ARUN DISTRICT COUNCIL:A/106/08/CLP

Crawley Borough Council (R on the application of) v (1) Secretary of State for Transport & the Regions (2) Helberg (Eve) (t/a Evesleigh Group) (2004)

[2004] EWHC 160 (Admin)

Richards J

Case No: CO/4777/2003 Date: 23/01/2004

Heading: Property / Land, Local Government
Sub-heading: Town and Country Planning

Outcome: Appeal Dismissed

Richard Wald	instructed by Crawley Borough Council Legal Services for the claimant
James Strachan	instructed by Treasury Solicitors for the first defendant. Alun Alesbury instructed by Steele Raymond Solicitiors for the second defendant

Judgment Status: Given
Transcript Status: Approved

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CO/4777/2003
Neutral Citation Number: [2004] EWHC 160 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 23 January 2004

BEFORE:

MR JUSTICE RICHARDS

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THE QUEEN ON THE APPLICATION OF CRAWLEY BOROUGH COUNCIL
(CLAIMANT)

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SECRETARY OF STATE FOR TRANSPORT AND THE REGIONS
(1ST DEFENDANT)

EVE HELBERG (TRADING AS THE EVESLEIGH GROUP)
(2ND DEFENDANT)

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MR RICHARD WALD (instructed by Crawley Borough Council, Legal Services) appeared on behalf of the CLAIMANT
MR JAMES STRACHAN (instructed by Treasury Solicitor) appeared on behalf of the 1ST DEFENDANT
MR ALUN ALESBURY (instructed by Steele Raymond Solicitors) appeared on behalf of the 2ND DEFENDANT

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JUDGMENT
(As Approved by the Court)

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Judgment

1. MR JUSTICE RICHARDS: This is an application under section 288 of the Town and Country Planning Act 19900, by which Crawley Borough Council challenges the decision of an inspector appointed by the First Secretary of State, given by letter dated 8 August 2003. In that decision the inspector allowed an appeal by the Evesleigh Group, the second defendant in these proceedings, under section 195 of the 1990 Act against the refusal by the Council of a Certificate of Lawfulness under section 192 for the proposed use of premises known as Oak House, 193 Weald Drive, Crawley, for occupation for four persons between the ages of 18 and 65 with learning difficulties living as a single household.

2. Before me, the main submissions have been made by Mr Wald on behalf of the Council, and Mr Strachan on behalf of the First Secretary of State. Mr Alesbury has appeared on behalf of the second defendant to safeguard that defendant's position, but in the event has adopted Mr Strachan's submissions.

3. The property in question is a semi-detached house which was previously in use as a single dwelling, though it included an extension part of which formed a self-contained "granny annexe". The inspector, at paragraph 5 of the decision letter, described the proposed use in these terms:

> "The proposed (and now existing use) is for occupation by 4 people between the ages of 18 and 65 with learning difficulties -- the appellants are not registered to take people above or below those ages -- who will have carers there at all times. The carers do not live on the premises but a shift system is operated so that there are always two on site, even through the night."

4. The application related to the proposed use of the property, but, as is apparent from that passage, by the time of the inspector's consideration of the matter the property was in actual use for the relevant purpose. The inspector nonetheless thought it right to deal with the application as one for a proposed use and no complaint is made of his adopting that course.

5. The issue arising on the application was whether the proposed use fell within Class C3 of the Town and Country Planning (Use Classes) Order 1987. If it did, the use

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would be lawful without a separate grant of planning permission. If it did not but fell instead within Class C2, a grant of planning permission would be required if the change of use was material.

Statutory framework

6. Section 57 of the 1990 Act generally requires planning permission for the carrying out of any development of land. Section 55(1) defines development as including the making of any material change of use, subject to certain exceptions. Sub-section (2) sets out certain uses of land which will not be taken to involve development, and they include in paragraph (f): buildings or land used for the purpose of any class specified in an order made by the Secretary of State. The relevant order is the Use Classes Order 1987, to which I have already referred. Within that order, Classes C2 and C3 are described as follows:

> "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 (dwellinghouses)) ...
>
> Class C3 Dwellinghouses
>
> Use as a dwellinghouse (whether or not as a sole or main residence) —
>
> (a) by a single person or by people living together as a family, or
>
> (b) by not more than 6 residents living together as a single household (including a household where care is provided for residents)."

7. "Care" is defined in paragraph 2 of the Use Classes Order as follows:

> "'Care' means personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in Class C2 also includes the personal care of children and medical care and treatment."

8. So a change from the use of a dwellinghouse as a family home to use for not more than six residents living together as a single household (including a household where care is provided for residents) will not constitute development.

9. Guidance on the relevant classes is to be found in Department of Environment Circular 13/87. The most material paragraph is paragraph 27, which states:

> "The new dwellinghouses class groups together use as a dwellinghouse -- whether or not as a sole or main residence -- by a single person or any number of persons living together as a family, with use as a dwellinghouse by no more than 6 persons living together as a single household. The key element in the use of a dwellinghouse for other than family purposes is the concept of a single household. In the case of small residential care homes or nursing homes, staff and residents will probably not live as a single household and the use will therefore fall into the residential institutions class, regardless of the size of the home. The single household concept will provide more certainty over the planning position of small group homes which play a major role in the Government's community care policy which is aimed at enabling disabled and mentally disordered people to live as normal lives as possible in touch with the community ... Local Planning Authorities should include any resident care staff in their calculation of the number of people accommodated. The class includes not only families or people living together under arrangements for providing care and support within the community, but also other groups of people such as students, not necessarily related to each other, who choose to live on a communal basis as a single household."

10. Section 192 of the 1990 Act makes provision for a person wishing to ascertain whether a proposed use of a building would be lawful to apply for that purpose to the local planning authority. It is unnecessary for me to set out the detailed provisions concerning such applications.

The North Devon case

11. The application of Class C2 and Class C3 to a situation where occupants of a house were in receipt of full time care was considered in North Devon District Council,

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First Secretary of State [2003] JPL 1191. In that case, the property in question was occupied by two children under the supervision of a team of non-resident adult carers operating 8-hour shifts so that there were two non-resident staff on duty in the house at all times. Collins J held that that situation did not fall within Class C3. His essential reasoning was, first, and very importantly, that the children themselves could not be regarded as forming a household. Thus, he stated in paragraph 16:

> "It seems to me that the Inspector's approach was, in this respect, correct, inasmuch as he was regarding the household as needing more than just children. 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 the 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 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."

12. The next step in the reasoning was that the non-residential carers could not be regarded as living with the children in a single household. Collins J stated at paragraph 17:

> "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 in the premises who otherwise would be unable to live as a household."

13. In paragraphs 18 and 19, he went on to express disagreement with a judgment of Popplewell J in R v Bromley London Borough Council ex.p Sinclair [1991] 3 PLR 60. He said this:

> "Now that I recognise is an approach which may well not accord with that set out by Popplewell J in the Sinclair case, which I have already mentioned. In that case the Council proposed to use a house as a family home for three mentally handicapped persons. Twenty-four hour a day supervision was to be provided 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 care assistant who was there at night.
>
> An application for judicial review of the decision that the proposed use was within Class C3(b), and so did not require planning permission, was made by a local resident. Permission had been refused on paper and the matter came before Popplewell J as a renewed application for permission to apply for judicial review. He cited Class C3(b), the relevant parts of paragraphs 25 and 27 of the Circular and went on at page 62B:
>
> > The order does not say that the staff have to live together as a single household. It says the residents living together as a single household. The residents here are the three residents and the staff come in from time to time. I do not find anything in the order which takes into account the presence of the staff as being involved in the concept of a single household. The bracketed words are simply extending a household where care is provided for residents.
> >
> > I do not take the view that the staff have to be living together with

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> the residents. I am of the view that this can properly be determined as a Class C3(b) case."

I am afraid I cannot agree with that approach. It seems to me that the concept of living together as a household means that, as I have put it, a proper functioning household must exist and, in the context of a case such as this, that must mean that the children and a carer must reside in the premises. Otherwise, as it seems to me, it clearly falls within Class C2. It is apparent that the size of the institution is irrelevant for the purposes of C2. If it falls within that definition it is not to be regarded as a dwellinghouse; then whether there are 1, 2, 10 or 15 children makes no difference to the Class. It does, however, clearly make a difference in planning terms when one considers the second point, which is whether there was, in the context of this case, a material change of use."

14. Although holding that the inspector had been wrong to find that the use in that case fell within Class C3 rather than Class C2, Collins J went on to uphold the inspector's alternative finding that if it was a Class C2 use, the change of use was not material. Accordingly, he dismissed the judicial review application.

15. Having considered the legal background, I turn to the decision letter in the present case.

The decision letter

16. The inspector, in paragraph 3 of the decision letter, identified the only question as being whether the use fell within Class C2 or C3(b). He described the property as follows in paragraph 4:

> "The house is a semi-detached property which was previously used as a single dwelling albeit that in 1993 an extension was built, part of which formed a self contained 'granny annexe' which was occupied from 31 August 1994 until the current appellants moved in. The Council did not dispute this and even though there would almost certainly have been a fair amount of independent occupation by the parents of the wife of previous occupants, the Council have clearly considered it was still a dwelling within Class C3. The ground floor of the side extension contains its own living room, bathroom, kitchen, bedroom, conservatory and fenced off area of garden as well as its own entrance to the side of the house in addition to two back to back locking doors leading from the hall of the main residence into the 'granny annexe' plus a gate into the main garden area of the property."

17. I have already quoted the first part of paragraph 5. After that passage, the inspector stated that the question that needed to be determined was whether the nature of the occupation of those living in the house was as a single household. He observed that the Council argued that the test was whether the occupation was based on a communal basis with shared living rooms, toilets and bathing facilities, kitchen and cooking, shared services, leisure time and food purchases. He observed that this was not disputed by the Evesleigh Group. Indeed, it was argued that that was basically how the residents did occupy the property. He went on as follows in paragraphs 6 to 10:

> "The appellant acknowledged that advantage had been taken of the layout of this particular property to house someone who, because of her particular difficulties, needed time alone on occasions. She could achieve this if she had the use of a separate lounge and kitchen and could on occasions prepare her food and eat separately from the others as well as sit on her own in the lounge. This was not generally how the property was occupied, however, they normally did things together including going out shopping and into the community for their various needs using a car provided by the home. The carers are there in a supervisory role and the level of care is not of a type that would result in the property falling within Class C2 (which includes nursing homes and hospitals).
>
> The only physical alteration made has been the provision of saloon-type swing doors between the house and what was the annexe so that one is generally likely to find the two back to back doors open. Also one of the areas downstairs was

used as a quiet area where any of the occupants could sit with visitors rather than just have people in the bedrooms which were the only non shared rooms in the property.

The Council accepted in principle that it was the manner in which the occupants lived together that was particularly relevant rather than the level of care and the manner in which that was provided. Their representations, however, placed a lot of emphasis on the physical layout of the property leading to a conclusion that there was a separate flat on the ground floor which would result in it not being a dwellinghouse. The Council also argued that the resident of this ground floor part rarely integrated with the other three and there were two distinct units and, therefore, two distinct households within the property.

Whilst I agree that the physical layout of the property would permit the easy formation of a separate unit, I do not agree with the Council that it 'does not therefore lend itself to the occupants living together as a single household'. As the Council pointed out in its representation, it is the nature of the occupation that is relevant not the layout of the rooms. The appellant's representations stated that they did generally live together as such. Further, even if the way that the property was lived in was more in the nature of how the Council claimed that it was, it would, in my opinion, be likely to be even more similar to how the previous occupants of the property were likely to have occupied it when the parents of the wife of the family had their own independent annexe; it is likely there would have been times when everyone in the house was together and times when the parents were living more of an independent, separate existence in the nature of a separate household.

For the reasons given above and taking account of all other matters raised, the level of care that takes place, the fact that only adults between the ages of 18 and 65 years of age are catered for and the basis on which the four residents occupy the property on a day to day basis, I conclude that the use falls within Use Class C3(b) and no permission is required as the previous lawful use was use as a dwellinghouse which also falls within Use Class C3."

Ground 1

18. The challenge that is brought by the Council comes under two broad heads. The first is expressed in this way in Mr Wald's skeleton argument. It is submitted that the inspector, in failing to consider the North Devon case, failed to have regard to a material consideration and or failed to give any or any adequate reasons for failing to apply the North Devon case. So the essential points raised under this ground concern the application of the North Devon case and the regard, if any, had to it by the inspector.

19. It is not in dispute that a copy of the North Devon judgment was sent to the Planning Inspectorate by the Council in April 2003, which was before the date of the site visit. Mr Strachan has told me on instructions, although it is not formally in evidence, that the inspector himself received a copy of the judgment. It is true that the inspector does not refer in terms to the judgment in his decision, but, in my view, it is a clear inference from the circumstances as a whole that he had a copy of it and he had the judgment well in mind. It is to be noted that after the date when a copy of the judgment was sent to the Inspectorate, a request for information was made by the inspector. He wrote to the parties requesting information as to whether the residents of the property were to be adults or children and as to the nature of their learning disability. The letter itself, dated 2 July 2003, observes that two letters received from interested persons referred to children being cared for at the property and mentions vagueness in the expression 'learning disability' that had been used in the previous representations.

20. In response to that, the appellant submitted a reply giving an explanation of the meaning of a learning disability and stating that they were not registered to take any person under 18 or over 65 in the house. That the application related only to occupation by adults and not to occupation by children is something that the inspector took pains to emphasise in the decision. That is apparent from the passages I have already read, and

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he spells out in paragraph 2 that he deals with the appeal expressly on the basis of occupants between the ages of 18 and 65. The obvious explanation for his seeking such information and referring to it in this way in his decision is that he was well aware of what was said in the North Devon judgment in respect of a case of occupation by children. He was anxious to check that this was not the factual situation with which he was dealing in the present case, and anxious to spell that out in the decision. I do not accept Mr Wald's submission that the enquiry was prompted simply by the fact that interested persons had mentioned the presence of children on the premises. In my view, that would not have been enough to trigger this line of enquiry and reasoning, whereas the inspector's appreciation of the North Devon judgment provides a convincing explanation for what happened. Thus I am satisfied that there was no failure to have regard to that judgment.

21. It is not, in those circumstances, necessary to consider a point raised by Mr Strachan as to whether a decided legal authority is itself capable of being material consideration. The point made by Mr Strachan is that one does not need to refer to decided cases as material considerations. The decision-maker either gets the law right or does not, and it is in that context that one would look at the relevant case law.

22. The contention that the inspector failed to give any or any adequate reasons for failing to apply the North Devon judgment is, in my view, misconceived. What the inspector had to apply was the statutory provisions. He did apply those provisions and he gave adequate and intelligible reasons for the conclusion he reached in applying them. What he found was that the four residents, the people with learning difficulties, would occupy the house as a single household, and he explained the test that he applied, which does not appear in itself to have been the subject of any material dispute, and the factors that led him to the conclusion he reached.

23. It was not incumbent upon him to address the North Devon judgment in terms, or to explain why he reached a different conclusion on the particular facts of the present case from the conclusion reached on different facts in the North Devon case. In this connection, it is important to stress that no argument had been addressed by the parties in terms of the kind of issues that were at the heart of the North Devon judgment, let alone by reference to the North Devon judgment itself. It is unsurprising that the case was not referred to in the main submissions since it postdated those submissions, but the fact is that there was, in my view, nothing in the written representations that raised issues of the kind that the North Devon judgment was concerned with. That case and the way in which it was decided had not become an issue between the parties, let alone a principal controversial issue.

24. At all material times the Council's objection to the use falling within Class C3 was on the basis that the ground floor annexe of the house was physically and functionally separate from the rest of the house, and that the degree of separation between the three residents of the main part of the house and the one resident of the annexe was such that the four residents would not be living together as a single household.

25. I have considered passages in the original report to the Council, that is to say the officer's report to the Council, where, in my view, that is the essential basis upon which objection was raised. I am wholly unpersuaded by an argument by Mr Wald that the basis of objection related to the inter-relationship between the residents and the carers, or was somehow based upon the particular role of the carers.

26. The Council's written representations to the inspector likewise focused, as it seems to me, on the particular question of whether the annexe was physically and functionally separate from the rest of the house, and the general application of the test for living together as a single household as it related to the four residents. Indeed, the written representations referred in paragraph 5.4 to a decision of the Secretary of State which concluded that the level of care and the manner in which it was provided was not relevant in determining the lawfulness of use. What mattered was the manner in which the occupants lived together as a single household, and it was that question which was

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addressed in the written representations. The only relevance attached to the carers was that, because they were non-resident, they did not fall to be taken into account in calculating the number of residents, which was important because a maximum of six is permitted under Class C3(b). There was no suggestion that issues of the kind debated in the North Devon case concerning the level of care and the non-residential status of carers made any difference to the analysis beyond that point about maximum numbers.

27. When a copy of the North Devon judgment was sent to the Inspectorate, it was done under cover of a letter which stated:

> "Please find enclosed a recent decision of the High Court which has set out clarification as to the interpretation of C2 and C3 uses. This case has just become known, and in view of the circumstances surrounding this particular appeal, the Council considers that it is important that this should be drawn to the inspector's attention".

28. There was no attempt to put forward any submissions as to its application. I reject the contention advanced by Mr Wald that there was an implied argument advanced that the present case fell within the scope of the reasoning in the North Devon judgment. Even when information was provided to the inspector by the appellant to the effect that there would be no children at the property, no attempt was made by the Council to raise issues concerning the application of the North Devon judgment. All of this underlines the fact that it was simply not an issue between the parties and, in my view, therefore, it was not one that the inspector was required to deal with in his decision. I reject the argument as to inadequacy of reasons.

29. Of course, the North Devon judgment is potentially relevant now insofar as it is alleged that the inspector erred in law by failing to apply some principle to be derived from that judgment. I have to say that that is not how the case is advanced in the written material before me, including the Council's skeleton argument. Nonetheless, the point has been put forward orally by Mr Wald, at least to some extent, so let me make clear my views on that issue. I do not read the North Devon judgment as laying down any principle inconsistent with the conclusion reached by the inspector in this case. It is not said, for example, by Collins J that the provision of full-time care by non-resident carers necessarily precludes a finding of occupation as a single household. What it does is focus, first, on those who are in occupation and ask whether they themselves do constitute a household. It holds, for reasons set out in the judgment, that children cannot by themselves be regarded as constituting a household. Whether or not that is right is not something that I need to decide because that is not this case. This case is not concerned with children, and what is said by Collins J in respect of children does not govern this case.

30. The observations he makes at the end of paragraph 16 of his judgment do indeed appear to go wider, but for my part I would be very reluctant to read them as purporting to lay down a principle that those who suffer from disability and who need care in the community can never by themselves constitute a household, that is to say that the reasoning applied to children necessarily and invariably applies to them too. If the observations are intended to lay down such a principle, they are obiter. I do not need to follow them and I would decline to follow them.

31. In my judgment, the correct position is that, in every case, the judgment to be made in the application of the criteria in Class C3 depends upon the specific facts of the individual case. There may indeed be cases where, having regard to the nature of the disability suffered and the degree of care required, persons resident in a house cannot sensibly be said to constitute a household. But there will be other cases, and in my judgment this is one of them, where persons resident in a house can sensibly be said to constitute a household notwithstanding that they have some disability and need care. That is so even if the need is for full-time care. I would reject any suggestion that in a case where care is needed for those under a disability Class C3 can apply only if the carers are in residence in the same property as those for whom they are caring. That would seem to me to run counter to the language of Class C3 itself and to the underlying

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policy.

32. If the carers are resident, the question is whether they, together with the other residents, constitute a single household. But if they are not resident, there remains a perfectly sensible question whether those who are resident, that is to say those who are in receipt of care, themselves constitute a single household. That is a question essentially to be answered on the facts. It was a question considered on the facts of this case by the inspector and answered affirmatively by him.

33. What I have said seems to me to be in line with the approach adopted in ex p Sinclair, to which I refer notwithstanding that it was only a judgment on a permission application, because Collins J referred to it in his substantive judgment.

34. The approach also seems to me to be in line with the broad guidance given by the judgment of the Court of Appeal in R(Hossack) v Kettering Borough Council [2002] JPL 1206, a case which has not featured in any of the written material before me, including the skeleton arguments, but to which my attention has been drawn in the course of argument this afternoon. That case concerned a different aspect of the application of Class C3. What is important about it, as it seems to me, is the rejection by the Court of Appeal of a prescriptive approach and the endorsement of an approach that treats the application of Class C3 as a matter of fact and degree in every case. In the course of the leading judgment, given by Simon Brown LJ, there is an analysis of the authorities, beginning with Simmons v Pizzey [1979] AC 377 in which Lord Hailsham referred to various definitions of the expression "household" and stated:

> "I do not find any of these references particularly helpful, except to make clear to me what I would have supposed in any case that both the expression 'household' and membership of it is a question of fact and degree, there being no certain indicia, the presence or absence of any of which is by itself conclusive."

35. The subsequent examination of the authorities included those where various factors were identified as helpful considerations to bear in mind when determining whether the occupants of a property are members of a single household. But at the end of his judgment Simon Brown LJ came back to Lord Hailsham's observation in Simmons v Pizzey, that there are "no certain indicia, the presence or absence of any of which is by itself conclusive".

36. It is unnecessary to look at the various factors that were considered in Hossack. The case is relevant in the present context, as it seems to me, because of its emphasis on fact and degree. That accords with the approach that I would take to the present question. There is no indication that Hossack was cited to Collins J in the North Devon judgment, but in any event, for the reasons I have given, I do not regard the North Devon judgment as laying down a principle applicable to the present case, and certainly I do not regard it as laying down a principle determinative of the present case. In my judgment, if and insofar as an error of law on the part of the inspector is alleged, I would reject the submission for the reasons I have given. It seems to me that his approach in evaluating the particular facts of the case was perfectly correct and, subject to the second ground to which I now come, cannot sensibly be criticised.

Ground 2

37. Ground 2 relates to the basis of objection that was, in fact, advanced by the Council before the inspector concerning the alleged physical and functional separation of the annexe. Mr Wald submits that the layout of the property and the use to which it was put were such that the inspector's decision that the four residents were living together as a single household was Wednesbury unreasonable. He has reminded me of what was said by the Eversleigh Group in a letter of 20 September 2002 in providing information in support of the application. That letter stated, amongst other things:

> "The home is run on the same basis as a family home, and although the physical layout of the home appears to segregate an individual service user, they will all live as part of the whole home. The service users will spend most of their time in the communal areas of the home such as the kitchen and the lounge and join in the various activities that are provided".

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> The main reason the service user has the ground floor accommodation is purely for her care needs. She can exhibit behaviour which means she likes to be alone, as we all do, and although this can be seen as a separate service being offered, it is in fact purely based around the needs of the service user
> Unfortunately she has her own kitchen facilities, but these will be rarely used as she will integrate with the others, however, she does then have the option while being behaviourally unstable to have choice in her environment and facilities."

38 Reference was made in the Council's written representations to a site visit undertaken by a Council officer in February 2003, which was said to have confirmed that the ground floor annexe was physically and functionally separate from the rest of the house. This was also said to have been verified by a care manager during a visit, who confirmed that the severity of this resident's needs and behaviour required her to be separated from the other three residents. This necessitated accommodation specifically tailored to her individual care needs through the provision of a self-contained living/dining room, bathroom, kitchen conservatory, separate side entrance and rear garden (see paragraph 5.7 of the written submissions).

39. A somewhat different situation seems to have been apparent at the time of the site visit undertaken by the inspector. A note of that site visit, on 28 May 2003, records:

> "The inspector led the site visit, which involved an inspection of the layout of the premises and of the nature of the occupation of the house. It was noted during the site visit that the fourth client was sitting at a table in the main garden area with a male carer. It was also noted that a wooden door within the close boarded fence which separates the two garden areas had been opened to provide access to and from the main garden.
> Ms Helberg [the second defendant and the manager of the Evesleigh Group], advised the inspector that the way in which the physical characteristics of the property were being exploited during the site visit, and the way in which the property can be seen to be functioning was typical of the manner in which the home operated and was no different to a typical household. She said that the four residents live together and that this generally involves communal eating and socialising, including external trips.
> At this stage, I [the council officer who wrote this note] pointed out to the inspector that the relationship between residents described by Ms Helberg was completely different to that which I observed with the Council's investigation officer during the previous visit. I referred the inspector to paragraphs 5.7 and 5.9 of the Council's appeal statement. I also reminded the inspector that the purpose of the site visit, given that the appeal was being dealt with by way of written representations, was merely to point out relevant facts and was not a forum for the debate of any issues. The inspector advised Ms Helberg that he was unable to consider the merits of the case or to listen to arguments from any party. The site visit concluded shortly after this conversation."

40. Notwithstanding the apparent differences between what had been seen in February and in May, Mr Wald submits that when one looks at the physical and functional characteristics of the property, it can be seen that one has here two distinct dwellinghouses and not something that could be used by the occupants as a single household. He submits that the inspector's conclusion that the property was capable of being used as a single household was a decision that no reasonable decision-maker could have made.

41. Mr Strachan takes issue with that line of argument, submitting that it is without any merit. He submits that there is simply no basis to suggest that the conclusion reached based on the inspector's assessment of the evidence and his site visit was irrational. Mr Strachan points out that, as identified in the decision letter, the Council itself had accepted that the property was capable of being used as a single dwellinghouse and had been so used by a family and grandparents at a time when the grandparents lived in the granny annexe. He submits that it cannot, therefore, reasonably be argued

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that the physical layout is such as to render irrational the inspector's conclusions in relation to the proposed use.

42. Moreover, as the inspector pointed out in paragraph 9 of the decision letter, even if the use was more as the Council suggested, this would be even more akin to the previous use as a dwellinghouse and would therefore not assist the Council's case. Mr Strachan stresses that the question for the inspector was not whether some historical use of the property constituted use as a single dwellinghouse, but whether use of the kind proposed in the application would constitute use as a single dwellinghouse. The site visit gave the inspector an opportunity to examine the premises and the way in which they were being used at the time, but ultimately it was a question of whether a certificate should be issued that the proposed use was lawful. As to that, it is submitted the inspector made a careful appraisal of the situation and plainly reached a rational conclusion.

43. I accept Mr Strachan's submissions. The inspector had ample information from the written material before him and from what he had seen on his site visit to be able to reach a view on this question. It is correct that he was concerned with the proposed use, but no doubt his assessment was illuminated by what he saw in practice on his site visit. He was aware of the evidence that usage appeared to be different on the Council officer's earlier visit. There is nothing to show that he failed to take into account any of the evidence or representations before him. This was pre-eminently a question of fact and degree for the inspector. His conclusion that the proposed use would amount to use as a dwellinghouse by the occupants living together as a single household was carefully reasoned and, in my view, unassailable. I reject the contention under ground 2 that it was not reasonably open to the inspector to arrive at the decision set out in the decision letter.

44. Accordingly, both grounds of challenge fail and the claim is dismissed.

45. MR STRACHAN: My Lord, I am grateful. Could I just raise one matter?

46. MR JUSTICE RICHARDS: Yes.

47. MR STRACHAN: I suspect it arises --

48. MR JUSTICE RICHARDS: Have I got something wrong in what I said?

49. MR STRACHAN: It is an error on my part, my Lord. In my skeleton I identified that this was the inspector allowing an appeal under section 78 and your Lordship referred to that. It was an appeal under section 195.

50. MR JUSTICE RICHARDS: Of course, because it is a certificate of lawful use. I am grateful. I will correct that in the approved judgment.

51. MR STRACHAN: My Lord, the only other matter is that I do ask, therefore, that the claimant pay the first defendant's costs. My Lord, there is a summary assessment schedule and I understand that the costs are agreed, but I can hand up the schedule to you. The total which is agreed with the claimant is £3,457. If your Lordship is content with that, we would ask for an order in those terms.

52. MR JUSTICE RICHARDS: I have that schedule. Mr Wald, you cannot resist?

53. MR WALD: No, my Lord.

54. MR JUSTICE RICHARDS: In that case there will be an order that the Council pays the Secretary of State's costs, to be summarily assessed in the agreed sum of £3,457. Thank you very much.

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North Devon District Council v The First Secretary of State
[2003] EWHC 157 Admin

Collins J

Case No: CO/4245/2002 Date: 30/01/2003

Heading: Local Government, Property / Land
Sub-heading: Planning

Judgment Status: Given
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CO/4245/02

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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2

Thursday, 30 January 2003

B E F O R E:

MR JUSTICE COLLINS

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NORTH DEVON DISTRICT COUNCIL

(CLAIMANT)

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ARUN DISTRICT COUNCIL:A/106/08/CLP

THE FIRST SECRETARY OF STATE

(DEFENDANT)

- - - - - - -

Computer-Aided Transcript of the Stenograph Notes of

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MR DH FLETCHER (instructed by North Devon District Council, Civic Centre, Barnstaple, Devon EX31 1EA) appeared on behalf of the CLAIMANT

MR M GIBBONS (instructed by Treasury Solicitors) appeared on behalf of the DEFENDANT

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J U D G M E N T

(As Approved by the Court)

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1. MR JUSTICE COLLINS: This appeal raises a short but not at all easy point of construction of two classes set out in the Use Classes Order of 1987. The two classes are contained in Part C and are: Class C2, which is headed " residential institutions", and Class C3 which is headed "dwelling houses". The question is whether the situation in this case fell within C2 or C3. There is a subsidiary question relating to whether even if it was within C2, nonetheless there was a material change of use from its C3 use as a dwelling house. That, of course, is a question which depends entirely on the facts of this individual case.

2. The facts are straightforward and, indeed, are agreed. The premises in question are an address in Barnstaple in North Devon. They comprise a semi-detached 3 bedroom dwellinghouse in a residential area. A company called Southern Childcare Limited runs a business operating registered children's

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homes. Since 2000, as a result of provisions contained in section 40 of the Care Standards Act 2000, which amended section 63 of the Children Act 1989, children's homes which provide for three or less children are required to be registered. That was not the position before that change in the law.

3. I gather from the information before me that there are a number of such small homes, that is to say homes catering for three children or less, which have sprung up. The reason for that is not entirely clear. It may have something to do with a lack of foster parents, or with the increased concern about the welfare of children and the need for them to be looked after in small units rather than in the larger children's homes that used to be in existence in the past. In any event, the local planning authority, in this case North Devon District Council, are concerned about the effect on residential areas of these homes, and are concerned that there should be the possibility of planning control to deal with applications to set up these homes in residential areas.

4. In February 2000 Southern Childcare Limited began to use the premises to provide residential care for two children aged between 10 and 17. The Inspector who eventually had to decide on the issue described the premises. Outside was a semi-detached 3 bedroom house which looks like any other house in the street. Internally, it is in good decorative order; there is a small office downstairs, otherwise it is laid out as an ordinary house. The children sleep in individual bedrooms. There is the usual kitchen and bathroom facilities.

5. Southern Childcare Limited provide in the premises residential care for two children placed in their care by various local authorities. Two non-resident staff are on duty at all times and the house is under the supervision of a team of 6 or 7 adult carers who operate 8-hour shifts. The result is the children are never unsupervised whilst in the building. That means of course that the various carers will come and leave at the beginning and end of their shifts but otherwise the building is to all intents and purposes used as any other family house would be with two children there: shopping trips are needed; children have to be taken to school; the children assist to an extent in the preparation of meals and so on.

6. Because there was a question raised as to whether the use required planning permission, Southern Childcare Limited applied under section 191 of the Planning Act for a certificate of lawful use. That application was refused by the local planning authority. Southern Childcare Limited appealed and an inspector determined the appeal in their favour on 5th August of last year. Against that decision the Council appeals to this court.

7. I should go straightaway to the relevant provisions in the Use Classes Order. The purpose behind the Use Classes Order is well-known and is conveniently set out in Circular 13/87, issued by the Department in May 1987 when the Use Classes Order was about to come into effect. The purpose is set out in paragraph 3, and it is there indicated:

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"The aim of the new Order is twofold:-

(i) to reduce the number of classes while retaining effective control over changes of use which, because of environmental consequences or relationship with other uses, need to be subject to specific planning applications and:

(ii)to ensure that the scope of each class is wide enough to take in changes of use which generally do not need to be subject to specific control.

It serves no-one's interest to require planning permission for types of development that generally do not damage amenity. Equally, the Secretaries of State are in no doubt that effective control must be retained over changes of use that would have a material impact, in land-use planning terms, on the local amenity or environment."

That is doing no more in reality than setting out the general approach to planning control, but it helpfully indicates the rationale behind the Use Classes Order. By section 55 of the Act, provided that a use falls within a particular designated class, then no planning permission is needed for any change which falls within the same class.

8. The two classes are C2 and C3. C2 reads:

"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."

C3 reads:

"Use as a dwellinghouse (whether or not as a sole or main residence)

(a) by a single person or by people living together as a family, or

(b) by not more than 6 residents living together as a single household (including a household where care is provide for residents)."

It will be noted that there is reference to care in both C2 and C3. Care is in fact defined in paragraph 2 (the interpretation clause of the Order) this:

"'care' means personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in class C2 also includes the personal care of children and medical care and treatment."

It is to be noted that that definition appears to exclude the personal care of children from the definition of care except in class C2. In class C3 there is

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reference (in the parenthesis to C3(b)) to care provided for residents. That care will not by the definition clause include care of children. Of course if the children happen to be disabled or to suffer from mental disorder, then care for them will fall within class C3(b), but it is not suggested that the children with whom this case is concerned would fall within that category. They are children who, for whatever reason, have been put into the care of the local authority, and the local authority is required to find somewhere for them to live and to be cared for during their minority.

9. The application by Southern Childcare Limited was "use as a dwelling providing care for up to 3 children living together as a single household with care provided by up to two non-resident staff." So it appears that the application was based on the contention that the children would constitute the single household living together and thus fall within C3(b), and that the non-resident staff would provide care but would not be regarded as part of the household because that would not be necessary.

10. When the matter came before the Inspector he considered the correct construction of the Order between paragraphs 12 and 19 of his determination. I do not propose to read them in any detail, but some parts I shall cite because they indicate the way in which the Inspector approached his task. In paragraph 16 he said:

"Living together incorporates dining together, sharing the kitchen, lounge and garden etc. A functioning family (parents and children adopted children foster children) is almost by definition a caring unit. Whilst clearly a husband and wife with two foster children would be considered as falling within Class C3 (a) of the UCO, there is a close similarity with the situation on the appeal site except that the carers (guardians) whilst present all the time, are not resident in the same way as a husband and wife. The dictionary definition of a household is 'the occupants of a house regarded as a unit'. Although the care element in a household is less than that for a family there are joint shared responsibilities, the security of the house, the buying of food, the preparation of meals, the paying of bills and the maintenance of the property are some examples. There has to be a thread of care running through a household for it to function effectively."

In paragraph 19 he states:

"If one includes the children and the adults on the appeal premises, there are then four residents living together as a single household. The High Court judgment in the case of *R v Bromley London Borough Council ex parte Sinclair* [1991] 3 PLR60 has accepted that staff providing care for residents need not themselves be resident. 'Care' as defined in Art 2 does not come into play on the appeal site and I find that the use is within the constraints of Class 3(b) of the UCO: namely the use as a dwellinghouse by not more than six residents living together as a single household."

It seems to me that the natural meaning of what the Inspector says in

paragraph 19 is that he is regarding (and what he sets out in paragraph 16 supports this conclusion) the household as being the children plus the carers. But, in his view, the case of *Sinclair* means that carers need not be resident carers, in the sense that they need not have the premises as their residence, and live there as well as the children. That, in his view, is not necessary; provided they are present on the premises then they can be regarded as part of the household. It is true that when he came to give the lawful development certificate it was in these terms:

"The use of the premises as a dwelling house providing care for up to two children living together as a single household with care provided by up to two non-resident staff."

That, of course, is more consistent with the way in which the application was framed. Nonetheless the natural meaning of paragraphs 16 and 19 seem to me to point clearly in the direction that the Inspector is finding that the household includes both children and carers, but that carers do not need to be resident carers.

11. Mr Fletcher contends that that is wrong, and that insofar as *Sinclair* may appear to support that approach it is wrongly decided. He submits that the purpose behind the division of classes C2 and C3, insofar as it applies in the circumstances of this case, is that small homes used for care in the community should not be regarded as falling outside the class as a dwellinghouse merely because there are carers, provided that those carers are resident. He submits that if one looks at the natural meaning of the words used in the Use Classes Order and couples that with the guidance given by the Circular, that conclusion is inevitable. The Circular in paragraph 5 states:

"The new Order is also intended to clarify the circumstances in which the establishment of small community care homes and hostels will require planning permission. For example, it provides that development is not involved when a dwellinghouse becomes used as a small community care home, provided that all the residents live together as a single household and that they number no more than 6 including resident staff."

That certainly on its face appears to me to be more consistent with the approach that Mr Fletcher submits is the correct one.

12. In paragraphs 25, 26, and 27 the Circular deals specifically with classes C2 and C3. In discussing C2 in paragraph 25 it states:

"The *residential institutions class* combines classes XXII and XIV of the 1972 Order. Apart from educational establishments, the characteristic of the uses contained in this class that sets them apart from those in the hotels and hostels and dwellinghouses classes is, in the case of the former the provision of personal care and treatment, and in the case of the latter that the residents and staff do not form a single household."

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In paragraph 27, which deals with class C3, it is said:

"The new *dwellinghouses class* groups together use as a dwellinghouse - whether or not as a sole or main residence - by a single person or any number of persons living together as a family, with use as a dwellinghouse by no more than 6 persons living together as a single household. The key element in the use of a dwellinghouse for other than family purposes is the concept of a single household. In the case of small residential care homes or nursing homes, staff and residents will probably not live as a single household and the use will therefore fall into the residential institutions class, regardless of the size of the home. The single household concept will provide more certainty over the planning position of small group homes which play a major role in the Government's community care policy which is aimed at enabling disabled and mentally disordered people to live as normal lives as possible in touch with the community ... Local planning authorities should include any resident care staff in their calculation of the number of people accommodated. The class includes not only families or people living together under arrangements for providing care and support within the community, but also other groups of people such as students, not necessarily related to each other, who choose to live on a communal basis as a single household."

That again, Mr Fletcher submits, and I agree, points in the direction of resident care staff and small residential homes and, indeed, the reference to the need for certainty over the planning position of small group homes playing a major role in the Government's community care policy, gives a clue why the definition of "care" as not including children should be applicable to C2 and not to C3 because children do not fall into the community care policy because they are not disabled or mentally disordered.

13. It seems to me that it is essential that all the words of the Order are given some meaning. There is no doubt that unless the circumstances here mean that it falls within C3, the activity in question would clearly fall within C2, because it is use for the provision of residential accommodation and care to people in need of care. The definition of "care" which is applicable to C2 includes care of children. So unless it falls within Class C3, it clearly will fall within C2. The question, therefore, is whether it does fall within C3.

14. It is not contended that it falls within C3(a) and the Inspector did not so find. Clearly, it is not being used by people living together as a family. The question therefore is whether it falls within C3(b). There are certainly not more than 6 residents. But are they living together as a single household, including a household where care is provided for residents? The parentheses does not directly apply because care does not include care of children. Thus, it is not a household where care is provided for residents. The first question, as it seems to me, is what is the meaning in the context of C3(b) of "household"?

15 It is submitted by Mr Gibbon that the children can constitute the household. The children are living together as a single household and, therefore, it is a dwellinghouse. The parenthesis does not apply and, in the

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straightforward meaning of the words, you have here not more than 6 residents living together as a single household. Of course if any of the carers were resident, then they would have to be brought into account, but there would be no problem because obviously a resident carer would be properly regarded as part of the household, but the absence of a resident carer does not prevent it being a household.

16. It seems to me that the Inspector's approach was, in this respect, correct, inasmuch as he was regarding the household as needing more than just children. 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 the 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 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.

17. 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 in the premises who otherwise would be unable to live as a household.

18. Now that I recognise is an approach which may well not accord with that set out by Popplewell J in the *Sinclair* case, which I have already mentioned. In that case the Council proposed to use a house as a family home for three mentally handicapped persons. Twenty-four hour a day supervision was to be provided 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 care assistant who was there at night.

19. An application for judicial review of the decision that the proposed use was within Class C3(b), and so did not require planning permission, was made by a local resident. Permission had been refused on paper and the matter came before Popplewell J as a renewed application for permission to apply for judicial review. He cited Class C3(b), the relevant parts of paragraphs 25 and 27 of the Circular and went on at page 62B:

"The order does not say that the staff have to live together as a single household. It says the residents 'living together as a single household'. The

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residents here are the three residents and the staff come in from time to time. I do not find anything in the order which takes into account the presence of the staff as being involved in the concept of a single household. The bracketed words are simply '(including a household where care is provided for residents).'

I do not take the view that the staff have to be living together with the residents. I am of the view that this can properly be determined as a Class C3 (b) case."

I am afraid I cannot agree with that approach. It seems to me that the concept of living together as a household means that, as I have put it, a proper functioning household must exist and, in the context of a case such as this, that must mean that the children and a carer must reside in the premises. Otherwise, as it seems to me, it clearly falls within Class C2. It is apparent that the size of the institution is irrelevant for the purposes of C2. If it falls within that definition it is not to be regarded as a dwellinghouse, then whether there are 1, 2, 10 or 15 children makes no difference to the Class. It does, however, clearly make a difference in planning terms when one considers the second point, which is whether there was, in the context of this case, a material change of use.

20. Although it may sound somewhat illogical, it is accepted by both Mr Fletcher and Mr Gibbon 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 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.

21. The Inspector understandably deals with this very briefly. In paragraph 20 he states:

"In the alternative, the Council state that the change of use is a significant factor which when weighed with other changes to the character of the use of the premises amounts to a material change of use. Since I have found that the use is as a dwelling house, the alternative does not fall to be considered. There is nevertheless no indication from my consideration of all the representations and from my detailed inspection of the site and the surroundings, that there has been a change of use from a dwelling house which could, as a matter of fact and degree, be considered as being a material one."

Mr Fletcher attacks that on the basis that it is unreasoned, and the Inspector appears to be saying from the use of the word "could" that there is not even an arguable case that there has been a change of use.

22. The parties put forward extensive submissions to the Inspector and he clearly had them before him and had regard to them. The Council dealt with materiality over some four pages of its submissions. It set out what it submitted were the principles referred to and cases in support, in particular in paragraph 6.9 of its submissions. It made the point that the case law established that whether there had been a material change was a question of fact and degree and the fact that, in the broadest sense, the property continued to be used for residential purposes did not mean that there could not have been a material change of use. The court in the case of *London Borough of Richmond upon Thames v Secretary of State* [2001] JPL 84 indicated that matters which could be planning considerations might include the effects on the residential character of the area, strain on the welfare services and reduction on the stock of private accommodation available for renting. Points were made about traffic movements and various other factors were put forward.

23. True it is that the Inspector dealt very briefly with those matters. But it is plain that he had before him all the relevant submissions and all the relevant representations. He had inspected the site and he had considered all the issues. He sets out at the beginning of his determination a description of the site and surroundings and of the background. It would have been better, no doubt, had he referred in more detail to the submissions which had been made and explained why he rejected them. Nevertheless, it is, in my view, clearly implicit in what he says that he had considered them and that he had rejected them as being matters which indicated a material change of use.

24. Mr Fletcher accepts that it would have been open to the Inspector to have decided that the change of use was not material but he should, if he was to reach that conclusion, have indicated more clearly why. I do not dissent from that proposition in the sense that I too would have preferred that he had indicated more clearly why. But one has to be careful in accepting a reasons challenge. It seems to me that if, in reality, it is plain that the Inspector has considered the matters and has reached a decision, which in law was open to him, then it would take a very strong case to quash that purely on the ground that the reasons were not as extensively set out as they should have been.

25. The only matter which has given possible cause for concern is the use of the word "could." But, in my view, it does not bear the construction which Mr Fletcher suggests is the possible one. All that the Inspector is saying is that in his judgment the matters put forward do not mean that the change of use is a material one. It is true he does not express himself as happily as he might, but as a matter of pure English reading that sentence does not, in my view, lead one to conclude that he had misdirected himself in approaching it on the basis of arguability rather than fact.

26. Accordingly, in my view, the Inspector was wrong to regard this as falling within C3(b) rather than C2, and that the Council's contentions are and were correct. C3 does require at least one residential carer, together with of course those who are being cared for. On the facts of this case, and I emphasise

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limited to the facts of this case, the Inspector was correct to decide that there was no material change of use in the circumstances.

27. Accordingly, although it may be expressed slightly unhappily in the context of my decision, and indeed in the way the Inspector approached it in his decision, the use for up to two children, with care provided by up two non-resident staff at these premises, and only at these premises, is, in the circumstances, a lawful use.

28. Accordingly, for those reasons, I dismiss this appeal.

29. MR GIBBONS: My Lord, in the light of that may I seek brief instructions before I make any further submissions?

30. MR JUSTICE COLLINS: Yes .

31. MR GIBBONS: My Lord, the question of costs arises from my point of view. Now the usual situation clearly, as your Lordship is aware, not only because the principal argument today is on Use Classes Order but also the Inspector, clearly I am entitled to make the formal submission that I have succeeded even though there has not been----

32. MR JUSTICE COLLINS: Yes, but nowadays we split costs rather more, do we not?

33. MR GIBBONS: My Lord, you have anticipated my very next observation, which is, if your Lordship is inclined, as it were, to take the CPR approach to this rather than the more old-fashioned approach.

34. MR JUSTICE COLLINS: I think I have to, do I not?

35. MR GIBBONS: Clearly, my fallback position would be no order as to costs.

36. MR JUSTICE COLLINS: I am thinking along those lines.

37. MR FLETCHER: My Lord, I am very happy with my learned friend's fallback position.

38. MR JUSTICE COLLINS: I think that in the circumstances, and having regard to the issues, I know it is palm tree to some extent, but costs almost always is, I think no order for costs is the fair order. No further applications?

39 MR FLETCHER: No, my Lord.