



PLANNING COMMITTEE

03 September 2015

REPORT OF HEAD OF PLANNING AND BUILDING CONTROL

The Hawthorns, Erdington Road, Aldridge
Formerly Baytree House

1.0 PURPOSE OF REPORT

- 1.1 To request authority to take planning enforcement action in respect of the carrying out of building operations without the required planning permission.
- 1.2 To request authority to take planning enforcement action in the event that the unlawful building is put into use for purposes otherwise than those falling within Planning Use Class C2 as currently being advertised by the operator of the building.

2.0 RECOMMENDATIONS

- 2.1 **To authorise the Head of Planning and Building Control to issue an Enforcement Notice** under the Town and Country Planning Act 1990 (as amended), to require remedial actions to be undertaken as shown below in 2.4.
- 2.2 **To authorise the Head of Planning and Building Control to institute prosecution proceedings** in the event of non-compliance with an Enforcement Notice or the non-return of Requisitions for Information or a Planning Contravention Notice; and the decision as to the institution of Injunctive proceedings in the event of a continuing breach of planning control.
- 2.3 **To authorise the Head of Planning and Building Control to institute prosecution proceedings** in the event of non-compliance with an Enforcement Notice or the non-return of Requisitions for Information or a Planning Contravention Notice; and the decision as to the institution of Injunctive proceedings in the event of a continuing breach of planning control.
- 2.4 **To authorise the Head of Planning and Building Control, to amend, add to, or delete from the wording** set out below stating the nature of the breaches, the reasons for taking enforcement action, the requirements of the Notice, or the boundaries of the site, in the interests of ensuring that accurate and up to date notices are served.

Details of the Enforcement Notice

The Breach of Planning Control:

Without the required planning permission, the construction of the development

Steps required to remedy the breach:

- Demolish the unlawful building and remove from the land all rubble and other materials
- Restore the land to its previous condition.

Period for compliance:

3 months

Reason for taking Enforcement Action:

The building now on site has replaced the former Baytree House Care Home. Application 12/1400/FL was submitted by the Restful Homes Group and the description of development was 'Demolition of existing day centre, construction of 3 storey care home with associated car parking and roof garden'. The care home was proposed with 70 bedrooms and permission was issued on 24 December 2012

During the construction of the new building, application 14/0467/MA was submitted by Restful Homes Group to secure approval for a number of small amendments to the layout of the property. The decision was approved on 25 April 2014.

In line with the description of development on the original 2012 application both this proposal and the subsequent amendment were considered for the use of the building as a care home falling within use class C2.

The built development does not accord with the approved plans and as such is considered unlawful. The case of *Sage v SSE* [2003] UKHL established that if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the whole operation is unlawful.

In issuing an Enforcement Notice for the building operations planning officers will need to seek the removal of the building in its entirety as it does not benefit from planning permission. It may be the case, however, that there are lesser steps which could be taken to make the building conform with the approved plans and the operator of the building may wish to discuss this with planning officers.

The use of the building is a secondary, but equally important, issue. Planning permission was granted for a C2 care home and not for 70 individual self contained flats. The distinction is important in planning terms.

Following receipt of comments from the public and local Members that the building was not being used as a care home, visits have been undertaken by officers including a detailed assessment on 2nd September.

The building as now constructed and fitted out though consists of the 70 units (as built) to be entirely self-contained, with en-suite facilities and kitchenettes described as tea-making areas by the owners, lockable front doors and boxes on the front of the flats within which messages, small items and letters can be deposited. Although letterboxes are attached to the front of each door these are fake and there is no opening through which letters can be posted.

The apartments are not purchased from the company but rented on a monthly basis. A copy of an example agreement has been submitted to the Council. The agreement limits occupation to a maximum of two people and includes the following:

- Insurance for the building but not contents
- Heating and hot water
- Lighting
- Water and drainage
- Weekly housekeeping including laundry of bedding and towels
- Emergency call system
- Ad-hoc transport to Aldridge Town Centre
- Three meals a day to be taken at set times
- The ability for meals prepared by the Hawthorns to be consumed in residents rooms
- A wellbeing assessment prior to arrival at the Hawthorns to identify care and support needs
- Support to assist the occupier to maintain independent daily living
- The provision of scheduled regular social, wellbeing and lifestyle activities

The following are excluded:

- Nursing and health care services
- Television Licence
- Any telephone/ fax or other telecommunication facilities
- Insurance of the occupiers personal belongings.

The owners have admitted that they are not intending to operate as Care Quality Commission (CQC) qualified premises and there is to be no 24hr nurse on site. The owner's have confirmed that no registered domiciliary, respite or dementia is to be provided. The operators do provide assistance to daily living but this is not quantified in terms of minimum levels of provision over a set period of time.

A Planning Contravention Notice was served on the operators on the 2nd September and a response was received on 11th September. It confirms that the property is owned by SIPL Saints Propco S.A.R.L. in Luxembourg and is leased to the operators Avery Homes RH Ltd. of Northampton.

The property is occupied by seven residents of which one needs District Nurse service and three need personal care from an external provider. Although all seven are indicated as needing assisted living care, none of the residents need dementia or respite care.

For reference, the relevant classes under consideration in this matter can be summarised as follows:

C2 Residential institutions - Residential care homes, hospitals, nursing homes, boarding schools, residential colleges and training centres.

C2A Secure Residential Institution - Use for a provision of secure residential accommodation, including use as a prison.

C3 Dwellinghouses - this class is formed of 3 parts:

C3(a) covers use by a single person or a family (a couple whether married or not, a person related to one another with members of the family of one of the couple to be treated as members of the family of the other), an employer and certain domestic employees (such as an au pair, nanny, nurse, governess, servant, chauffeur, gardener, secretary and personal assistant), a carer and the person receiving the care and a foster parent and foster child.

C3(b): up to six people living together as a single household and receiving care e.g. supported housing schemes such as those for people with learning disabilities or mental health problems.

C3(c) allows for groups of people (up to six) living together as a single household. This allows for those groupings that do not fall within the C4 HMO definition, but which fell within the previous C3 use class, to be provided for i.e. a small religious community may fall into this section as could a homeowner who is living with a lodger.

Sui-Generis* A use on its own to which any change of use will require planning permission: Theatres, Scrap yards, Nightclubs, Petrol stations, Launderettes, Taxi businesses, Amusement centres, Casinos, Large HMOs

Class C2 of the Use Classes Order, includes residential school college or training centre where individual lockable rooms, perhaps with two or three sharing, perhaps with shared or individual bathrooms and kitchen facilities, are occupied for annual or termly fees with classes and activities (entertainment) in common areas and meals in a refectory.

Because of the close nature of the C2 and C3 uses, Officers have obtained counsel's opinion on the specific nature of the operation being undertaken at the property. The advice is as follows:

18. The use permitted by the 2012 permission is clear: the development authorised is a Care Home and that description is a clear C2 use recognised in planning law and is distinct from and mutually exclusive with C3 use as dwelling.

In light of this advice, it is therefore considered that planning application 12/1400/FL has not been implemented in accordance with the approved plans and description of development as set out on the application form.

3.0 FINANCIAL IMPLICATIONS

An appeal against an enforcement notice could be subject to an application for a full or partial award of the appellant's costs in making an appeal if it was considered that the Council had acted unreasonably. Planning applications may also be submitted that require an application fee.

4.0 **POLICY IMPLICATIONS**

The report recommends enforcement action in order to seek compliance with planning policies. The following planning policies are relevant in this case:

Planning law requires that planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. The National Planning Policy Framework (NPPF) is a material consideration in planning decisions and sets out that *"...due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)"*.

National Planning Policy Framework (NPPF)

The NPPF sets out the Government's position on the role of the planning system in both plan-making and decision-taking. It states that the purpose of the planning system is to contribute to the achievement of sustainable development, in economic, social and environmental terms, and it emphasises a *"presumption in favour of sustainable development"*.

It is based on 12 core planning principles. Those particularly relevant in this case are:

- Always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings
- Take account of the different roles and character of different areas, promoting the vitality of our main urban areas
- Contribute to conserving and enhancing the natural environment

The NPPF also states that effective enforcement action is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary and local planning authorities should act proportionately in responding to suspected breaches of planning control.

The Development Plan

The Black Country Core Strategy (BCCS)

The relevant policies are:

CSP4 – Seeks to ensure that developments enhances place making
ENV1 seeks to ensure that protected species are not harmed by development
ENV2 sets out that development will preserve and, where appropriate, enhance local character and those aspects of the historic environment
ENV3 sets out the criteria for design quality.
TRAN5 Sets out the requirement for development to focus on moving away from the reliance on the private car.

It is considered in this case that the relevant provisions of the BCCS can be given full weight as they are consistent with the NPPF.

Saved Policies of Walsall's Unitary Development Plan (UDP)

The relevant policies are:

GP2 expects development to make a positive contribution to the environment and considers

(II) the susceptibility to pollution of any kind as an adverse impact which would not be permitted, and VII. Adequacy of access will be taken into account.

ENV10 states that development which may give rise to pollution such as noise and smell will only be permitted where it would not have an adverse effect on adjoining uses/potential uses.

ENV14 sets out to encourage the reuse and redevelopment of previously developed land

ENV18 seeks to ensure the positive management of existing trees as part of development proposals. Development will not be permitted unless the desirability of the proposed development significantly outweighs the ecological or amenity value of the woodland, trees or hedgerows.

ENV23 expects that development will take account of the natural environment and protected species.

ENV27 states that development will not be permitted that adversely affect the setting of Listed Buildings.

ENV29 states that development should preserve or enhance the character and appearance of a Conservation Area

ENV32 states that poorly designed proposals which fail to take account of the context or surroundings will not be permitted.

ENV33 seeks to ensure that developments of care homes provide appropriate features where residents would benefit from the sensory stimulation provided by a landscape scheme

H6 highlights the criteria for dealing with care homes and homes for the elderly. These include:

- The provision of nursing homes and homes for the elderly will normally be appropriate in residential and mixed residential/commercial areas.
- All car parking should usually be provided on the frontage of the property, and be landscaped so as not to be obtrusive in the street scene.
- In determining applications the Council will have regard to the impact on existing landscape features, the extent to which they will be retained, and the nature of new landscaping proposed, in respect of the contribution made to ensuring privacy; reducing the impact of parking and turning areas; and to the environment in general.

T7 and T13 seeks to ensure that car parking and servicing is well laid out and car parking is provided for at an appropriate level.

AL3 – The Croft - The Croft is a valuable urban open space providing a “village green” close to the heart of the centre. It includes a children’s play area and also a number of important pedestrian routes linking the centre to nearby residential areas

It is considered in this case that the relevant provisions of the UDP can be given full weight as they are consistent with the NPPF.

Supplementary Planning Documents (SPD)

Where relevant BCCS and UDP policies are consistent with the NPPF, the related SPDs will also be consistent provided they are applied in a manner consistent with NPPF policy. The relevant SPDs are:

Designing Walsall (2008)

Conserving Walsall's Natural Environment (2008)

5.0 LEGAL IMPLICATIONS

Pursuant to section 171A (a) of the Town and Country Planning Act 1990 (as amended) the carrying out development without the required planning permission constitutes a breach of planning control. Section 171B adds that where there has been a breach of planning control such as a change of use, no enforcement action may be taken after the end of the period of ten years, beginning from the date the breach commenced. It appears that the breach of planning control occurring at this site commenced within the last ten years.

For the reasons set out in this report, it is considered expedient to take enforcement action. Accordingly, authority is sought to serve an enforcement notice, pursuant to section 172 of the Town and Country Planning Act 1990.

The breach of planning control is set out in this report. Members must decide whether it is expedient for the enforcement notice to be issued, taking into account the contents of this report.

Non-compliance with an Enforcement Notice constitutes an offence. In the event of non-compliance the Council may instigate legal proceedings. The Council may also take direct action to carry out works and recover the costs of those works from the person on whom the Enforcement Notice was served. Any person on whom an Enforcement Notice is served has a right of appeal to the Secretary of State.

In the event of non-compliance with a Requisition for Information or non-compliance with a Planning Contravention Notice an offence is also committed and the Council may prosecute.

6.0 EQUAL OPPORTUNITY IMPLICATIONS

Article 8 of the Convention for the Protection of Human Rights and Article 1 of the First Protocol to the Convention state that a person is entitled to the right to respect for private and family life, and the peaceful enjoyment of his/her property. However, these rights are qualified in that they must be set against the general interest and the protection of the rights and freedoms of others. In this case, the wider impact of the use and the appearance of the land overrules the owner's rights.

7.0 ENVIRONMENTAL IMPACT

The report seeks enforcement action to remedy adverse environmental impacts.

8.0 HUMAN RIGHTS LEGISLATION

Section 6 of The Human Rights Act 1998 relates to Acts by Local Authorities. The Act states in subsection (1) that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. In this instance the act under consideration by the Authority is the closure of the premises and the home occupied by residents some of whom may have care needs.

Subsection (1) does not apply to an act by the Authority if (a) as the result of other primary legislation the Authority could not have acted in any other way or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

In this instance the Authority is seeking to take enforcement action against an unauthorised change of use of a building in accordance with the development plan unless there are material considerations that indicate otherwise in accordance with section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004.

In considering the needs of the residents who may be displaced if the enforcement action is ultimately found to be successful, it is noted that the residents do not benefit from extended secured tenancies with notice periods of only 30 days being in place. The draft contract of which the Council has seen a copy, does provide in paragraph 4.1 for extended periods of 60 or 90 days and this is noted.

Given the personal circumstances that may be in place with each resident when any enforcement action could be instigated, it is recommended that a personal assessment be undertaken of each person's needs prior to action to establish if alternative accommodation meeting their requirements can be secured. Until such time that all residents can safely be re-housed in a suitable location, any enforcement action should be put into abeyance.

9.0 **WARD(S) AFFECTED**

Aldridge Central and South

10.0 **CONSULTEES**

None

11.0 **CONTACT OFFICER**

Shawn Fleet

Development Management: 01922 650453

11.0 **BACKGROUND PAPERS**

Enforcement file not published

David Elsworthy

Head of Planning and Building Control

Planning Committee
02 September 2015

12.0 BACKGROUND AND REPORT DETAIL

- 12.1 The site is located on the corner of Erdington Road and Little Aston Road. Baytree House comprised a former Elderly Persons Home and Social Services Area Office. The former Elderly Persons Home was constructed in the 1970's and was a 2 storey building with 24 bedrooms and 25 no. car parking spaces on the site.
- 12.2 Pre application discussions were held with the applicants, the Restful Homes Group about the redevelopment of the site as a care home and the subsequent application 12/1400/FL was submitted describing the development as a care home. Approval for the development was granted on 24 December 2012.
- 12.3 In the planning officer's report to 13th December 2012 planning committee, the issue of car parking provision was considered. Car parking provision was sought at a maximum of 1 space per 2 beds which would require a maximum of 35 spaces plus 3.5 disabled spaces. The scheme proposed 30 spaces and a provision of 4 disabled spaces. As the application site was in a sustainable location within walking distance of Aldridge Centre, the slight shortfall in the level of car parking was deemed appropriate.
- 12.4 As the development was being constructed, application 14/0467/MA was submitted by the Restful Homes Group to secure approval for a number of small amendments to the layout of the property. The decision was approved on 25 April 2014. One of the changes included a revised parking layout to include 35 parking spaces plus 4 disabled and a drop off area.
- 12.5 As work on site was drawing to a close, notice was displayed on the front of the property advertising the property as retirement apartments. This was brought to the attention of the Local Planning Authority by local residents and the ward Members. Enquiries were made of the operator about the nature of the business and it transpired that the site had been acquired by the Hawthorn Group from the original applicants.
- 12.6 The Hawthorn Group confirmed that they were marketing the apartments and whilst there would be some communal facilities notably the communal restaurant and recreational facilities, each room would be independent. Furthermore, the operator confirmed the premises would not be registered with the Care Quality Commission (CQC).
- 12.7 The operators of the Hawthorns have confirmed that although they do not provide care directly this is available through registered domiciliary providers who come to the property.

- 12.8 In terms of the offer being presented, The Hawthorns has sought to move away from the traditional care home arrangements following the Winterbourne scandal in Bristol. They are now seeking to present themselves as retirement facilities. The operators are seeking to provide accommodation to a range of residents from early retirees through to those in later life. This arrangement has been referred to by the company as the continuum of care. The average age for their occupiers has been calculated as being 84.
- 12.9 Two competing companies Sunrise Senior Living and Signature Senior Lifestyle have been cited by the Hawthorns as organisations providing similar care. Whilst the outward appearance of these facilities is similar, both of these companies are registered with the Care Quality Commission. Accordingly they are able to deliver registered care directly to their residents which the Hawthorns is unable to do.
- 12.10 The rental agreement provides for accommodation plus three meals, concierge service, 24 hour assistance from staff through monitoring systems and nurse call system. Whilst most of these facilities are available within the premises, the nurse call system is not provided on site and needs to be called in. The operators do state however that there is no requirement for a care home to provide 24 hour care and this is noted.
- 12.11 As part of the unapproved amendments, the operators have changes the use of the nursing stations and these are now being used as general offices.
- 12.12 The operators have highlighted the fact that the development has been constructed as a nursing home in respect of the requirements of the Building Regulations in that it does not comply with the Building Regulations in respect of Parts B: Fire; E: Acoustics and F: Ventilation which would be required for independent dwellings. This has been confirmed through discussion with the Councils Building Control service.
- 12.13 Nevertheless, whilst the building may have been constructed to one design standard this does not prevent the use of the building for another use. If it is established that the building is being used as House in Multiple Occupation (HMO) and not a C2 care home then a breach of the Building Regulations will be established which will need to be resolved through action undertaken using the relevant legislation.
- 12.14 It has been confirmed through legal opinion that the use permitted by the 2012 permission is clear: the development authorised is a Care Home and that description is a clear C2 use recognised in planning law and is distinct from and mutually exclusive with HMO use.
- 12.15 On this basis therefore, the property is not a care home but a block of independent living units and that the parking provision on site is not sufficient for that purpose.
- 12.16 There is extensive case law on the meaning of “dwelling house” but for the purposes of this case, reference is made to the definition in the judgement of

MrCullough in *Gravesham B.C. v Secretary of State for Environment* [1982] 47 P&CR 142 “ The characteristic common to those which were dwelling houses were ‘*all are buildings that ordinarily afford the facilities required for day-to-day private domestic existence*’.

12.17 The case established that it was not solely the building which should be considered, so that it ordinarily afforded the facilities required for day to day private domestic existence, but it was also necessary that it should be used as such.

12.18 The flats here are self-contained and would each be occupied by a single household, within the meaning of section 258 of the 2004 Act (and corresponding regulations at SI 2006/373). Whilst it would be possible for a resident to share in activities and meals with others in the building, it would also be feasible for an individual or couple to live in near isolation from their neighbours only meeting as they passed along the corridors and through the entrance lobby to the outside. It is recognised that the kitchenettes are limited in their scope to prepare meals especially hot food and whilst there is no oven or hob in place, space exists to provide a microwave or combination oven with microwave and grill features.

12.19 In order to assist planning officers in assessing the distinction between use classes C2 and C3 or HMO use in circumstances such as these, legal opinion has been secured. Notably, Counsel has referred the recent case of *Harris v Berkeley* [2014] EWHC 3355. Within this case, it was noted by Morgan J. that:

“I next consider the use to which the physical thing may be put. The answer, based on the terms of the planning permission, is that this physical thing may be used for the use described within class C2 and may not be used for the use described within class C3. This distinction between C2 and C3 is a distinction made for planning purposes but when one considers the permitted use planning law is all important. The relevant part of class C2 is the first part of class C2 which refers to the physical thing being used for the provision of residential accommodation and care to people in need of care. The units therefore can be used for the provision of residential accommodation. They cannot be used for the provision of residential accommodation absent the provision of care. Residential accommodation must be provided as part of a composite. The composite provision has two elements: one is residential accommodation, the other is care.”

12.20 It is the closing sentence of this paragraph is of particular note, the need for a composite of both accommodation and care, not the singular provision of accommodation which is the offer available to occupiers of the Hawthorns.

12.21 The applicants have brought forward other case law which they believe supports their position. The case of *LeeLamb Homes Ltd v Secretary of State for Communities and Local Government and Maldon DC* [2009] EWHC 1926 (Admin) has been cited. In this instance, the application was refused by the Council and the subsequent appeal dismissed. Upon application to the courts, the Inspectors decision was quashed on the basis the Inspector misdirected

himself by stating that care implied the occupants should have had existing medical conditions requiring extra care. The requirement for existing need for extra care was deemed not a pre-requisite.

- 12.22 Following this it is argued by the Hawthorns that it is generally accepted that if residents are over 55 and in need of generally two hours of care a week (which can be in the form of basic help with cleaning and shopping) then the use of the property will fall within Use Class C2
- 12.23 This is a position which is not accepted by the Council. Whilst it is accepted the Inspector erred in the case of the LeeLamb Homes Ltd decision assuming it is necessary for residents to have a pre-existing condition, the Council approaches this matter from the nature of the offer at the premises. In this respect, it is argued that the scope of provision is insufficient to provide an appropriate level of care to support the role of the building as a care home.
- 12.24 In the matter of the High Court Case Mr J Harris & Anor v Berkeley (Strategic Land) Ltd & Anor [2014] EWHC 3355 (Ch), mentioned by the Hawthorns, consideration was given to the nature of care as part of a contractual dispute between parties. Mr Justice Morgan stated “The relevant part of Class C2 is the first part of Class C2 which refers to the physical thing being used for the provision of residential accommodation and care to people in need of care. The units therefore can be used for the provision of residential accommodation. They cannot be used for the provision of residential accommodation absent the provision of care. Residential accommodation must be provided as part of a composite. The composite provision has two elements: one is residential accommodation, the other is care.”

It is therefore argued by the occupiers that if a care home is providing residential accommodation and residents are being provided with a package of care then the use will fall within use class C2. Furthermore, they argue that in looking at whether a premises falls within use class C3(b) consideration needs to be given to the level of care provided and if this amounts to a level of care that the occupier cannot realistically form a care home operating and functioning in the way that a normal household would with the division of tasks between the resident and their career then the property must fall within Class C2.

- 12.25 In the case of the Hawthorns, it is claimed that the residents are not operating as a single household. They are not capable of undertaking the tasks associated with the running and functioning of a home. Therefore they could not be considered to fall within Class C3. As stated, the rooms do not provide full living facilities and therefore they cannot be considered to be independent dwelling houses within Class C3.
- 12.26 Guidance on the distinction between Classes C2 and C3 is limited. The operators have drawn reference to the Housing Learning and Improvement Network who have produced the document “Planning Use Classes and Extra Care Housing”, dated November 2011. The position it sets out on the distinction between C2 and C3 in the opinion of Avery remains accurate today

and supports the most up to date case law. It states that the following points will tend to point towards a C2 development:

- The units are not for sale on the open market, but are restricted by a s.106 obligation requiring occupants to be either in need of a specified level of care or in receipt of a specified minimum package of care services and above a specified minimum age;
- Applying eligibility criteria and undertaking an initial assessment of care needs with regular reviews and monitoring can enforce this;
- Given the additional costs involved in paying for care and accommodation, it makes sense for the units to be occupied by those in genuine need of care;
- The distinguishing feature of C2 establishments is the provision of care to those who need it. Where units are restricted to those in need of care by reason of old age, this would fall within the definition of C2;
- The provision of care is directly linked to the care unit, which cannot be occupied unless certain criteria are met;
- The involvement of a registered CQC provider in the delivery of care
- The availability of care rather than an absolute requirement to receive a pre-determined package may be sufficient, especially relative to older persons where a degree of future inevitable decline can reasonably be built into the model.

- 12.27 Taking this evidence on board, officers are of the view the criteria set out above have not been met to a sufficient degree in this instance. Firstly, there is no mechanism in place to control the nature of occupancy. Whilst a small element of care is provided within the contract and an assessment of a person's needs is made prior to occupation there is no constraint precluding individuals who are in good health with no care requirement. The main constraint to occupation appears to be one of social attitude based on the fact that the majority of residents who have chosen to live there are 70 plus. Over time there are no constraints to this changing especially if the operators begin to focus their marketing on younger tenants in their 50's.
- 12.28 Furthermore, there are no specific eligibility criteria on occupation. Taking note of the LeeLamb Homes Ltd. case it is accepted these are not essential but the existence of such criteria would support a claim that the property is a care home and not a residential unit.
- 12.29 In addition, the absence of on-site registered care provision which is managed by the CQC which is not included in the monthly charges suggests the operation of the facility is not C2 in nature
- 12.30 It is accepted there is a degree of care provided within the building but this is limited in scope and not sufficient in extent to support the C2 designation.
- 12.31 The legal opinion sought by the Council is of the view that the development is unlikely to comprise a care home but is more likely to be the provision of 70 Class C3 dwellings.
- 12.32 With the benefit of additional survey information, it is considered the premises is actually operating as a house in multiple occupation. Whilst this is a long

way removed from the more traditional form of HMO which comprises of a large but simply furnished property for the benefit of itinerant workers, short term residents or non-homeowners, the key elements of a HMO are in place. There is a central entrance point for the building, shared parking facilities, private rooms, shared recreation facilities and common dining areas. The provision of the cleaning and catering facilities go beyond the basic elements of a HMO but these are optional.

- 12.33 Therefore, as things stand there is clearly sufficient reason for the Council to consider enforcement action.
- 12.34 In terms of the harm arising from the unauthorised change of use, this is reflected in the parking provision for the property. The original application at that time was assessed on the basis of a care operation for which the parking policy T13 required only a low number of parking spaces, 35. If the development were now to be considered sui generis then parking provision would be assessed on the exact nature of the operation with a requirement for 70 spaces.
- 12.35 The shortfall in provision is likely to lead to overspill parking on the neighbouring roads many of which are either narrow or busy resulting in congestion and an impact on highway safety for road users and pedestrians.
- 12.36 The ongoing internal works which the owners are aware require planning approval are sufficient to justify enforcement action in breach of Condition 11 of 12/1400/FL (either by Breach of Condition Notice or a section 172 enforcement notice). An injunction under section 197B may be justified if the developer does not provide adequate reassurances that an application which addresses the use situation is not submitted and approved prior to the marketing of the units.
- 12.37 Consideration has been given to the proportionality of enforcement action. Whilst this affects the whole property it is noted that the harm arising from the short fall in parking provision is generated from all the units in the building and not one section. Accordingly, it is considered any enforcement action needs to address the property as a whole.
- 12.38 Section 173 of the Town and Country Planning Act 1990 sets out the contents and effect of an enforcement notice.
- 12.39 In view of the above, it is considered expedient that enforcement action is now taken through the issue of an Enforcement Notice to rectify the breach of planning control. Authorisation is also sought to institute injunction proceedings in respect of the intended use of the property; and prosecution proceedings should any Requisition for Information, Planning Contravention Notice or Enforcement Notice not be complied with and to institute injunctive proceedings if required in the event of a continuing breach of planning control.

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