young persons, they could not be said to be residents living together with the children as a single household. The children could not be expected to look after themselves. The carers were to have use of an en-suite bedroom on the top floor. At night, one would be on duty, the other asleep. As they were to alternate with colleagues every 2 days, they could not be said to intend to live on the premises. No. 73 would not be their home. Nor could it be said it would be their temporary home, as might be the case with the children, who could be there for a matter of weeks or months. While the children would be resident at No. 73, it would be their home. The same could not be said of the carers. In my view, this manner of intended use would fall outside Class C3(b).

23. The appellant questioned the Council's reliance on an appeal decision ref: APP/K0615/X/05/2004825, at Briar Cottage, Bickerton. He said in that case, the Inspector had said: "I consider the fact that the carers are not resident would not result in the proposed use of Briar Cottage being materially different in character to its lawful use as a as a dwellinghouse.". There, however, it is evident to me that the Inspector was considering whether the actual use of Briar Cottage, which he had found to be a Class 2 use, was materially different to its the lawful Class 3 use. The Inspector in the Briar Cottage case had followed Collins J in *North Devon* where the Judge had said the Inspector in *North Devon* had been wrong to regard the use as falling in Class C3(b) rather than C2. Class C3 required at least one resident carer together with those cared for. Nevertheless, on the particular facts of the case, the Inspector in *North Devon* had been correct to

decide that there had been no material change of use, and that the use was lawful. The Briar Cottage decision closely followed *North Devon*.

24. That brings me to the consideration in this instance, as to whether, even where the proposed use of No. 73 is within Class C2, that change of use from a Class C3(a) use would not amount to a material change of use. In *North Devon*, Collins J said; "Although it may sound somewhat illogical, it is accepted …… that, notwithstanding that this may fall within Class C2 rather than Class C3, nonetheless planning permission may not be required if the change of use was not a material change of use.", I need to look at the question of the materiality of the change of use of No. 73 The Crescent. In *North Devon*, the Judge went on to say: "I am bound to say that if an Inspector is satisfied that the use falls within C2 rather than C3, then it would appear that there is prima facie a change of use. Nonetheless, the Inspector is entitled, as indeed are the local planning authority, to consider whether that change of use was material. It will only be material if, as a matter of fact and degree in the circumstances of an individual case, the change of use was material.". *North Devon* was an s.191 application appeal as here. But some reliance was made on evidence of the actual use, rather than only on details of the proposed use. That seems to me to be reasonable, if the actual use correctly reflects that applied for.

25. The Council said the use of No. 73 as a children's home was materially different to use as a Class C3(a) residential use. They pointed to the fire alarm panel, health and safety notice, lockable office and other rooms, suggesting aspects more akin to institutional, rather than normal family home, life. The formal organisation of the business tends to support that. Even more pertinent, in my view, is the likely change in activity in the immediate vicinity of the property. Shift changes for carers are likely to see between 3 and 4 carers briefly in No. 73. There would be more comings and goings of cars and the people carriers referred to by the appellant than might be expected in a normal domestic household. Residential use of the property by troubled children could bring more disturbance than would most family homes. The reference to the police making visits to see children also suggests the nature of the use of No. 73 is not that of a normal domestic use. Numerous local residents had no doubt that the character of the use of No. 73 had changed. All these factors, cumulatively, lead me to conclude that a material change of use of No. 73 would occur as a result of running it as a children's home as set out by the appellant.

26. Had I found the proposed use of No. 73 to be lawful, that would have been lawful only on the date of the application. Subsequently, any change in use from a Class C3(a) to another use would have to be examined against relevant legislation applicable at that time and the nature of the use.

FORMAL DECISION

27. A Certificate of Lawful Use for the use of the property at No. 73 The Crescent, Stockport SK3 8SL as a Children's Home for up to 4 young people and 2 carers is not issued.

John Whalley

INSPECTOR