RE: TOWN AND COUNTRY PLANNING ACT 1990

RE: LAND AT COWLEY CLIFF, PRESS LANE, OLD TUPTON, CHESTERFIELD

RE: KEYS CHILDCARE LIMITED

OPINION

Emery Planning Partnership
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Your ref:
Our ref: JB/242603/IA

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1 I am asked to advise Keys Childcare Limited ("KCC") who are providers of residential care and private education specifically focusing upon children.

Factual Background

2 KCC provide care for children in residential properties that are used for the care of children in small groups. Up to four children with care provided by two care workers over 24 hour per day by non-resident staff.

3 KCC are seeking guidance on whether a material change of use would occur from C3 to C2 of the Use Classes Order 1987 in respect of a residential property in Chesterfield. However KCC are seeking guidance that can be applied in a more general manner for properties that they are considering acquiring.

The Proposed Activities

4 The subject property Cowley Cliff is a residential dwelling (C3). It is the intention to use this property as a children's care home. The premises will be vacated by the owners on completion of the purchase.

5 The property currently comprises at ground floor reception room, lounge, kitchen, utility room, ground floor shower room/WC, a family room/bedroom. At first floor it comprises a galleried landing and four further bedrooms, (some en suite) and a family bathroom. Outside the property the dwelling is set within a large site with a double garage and parking for several cars.

6 KCC proposes to carry out general works of repair and maintenance together with general alterations to the internal layout that may include the sub-division of a larger bedroom. It is not anticipated that the works would render the building not to benefit from the general facilities associated with a typical residential dwelling. No works to the external appearance (save for general repair and maintenance) are proposed.

7 The premises for the care of children would comprise the following accommodation at ground floor: living, dining room, kitchen, utility room and office/study. The first floor accommodation would be altered and would comprise 4 bedrooms for the children, a bedroom for the carer on duty and a bathroom.

All ground floor facilities would be shared. The preparation of meals would be undertaken by the carers and the persons present would eat at the same time. Due to other legal requirements, all bedrooms would be fitted with locks. However the carers would have a key to each room. The carer's room at first floor would comprise a bed, a wardrobe and a desk in order to allow paperwork to be completed. In addition, a small office is anticipated to be provided at ground floor for general paperwork and other associated uses.

8 The children would be aged in the region of 7 to 17 years. They would be neither mentally nor physically disabled and would be housed on a permanent basis. The children involved may have been taken into care due to fears as to their physical wellbeing or in the unfortunate position of having no available guardians.

9 At all times, two carers would be at the premises with the children. The carers on site would comprise a Team Leader and a Residential Care Worker. Two non-resident staff would be on duty at all times. However the house may be under the supervision of a team of up to 6 or 7 adult carers who operate 8 hour shifts. The shift patterns can be amended to improve the service provided. In addition, at times of introduction of a new child to the premises a third care worker may visit the premises as a visitor. The Team Leader and Residential Care Worker would work on a shift basis with a half hour overlap between the new RCW or TL to be briefed on any

new issues that have arisen on the previous shift. The changes of shift would be staggered.

10 The RCW night duty would be awake while the TL and the children sleep. If any matters arise such as a problem with one of the children, the carer is able to assist. The night shift would allow the RCW to attend to domestic chores such as ironing and tidying up. No noisy activities such as vacuuming would take place. The RCW would not sleep at the site; however, the TL could work either a 12 or 24 hour shift and so therefore may need to sleep at the premises. The carers would care for the children and cook, and all meals would be taken together in a family environment.

11 I am informed that KCC are looking for a number of sites throughout the UK. It is anticipated that they would be used in a similar manner; that is, two carers provided for up to 4 children. It is anticipated that providing the level of care and the requisite accommodation, properties that would be used would be large 5 bedroomed properties with sufficient space at ground floor for a study/office for the carers to use. In addition all such sites would have off-street parking or the use of a double garage so as to discourage parking on the highway.

A Statutory Framework

12 Section 55(1) of the Town and Country Planning Act 1990 defines development as including the "making of any material change of use"

subject to a number of exceptions. Section 55(2)(f) excludes from being a material change of use 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.

13 Within that Order, Classes C2 and C3 are described in the following terms:

> **"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)) ..."**

A dwelling house is dealt with in Class C3 which is defined as follows:

> **"Use as a dwelling house (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)."**

14 "Care" is defined in paragraph 2 as meaning:

"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 The effect of Section 55(2)(f) is that a change of use from a conventional dwelling house as a family home to use for not more than 6 residents living together as a single household (including a household where care is provided for residents) will not constitute development. The Use Classes Order 1987 was accompanied by a ministerial circular 13/87 when introduced. Paragraph 37 of 13/87 states:

"The new dwelling houses class groups together the use as a dwelling house - 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 dwelling house by no more than 6 people living together as a single household. The key element in the use of the dwelling house for other than family purposes is a 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 singe household concept will provide

more certainty over the planning permission 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."

Legal Authorities

16 The application of Class C2 and C3 to a situation where occupants of a house are in receipt of full-time care was considered in **North Devon District Council v. First Secretary of State [2003] JPL 1191**. In that case the property in question was to be occupied by two children under the supervision of a team of non-resident adult carers operating 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. At paragraph 16 of his Judgment he stated:

"It seems to me that the Inspector's approach was, in this respect, correct inasmuch as he was regarding the

household as meaning 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 that 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 He continued 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, 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 the carer living in full-time and looking after those in the premises who would otherwise be unable to live as a household."**

18 Mr Justice Collins then expressed disagreement with the Judgment of Popplewell J in **R v. Bromley London Borough Council ex parte Sinclair [1991] 3 PLR 60**. That case involved three mentally handicapped persons who lived in a household and were supervised by Social Workers. The use, it was concluded, could properly be determined as Class C3(b) use. In the **Sinclair** case, Popplewell J had concluded that there was not a requirement within the 1987 Order that the staff had to be living together with the residents. Collins J in the **North Devon** case disagreed with that approach. He stated:

> **"A proper functioning household must exist, and, in the context of a case such as this, that must mean that the children and the carer must reside in the premises. Otherwise, as it seems to me, it clearly falls within Class C2."**

19 Having concluded on the facts of that case, that the use fell within Class C3 rather than Class C2, Collins J held (on the basis of the

Inspector's findings of fact) that even if it was a Class C2 use, the change of use was not "material" and therefore did not constitute development requiring the grant of planning permission.

20 The **North Devon** case has been revisited in **R (on the application of Crawley Borough Council) v. Secretary of State for Transport and the Regions [2004] EWHC 160 (Admin).** This particular case concerned the use of a dwelling house for persons under a mental disability where non-residential care was provided. Richards J in his Judgment at paragraph 29 in referring to the **North Devon** case stated:

> **"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 it 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."**

21 He continued at paragraphs 30 and 31:

"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.

In my judgement the correct position is that in every case the judgement 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 judgement 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 the underlying policy."

22 Richards J drew upon the case of **R (Hossack) v. Kettering Borough Council [2002] JPL 1206** and **Simmons v. Pizzey [1979] AC 37** as demonstrating the proposition that "household" used to be determined as a question of fact and degree.

Application of Law and Policy

23 The assessment that is required involves a two-stage process:

(a) A determination whether the residents live together as a single household; and

(b) In the event that it was concluded that the residents were **not** living together as a single household whether there was a material change of use of the relevant premises.

24 The **North Devon** case has clearly been the subject of significant criticism in the **Crawley Borough Council** case It is my view that the proper question to be asked, in the first instance, is whether the residents are living together as a single household. Paragraph 29 of the Judgment of Richards J seems to me to leave open the question as to whether or not, depending on the facts of an individual case, children cannot by themselves be regarded as constituting a single household. Richards J expressly declined to decide that particular issue, as it was not necessary

for the purposes of the case before him. However, he plainly rejected the notion that persons resident in a house in need of full-time care are necessarily precluded from constituting a household. On that basis, it will be necessary on a case by case basis to determine whether the proposed occupants (the children, in this particular case) could not be regarded as capable of forming a single household.

25 However, it is plainly anticipated in my Instructions that the probability is that the proposed occupants (ie. the children in this particular case) would not be regarded as capable of forming a single household.

26 In that eventuality, the question posed at (b) above needs to be addressed. It will be recalled that in the **North Devon** case itself, Collins J upheld the Inspector's finding that no material change of use was involved on the facts of that particular case. On this analysis, there would have occurred a change from Class C3 to Class C2. This, of itself, can be an indication that a material change had taken place but is far from conclusive. It is axiomatic that whilst the statute makes clear that changes within a Class are not development, it does not state that a change from one Class to another will be deemed to be material and therefore require an express grant of planning permission as representing development within the meaning of the 1990 Act.

27 It would therefore be necessary to make an informed judgement as to whether any change would be material in the use of premises giving rise to the need for a grant of planning permission.

28 As set out above, Section 55 of the 1990 Act includes within the definition of "development" a "material change of use". With considerable understatement the Encyclopaedia of Planning states:

> **"Assessing what constitutes a "material" change in use is not entirely straightforward."**

29 Plainly a change is not material if it is de minimis or merely a change in the person conducting the use. The correct approach, in my view, is to judge materiality in land use consequences, having regard to the effect on local amenity and proper land use considerations: **East Barnett UDC v. British Transport Commission [1962] QB 484**. Some guidance is derived from the House of Lords case in **Westminster City Council v. British Waterways Board [1985] AC 676**. The Council in that particular case were alleging that a use of an area of premises was limited to that of a "street cleaning depot", the use to which the premises had been put historically. Lord Bridge stated:

> **"Those uses (operated from the site) as already indicated, included workshops, offices, stores, messing facilities and parking for a variety of vehicles, both under cover and in the**

open. This is just such a mixture of uses as would be required by a wide variety of undertakings whose business was the operation of some kind of vehicular transport and who required a base from which to operate. Whether, in any particular case, the proposed use of the premises by such an undertaking would involve a material change of use would depend on the detailed nature of the proposal. But it would be of no relevance that the use of the premises to enquire for what purpose the vehicles parked there were to be used when they left their base."

30 In this particular case, the outward appearance of the building would remain unchanged. The internal arrangements within the building would be entirely consistent with that of a conventional family home. The essential question to determine is what, if any, actual changes would occur as a result of the use proposed and, if change can be identified, whether that would be material in land use planning sense.

It would seem, at least on a cursory analysis, that the operation of the rota system and its associated "comings and goings" could constitute a "change". However, in view of the Class C3 definition of dwelling house as capable of including 6 residents living together as a single household (for example students), the associated level of activity is not likely to constitute any significant (or even measurable) change. The difference, it seems to me, relates to the provision of care, that difference, whilst constituting a

change, is not the equivalent of a "material change" unless and until it is demonstrated that some land use consequence in planning terms occurs as a consequence of that change. For my part I have been unable to identify any land use consequences that are derived from the consequence of the provision of care.

31 In short, it is my analysis that it would be unlikely that up to four children could be regarded, in the circumstances proposed in this case, as living together as a single household. Nevertheless, I consider on the current evidence that the proposed use would be unlikely to constitute a "material change of use" and therefore constitute development. The change from a conventional dwelling house to the limited care provision that is referred to for up to four children and non-resident carers operating a rota at the property would not give rise to land use changes that could be regarded as "material", thereby triggering the requirement to obtain planning permission.

32 Whether the property enjoys the General Permitted Development Order 1995 rights to enlargement, improvement or other alteration is debatable. The Permitted Development Rights apply to a "dwellinghouse". The current burden of authority is that premises in, for example, mixed use, do not benefit from Permitted Development Rights: **Scurlock v. Secretary of State for Wales [1976] JPL 431**.

By analogy in this particular case, the property is not being used as a dwellinghouse but a use that would fall within Class C2 of the 1987 Order. Insofar as a residential care home (of whatever size) does not enjoy Permitted Development Rights, so too, applying the same logic, the property would not, in my view, enjoy such rights under the 1995 Order.

Practical Consequences

33 The burden of this Advice is that it is, in all cases, a question of fact and degree as to whether planning permission would be required.

Given the significant financial outlay in acquiring property, these considerations must be in the forefront of KCC's mind when proceeding with any acquisition:

(a) An application, wherever possible, under Section 192 of the Town and Country Planning Act 1990 for a Certificate of Lawfulness of Proposed Use or Development should be made. This is an application whereby a detailed description of the proposed activity is submitted formally to the Local Planning Authority for their determination as to whether it constitutes development and whether planning permission is required for it. In the event of a determination that no planning permission is required for the proposal (in accordance with this Advice) the Certificate effectively grants immunity from any enforcement proceedings by the Local

Planning Authority based upon the factual premise that lies at the heart of the application for a Certificate; or

(b) At the very least, prior to completion of any transaction, the informal view of the professional officers of the relevant Local Planning Authority should be sought. Whilst this would **not** provide the same degree of assuredness as a Certificate as indicated above, it would, in my view, give a degree of comfort to KCC in proceeding with their transaction. It is unlikely, on the state of current authority, that KCC would be entitled in the legal sense to rely upon the advice of the professional officer as binding the Local Planning Authority to the view expressed. Even taking that on board, it is still a sensible and prudent approach to adopt.

Overall Conclusion

34 For the reasons I have set out above, my Opinion is as follows:

(a) In light of the current authority, there is an obligation to consider whether the children themselves could constitute a single household

(b) Whilst I consider, on the current information, it is unlikely that a conclusion could be reached that the resident children could constitute a household, it is then necessary to consider whether a "material change of use" has occurred.

(c) On the information currently available to me and consistent with the ***North Devon*** case, the proposal here is unlikely to have land use consequences that lead one to the conclusion that a "material change of use" has occurred.

(d) If so, no development within the meaning of Section 55 of the Town and Country Planning Act 1990 has occurred with the consequence that planning permission is not required.

(e) I do not consider that Permitted Development Rights would apply in respect of the proposed use.

(f) Prior to acquisition of a property, it would be prudent to make an application for a Certificate of Lawfulness of Proposed Use and Development in accordance with the 1990 Act.

35 I believe I have dealt with all the matters raised, but if I can assist further, do not hesitate to contact me.

JOHN BARRETT

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