

SUPPORTING STATEMENT – Planning Application Ref: TA/2021/394 - POW BECK HOUSE, MEADOW ROAD, WHITEHAVEN.

These proposals seek to replace the former detached council care facility of approx. 1,407sq.m for 38 residents with a modern and spacious C2 Extra Care facility comprising of 36 self-contained flats in a 75%/25% split of one-bed and two bed units. In addition, at ground floor there are extensive communal facilities proposed including a bistro, lounge and a hair and beauty salon. Please see appendix at the end of this planning statement regarding definitions and clarifications of this C2 Extra Care use in planning terms.

The following documents have been referenced and provide excellent information that reinforces the need for modern fit-for-purpose accommodation that can also provide long-term care in a secure environment.

Copeland Borough Council : Strategic Housing Market Assessment and Objectively Assessed Housing Need final report dated October 2019.

Cumbria County Council – Commissioning Strategy for Care and Support delivered by Adult Social Care 2016-2020.

Due to cuts in budgets and the increase in an aging population there needs to be a strategy in providing care to an additional 1,500 older people by 2025 in the Cumbria region alone. In line with the Cumbria Joint Health and Wellbeing Strategy Cumbria CC proposed three key things:

1. Investing in services which prevent, reduce or divert demand.
2. Promoting independence and self-reliance of people who need a service to minimise costs.
3. Provide services for people who do require high-level, residential or nursing-level care, aiming to reduce sending people a long way from home therefor reducing hospital admissions.

In order to address these three strategies together Cumbria CC are proposing key changes including: ***‘The development of more Extra Care housing. There will be demand for as much Extra Care as can be developed in the next ten years.’***

‘Reduction in the overall number of placements of Older People in residential and nursing care.

By 2020, less money each year will be spent on Older People’s residential and nursing care home placements. Some of this resource will be redirected to support more people in their own homes, either within Extra Care housing or with domiciliary care that can meet their specific needs’

– source: Cumbria County Council, Commissioning Strategy for Care and Support delivered by Adult Social Care 2015-2020

Perhaps the clearest indicator of the ageing population can be seen in figure 3.2 on page 34 of Strategic Housing Market Assessment and Objectively Assessed Housing Need final report October 2019. This graph clearly shows the higher proportion of people over 45 years of age when compared to both the North West and England as a whole (2016 figures). Not only is the percentage of over 45's approx. 1.5% higher in this region, the percentage of under 45's is noticeably less than the rest of the North East and England. This bears out the findings in the Cumbria CC report referred to above that provision for older people including Extra Care has to be increased considerably.

If the above figure is broken down further to only those aged 65+ then the division becomes more marked with an increase of 4% in the Copeland region compared to the North East and 3.65 compared with England. The change in population is on an upward trend with the %change in the 65+ group increasing by 23.6% between 2006 and 2016.

Our proposals include for full accessibility and provision of communal facilities, lift access and also facilities such as covered mobility scooter and charging facilities. 24hour staffing and flexible nursing care also is a good fit with the data provided by Copeland Borough Council that Copeland has a higher level of disability compared to other areas and the aging population means that a higher number of people with disabilities is expected to increase in the future.

Source – Copeland Borough Council Strategic Housing Market Assessment and Objectively Assessed Housing Need final report October 2019.

APPENDIX

IN THE MATTER OF EXTRA CARE HOUSING UNDER THE TOWN AND COUNTRY PLANNING (USE CLASSES) ORDER 1987

ADVICE

1. I am instructed to advise Ore Operations Limited (known as Oculus) on the use in planning terms of proposed extra care housing units.

Summary

2. The proposed use is within the C2 Residential Institution use as the provision of residential accommodation and care to people in need of care which is not within Class C3 Dwellinghouses.

Background

3. Oculus are proposing to develop and refurbish existing properties for *Extra Care housing* for elderly people. At least one occupant of every unit within each site will be eligible for exempt rent, meaning that they have a serious health issue which requires specialist accommodation.
4. Each site will consist of 60-100 units. Each unit will comprise a one or two bedroom apartment with a living/dining/kitchen area and a bathroom. Apartments will include a range of specialised physical features and adaptations which enable residents to age in safety and comfort. Some of the examples of these include: wheelchair accessible doors and electric sockets, level floor showers, ability to enable grab rail installations, incorporation of telecare infrastructure and assistive technologies. Assistive technologies will include use of wireless technologies, including wearable computing devices worn by residents, to enable early response to the on-site care manager. There will therefore be a 24 hour care presence on the site, but no live-in staff accommodation.
5. A variety of communal facilities will be provided on each site including staffed and supervised treatment rooms, physiotherapy suites, restaurant/café, residents' lounge, visitor accommodation and staffed office.
6. The units would be leased by a housing association (registered provider) with domiciliary care services being delivered by a care provider who is registered with the Care Quality Commission (England) or the Care Inspectorate (in Scotland). The level

of care provided on site would be domiciliary. Whilst there would be a clinical manager who will clinically supervise, support and monitor staff members in producing comprehensive assessment reports, intervention plans and progress reports, the units would not be nursing or residential care homes.

7. Nomination agreements would be in place with local commissioners and the occupants would either all be publicly funded, or split about 70% public and 30% private.

Use and Use Classes

8. Use in planning terms is concerned with the character of the use of the land.¹ Making a material change in the use of land usually requires planning permission.² A use of land includes uses which are ordinarily incidental or ancillary to the primary use. This is a judge-made concept³ designed to cater for the common situation that different and smaller uses will be part of a main use (for example, a shop may have an office for its management;⁴ a sports centre might have a store for equipment). There must be a relationship between the potential ancillary use and the main use,⁵ otherwise there would be two separate uses or a mixed use.
9. In considering whether a material change of use has taken place, it is necessary to identify the appropriate planning unit. This is the most appropriate physical area against which to determine whether a material change has taken place.⁶ As with primary and ancillary uses, the planning unit is a judge-made concept – it is not in the legislation – but one which enables the identification of the relevant land for the purposes of determining use.
10. Use classes are defined categories of use. If land is in use within a particular use class then a change to any other use within that use class will not be development unless the ability to make that change has already been excluded by a planning permission. Where a building or other land is within one use class a change of use to another use within the

¹ See *Hertfordshire County Council v Secretary of State for Communities and Local Government* [2012] EWHC 277 (Admin), [2012] JPL 836 at para 46 per Ouseley J, approved by the Court of Appeal [2012] EWCA Civ 1473 at para 11 per Pill LJ.

² Town and Country Planning Act 1990, ss 55, 57.

³ First appearing in *Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 WLR 506 at 512 per Lord Denning MR and 514 per Diplock LJ.

⁴ An example used in *Brazil Concrete Ltd v. Amersham RDC* (1967) 18 P & CR 396 at 399 per Lord Denning MR.

⁵ *Main v Secretary of State for the Environment* (1999) 77 P & CR 300.

⁶ The general principles are in *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207.

same use class is not development¹. The current order is the Town and Country Planning (Use Classes) Order 1987 (generally referred to as the Use Classes Order).

11. Not all uses are within a use class. Some are specifically excluded by the Use Classes Order⁷ and others simply do not fall within the terms of any use class. A use outside a use class may be referred to as *sui generis*. A use which is a mix of uses in two or more use classes does not have the benefit of the Use Classes Order.⁸ Many forms of residential use are not within a use class, including in the old-fashioned style, bed and breakfast accommodation, lodging houses and HMOs.
12. The potential categories of use for the present proposals are:
 - a) Use Class C2. Residential institutions
 - b) Use Class C3. Dwellinghouses
 - c) Sui generis, described simply as Extra Care Housing

Use Class C2. Residential institutions

13. Use class C2 is

“Class C2. Residential institutions

Use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses)).

Use as a hospital or nursing home.

Use as a residential school, college or training centre.”

14. Care is defined in article 2(1) of the Use Classes Order:

““*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;”

15. C3 is defined as:

“Class C3. Dwellinghouses

⁷ Listed in the Use Classes Order, art 3(6).

⁸ *Belmont Riding Centre v First Secretary of State* [2004] JPL 593 at para 31 per Richards J, approved in *Fidler v First Secretary of State* [2004] EWCA Civ 1295, [2005] JPL 510 at para 28 per Carnwath LJ and *Cocktails Ltd v Secretary of State for Communities and Local Government* [2008] EWCA Civ 1523, [2009] JPL 853 at para 8 per Pill LJ.

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

- (a) a single person or by people to be regarded as forming a single household;
- (b) not more than six residents living together as a single household where care is provided for residents; or
- (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4).

Interpretation of Class C3

For the purposes of Class C3(a) “*single household*” is to be construed in accordance with section 258 of the Housing Act 2004”

16. In *Rann v Secretary of State for the Environment* a guest house changing to a ‘holiday home for mentally handicapped persons’ did not fall into Class XIV (equivalent of C2) as for XIV ‘the care and maintenance referred to is of a special nature to be provided by those running the home or institution’.⁹ In the 1991 decision of *West Oxfordshire DC v Secretary of State for the Environment*¹⁰ the Court left unresolved whether ‘provision of residential accommodation for the care and maintenance of the elderly including a care centre and community centre’ was C2, C3 or *sui generis*. The case comment in the Journal of Planning Law suggested (on what is now superceded wording for C3):

“A single storey dwelling which was lived in by a group of six elderly persons as a household would *prima facie* come within C3 of the Use Classes Order even if there was an element of care. Equally a care centre of 30 bedrooms and a community centre would *prima facie* come within C2 as “use for the provision of residential accommodation and care to people in need of care.” The crucial factor is the concept of the planning unit. If the whole site is to be treated as the planning unit, then there would seem to be a strong argument that the use was neither C2 or C3 but a combination of the two and so *sui generis*. This would of course depend upon how independent were the households living in the single storey buildings.”

17. In *Leelamb Homes Limited v Secretary of State for Communities and Local Government*¹¹ the Court considered whether a continuing care and retirement

⁹ (1980) 40 P & CR 113 at 117 per Sir Douglas Franks QC.

¹⁰ [1991] JPL 58.

¹¹ [2009] EWHC 1926 (Admin); see para 15, 20 per Robin Purchas QC.

community was in C2 or a mixed C2/C3 use, seeming to take the view that it was in C2 where a planning obligation provided for ‘domiciliary care services’ and the occupancy of the dwellings to be managed and administered by an operator registered with the Commission for Social Care Inspection.¹² When the appeal was redetermined by an Inspector, it was accepted by all parties that the use was C2.¹³

18. The status of extra care accommodation has been considered in two recently reported planning appeals. In *Retirement Villages West Malling Ltd v Tonbridge & Malling Borough Council*¹⁴ a development of extra care development of 79 units (comprising of apartments and cottages) all within Use Class C2; associated communal facilities was proposed. Whilst the application had originally been refused by the local planning authority on the basis that it was for a Class C3 use which failed to provide necessary affordable housing and open space, it was agreed by the time of the inquiry that the use, as defined by a planning agreement, was C2. The planning agreement with the Borough Council, dated 5th December 2018, provided that each extra care unit was to be occupied by a ‘Primary Resident’ who was in need of at least 2 hours of Personal Care a week and was aged 65 years or older.¹⁵ Personal care meant the provision of one or more services including delivery of prepared meals from the clubhouse; assistance with personal hygiene, dressing and undressing, getting in or out of bed, the planning or preparation of meals, ordering, collection and taking of prescribed medicines; assistance within technology for home delivery, payment of bills, keeping in contact, hobbies and organising social activities for residents; arranging medical appointments; collection and parking of vehicles within the site to support independence; assistance to access facilities; arrangement of visitor access and overnight stays; assistance with household chores including cleaning and laundry for residents needing help because of their condition. The personal care would be provided following a health assessment.
19. In *Retirement Villages* the Inspector was content that the use was C2, and as specialist housing for the elderly, was precluded from requirements to provide affordable housing.

¹² Now replaced by the Care Quality Commission.

¹³ *Leelamb Homes v Maldon District Council* [2010] PAD 26; appeal ref APP/X1545/A/08/2081888.

¹⁴ Appeal reference: APP/H2265/W/18/3202040, application reference TM/17/00506/OA, report [2018] P.A.D.

11.

¹⁵ See clause 1 and Schedule 2.

20. *Wyboston Lakes Limited v Bedford Borough Council*¹⁶ concerned a section 73 application on an approved ‘continuing care retirement village (Class C2) comprising care home with nursing and dementia suites, restaurant, care apartments, spa and physio’. The local planning authority were concerned that the unilateral undertaking for that application would mean that the use would be C2 and another use.
21. The Inspector held:

“10. The appellant’s commercial model caters for independent living together with regular observation and assessment of residents by health professionals, moving through various stages of provision according to the needs [of each] resident at any time during their occupation. In this manner, the operation would offer residents a choice in their level of care, but does not impose a care programme onto residents. Instead, it is a more passive type of provision that enables them to feel in control of their own living arrangements. This nature of operation appears to offer both independent living, and a flexible programme of health care provision to which residents are entitled.

11. The revised undertaking retains the requirement for a specific standard of medical care provision, to be provided to all residents by a domiciliary care agency, which *3 would require registration and regular assessment by the relevant government regulatory body. Upon moving into the facility, residents would be required to enter into a contract with the provider that effectively ties them to the care provision of the operator. This would be a significant financial obligation for residents, and as such, entry into the facility would contain a degree of self-regulation, in that residents would not choose to subject themselves to such an arrangement unless care is required. I also acknowledge that unless a prospective resident has a disability as set out within the revised undertaking, the minimum age upon entry would be 65, which is higher than traditional “retirement villages”.

12. Moreover, the detailed matters applications that were being considered by the council at the time of the Hearing indicate that the proposed development would have an appropriate degree of accessibility for wheelchair users and ambulant disabled residents, together with a communal-focused layout. I consider that the development would appeal to prospective residents who require a certain level of

¹⁶ Appeal reference: APP/K0235/W/17/3171641; application reference: 16/00218/M73; report: [2019] P.A.D. 1.

care, or at least need the certainty of such within a supported community, but for whom a more independent living arrangement may not be attractive. Accordingly, the hybrid model of care provision and observation within an independent living environment, albeit with communal facilities, would offer a greater level of specialist care than would be considered appropriate within a Class C3 use. Despite the loss of some certainty towards a more traditional Class C2 operation within the amended undertaking, I am satisfied nonetheless that its revised provisions would provide an appropriate level of on-site care and communal facilities. Although there would be an independent living element to the scheme, the focus of the operation as set out within the undertaking would remain the bespoke provision of assisted living and care, at varying levels that would be dependent on the evolving needs of its residents. As such, the operation of the proposed development would fall within the Class C2 use class.”

22. The obligation provided for one resident in each unit to be registered for Disability Living Allowance, have a doctor’s certificate that they are suffering from a disability, are 65 years or older or registered with the Council as visually impaired, and to have a contract with the domiciliary care agency for the site.
23. The *Retirement Villages* and *Wyboston* schemes should be seen simply as examples of C2 uses rather than the minimum necessary to fall into that use class.
24. The proposed schemes are ‘the provision of residential accommodation and care to people in need of care’. Residential accommodation is provided. Care would also be provided at the site by the domiciliary services. That care will be provided to people in need of care because they have health issues which mean that they qualify for exempt rent status. The need for care does arise by reasons within the definition of care ‘old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder’. The extent of the care provided, including the permanent staffing of the facility to assist residents would be sufficient to mean that it is residential accommodation *and* care which is being provided.
25. Whilst residents will have independence in being able to come and go, they are there because they need and are in receipt of care at the facility. That gives an institutional character to the facility.

26. The use would not fall within Class C3. Each apartment would be occupied by ‘a single person or by people to be regarded as forming a single household’ and if viewed on its own, would be a C3 dwellinghouse. However that is an insufficient way of looking at what will be carried out on the site. There will be communal facilities including treatment rooms, a restaurant/café, a residents’ lounge and visitor accommodation. These facilities are part of the extra care facility and the residential accommodation – they are not separate uses, so it is not a residential and A3 (restaurant) development. The communal facilities are of a scale and of such an importance to the care element of the facility that they cannot be characterised as simply ancillary to C3 dwellinghouses.
27. The care element of C3(b) would be inapplicable as looking at the site as a whole there would be more than six residents but they would not live together as a single household.
28. So I consider that the level of care provided to those in need and the requirement that residents are in need of such care are sufficient to mean that the use would be C2. The care is integral to the operation and cannot be described as simply ancillary to dwellinghouse occupation. This conclusion is consistent with the recent appeal decisions. I do not consider that the schemes would have such a low level of care that the shared facilities create a use outside the use classes, so *sui generis*.
29. If any matters arise out of this advice, please do not hesitate to contact me in Chambers.

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5th February 2020