



PLANNING COMMITTEE

28 April 2016

REPORT OF HEAD OF PLANNING ENVIRONMENT AND TRANSPORT

The Hawthorns, Erdington Road, Aldridge Formerly Baytree House

1.0 PURPOSE OF REPORT

- 1.0 To update Members on progress since the decision of the planning committee at the meeting of 3rd September to progress with Enforcement Action at the Hawthorns, Erdington Road, Aldridge.
- 1.1 Following the resolution of Committee, the owners of the property, Avery Healthcare have sought legal opinion to establish that the use of the property falls within use class C2 and is not being used for an alternative purpose. Officers have given this opinion consideration and remain of the view that the property is not being used in accordance with the description of development for the approved scheme reference 12/1400/FL.
- 1.2 Discussions continued with the owners solicitors into December last year but it was not proven to officers that there were sufficient grounds for reviewing the committee decision. Officers agreed to defer the serving of the notice just in advance of Christmas for the welfare of the residents to ensure anxiety about possible eviction was avoided during the holiday period.
- 1.3 Following the Christmas period Officers sought further legal advice on the appropriateness of the enforcement action in light of new case law and evidence on the role and operation of C2 care homes. This included promotional information published by the Hawthorns advertising short stay breaks.
- 1.4 In the absence of further contact from the owners or their solicitors on the matter, officers wrote to the owners on 31st March advising that the Enforcement Notice would be served the week commencing the 18th April.
- 1.5 In advance of that date, the owners recommenced dialogue with the Council and have sought a meeting where they believe addition information can be provided to show that the manner in which they operate the premises is in compliance with the description of development. This meeting has been scheduled for Monday 25th April. They have also provided written confirmation to show that the property has now been registered by the Quality Care Commission (CQC) for the provision of care facilities. Whilst this indicates that some care is being provided at the property, officers remain of the view at the current time that this is not the principle purpose of the property. The owners have indicated that they have instructed Counsel in any defence of their position.

- 1.6 Given the approach by the owners in advance of the deadline, officers have held back from the serving of the Enforcement Notice until the outcome of the meeting.
- 1.7 An update will be provided to members at the Committee Meeting and any new evidence will be given due consideration. At the time of the preparation of this report, officers remain of the view that the recommendation to enforce remains.
- 1.8 The recommendations in the original report have been updated below to reflect the change from the former Head of Planning and Building Control to the Head of Planning, Environment and Transport and the original report presented to Committee at the meeting of 3rd September 2015 has been repeated after this report for reference.

2.0 **RECOMMENDATIONS**

- 2.1 **To authorise the Head of Planning, Environment and Transport 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, Environment and Transport to institute proceedings for an injunction** to prevent the use of the unauthorised building for purposes otherwise than as a Care Home falling within Use Class C2 of the Town and Country Planning (Use Classes) Order 1987 (as amended)
- 2.3 **To authorise the Head of Planning, Environment and Transport 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, Environment and Transport, 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:

1 month

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 building as now constructed and fitted out though consists of the 70 self-contained units, with bathrooms and kitchenettes, lockable front doors and mailboxes for use by the Royal Mail. It is intended that they be occupied via a lease. It is not clear if this will be linked to the care package or separate, save that the payment is said to cover rent, bills and three meals a day.

The owners have admitted that they are not intending to operate as Care Quality Commission (CQC) qualified premises. There will be no 24hr nurse on site but they have kept some of the facilities in place. The owner's lifestyle pages on its website indicate that no care element is to be provided, but that each room will benefit from a security cord.

Planning Officers have visited the property and taken photographs which show that each room benefits from its own secure access with a lockable door, number and letterbox. 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 70x individual self contained flats. The distinction is important in planning terms. As the building has not yet been put into use, the Council cannot issue an Enforcement Notice in relation to its use. However, authority is sought to enable planning officers to institute proceedings for an injunction to prevent occupation of the building otherwise than for the purposes of a Care Home falling within Class C2 of the Planning Use Classes Order in the event that the current marketing of the site continues.

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.

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, Planning Officers have obtained counsel's opinion on the specific nature of the operation being undertaken at the property. Counsel has confirmed that:

"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."

It is therefore clear that the construction of the building as self contained units has not served to implement planning permission 12/1400/FL (as amended). Furthermore, the intended use of the building otherwise than as a Care Home falling within Class C2 would not serve to implement the permission. The building (and the intended use of it) is therefore unlawful.

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 over-rides the owner's rights.

7.0 ENVIRONMENTAL IMPACT

The report seeks enforcement action to remedy adverse environmental impacts.

8.0 WARD(S) AFFECTED

Aldridge Central and South

9.0 CONSULTEES

None

10.0 CONTACT OFFICER

Shawn Fleet

Development Management: 01922 650453

11.0 BACKGROUND PAPERS

Enforcement file not published

Steve Pretty
Head of Planning Environment and Transport



PLANNING COMMITTEE

03 September 2015

REPORT OF HEAD OF PLANNING AND BUILDING CONTROL

The Hawthorns, Eardington 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 proceedings for an injunction** to prevent the use of the unauthorised building for purposes otherwise than as a Care Home falling within Use Class C2 of the Town and Country Planning (Use Classes) Order 1987 (as amended)
- 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.
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The building as now constructed and fitted out though consists of the 70 self-contained units, with bathrooms and kitchenettes, lockable front doors and mailboxes for use by the Royal Mail. It is intended that they be occupied via a lease. It is not clear if this will be linked to the care package or separate, save that the payment is said to cover rent, bills and three meals a day.

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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.

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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)

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Designing Walsall (2008)

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5.0 LEGAL IMPLICATIONS

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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.

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wider impact of the use and the appearance of the land over-rules the owner's rights.

7.0 ENVIRONMENTAL IMPACT

The report seeks enforcement action to remedy adverse environmental impacts.

8.0 WARD(S) AFFECTED

Aldridge Central and South

9.0 CONSULTEES

None

10.0 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 30 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 It has been confirmed by Counsel 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 C3 use as dwelling.*
- 12.8 On the basis of the marketing being carried out by Hawthorn Group the property is not a care home but a block of independent living units and the parking

provision on site is not sufficient for that purpose neither was planning permission granted for that use.

- 12.9 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 judgment 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*’.
- 12.10 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.
- 12.11 The flats here are self-contained and are being marketed on the basis that 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.
- 12.12 In order to assist planning officers in assessing the distinction between use classes C2 and C3 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.”*
- 12.13 It is the closing sentence of this paragraph which 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.
- 12.14 An argument could be levied that the development as undertaken is neither C2 or C3 but sui generis in nature meaning that it falls within a class entirely of its own. Consideration has been given to this and the outcome of the argument would in part balance on the extent and availability of care that exists both within the building or could be brought in. This would be clarified through the operation of the property.

- 12.15 Whether the activity proposed by the Hawthorn Group is in fact C3 or a sui generis use remains to be explored. However, it is clear that it is not a C2 use, the use for which planning permission was originally sought and approved in 2012. The planning 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 to be considered sui generis then parking provision would be assessed on the exact nature of the operation with the potential existing for a higher number of parking spaces to be provided. If the development were to be considered C3, a total of 70 parking spaces would be required.
- 12.16 As things stand there is clearly sufficient reason for the Council to consider enforcement steps and as a first step to put the relevant owner/developer/operators on notice of the likelihood of such action.
- 12.17 The harm arising from the use of the premises as a C3 operation will most directly manifest itself in terms of the lack of parking provision with only 35 spaces in contrast to the required 70 spaces. This is likely to lead to overspill parking on the neighbouring roads many of which are either narrow or busy including in the Aldridge Conservations Area. Should the land owner choose to submit a planning application to change the use to C3 residential use, the parking harm and lack of affordable homes and urban open space contributions would need to be considered.
- 12.18 The ongoing internal works are sufficient to justify the issue of an Enforcement Notice. An injunction under section 197B may be justified if the developer does not provide adequate reassurances that the building will be brought into use as a C2 Care Home and that the marketing of the units will be amended to reflect this.
- 12.19 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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