Appendix T3

Counsel's opinion for Crowell Homes Ltd on the C2 or C3 Use Class issue

Accompanies the report

Continuing care retirement communities

A guide to planning

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JOSEPH ROWNTREE FOUNDATION

Planning Officers Society

CROWELL HOMES LIMITED

re

Redevelopment of Ashwicke Hall, Marshfield, Gloucs

OPINION

1. I am asked to advise Crowell Homes in connection with a dispute that has arisen between the company and South Gloucestershire Council about whether the proposed use of Ashwicke Hall can properly be regarded as falling within classes C2 or C3 of the Use Classes Order. The clients contend that class C2 is the appropriate class; the Council, class C3. The present use is within Use Class C2. Ashwicke Hall is a Grade II listed building.

2. The very extensive land and premises in question are shown outlined in red on plan 4370-01A with my Instructions. They consist of a number of buildings which comprise Ashwicke Hall itself, buildings linked to it and a number of detached outbuildings. There are extensive grounds and gardens. I have taken all this area to be the planning unit.

3. From the plans and description the accommodation and proposed uses on the site are:

(1) Ashwicke Hall: ground-floor reception and communal rooms; a cellar with a health suite, pool etc.; upper floor suites for residents.

(2) Ashwicke Court: further suite accommodation for residents.

(3) The walled garden: I am not clear what is proposed here. I have assumed either communal accommodation or further suites or care rooms.

(4) The stable block: the same comment applies to this.

(5) Milner Court: nursing bedrooms; residents' suites; eight staff bed-sits.

(6) Detached buildings: East Lodge will be the manager's accommodation. The Raizes, Sallybrook and West Lodge will be sold as leasehold private houses. I assume that these will be entirely separate and hence outside any C2 use. There will be a material change of use when this occurs.

4. The intention is to operate a twenty-eight bed nursing home and approximately eighty-two Close Care units. The Nursing Home is the core of the development and provides care throughout the accommodation both for the nursing bedrooms and the Close Care units. The latter provide suites of rooms where residents can live and where, if necessary, 24 hour care can be provided even so far as, e.g., help with bathing and dressing/undressing.

5. The characteristics of the Close Care units are:

(1) they will be sold only to those who have an individual assessment of their needs which leads to an agreed care package. There will as I understand it be a similar assessment of those who use the nursing home but in either case they will be able to use the range of communal facilities (see below).

(2) The Close Care accommodation will be sold on a leasehold basis (of which 6 units will be rented to Social Services/Health Authority) for a term of 125 years.

(3) There will be restrictions in the leases such that occupation of the units will be linked to the Nursing Home; no alterations will be allowed; and the tenant will be an 'approved occupier' - although such an occupier will be allowed to have temporary guests.

(4) A service charge will be payable in addition to the care package following the assessment.

(5) There will be no assignment, under-letting or parting with possession of the Close Care unit, save with the consent of the landlord. If the dwelling falls vacant and the landlord believes that the tenant has permanently vacated the dwelling the landlord can require the tenant to state his intentions about his occupation. He can also, subject to the precise terms of the draft lease, give a notice which will allow him to obtain a surrender of the lease of the Close Care unit by a purchase of the tenant's interest.

(6) The landlord will covenant to repair and decorate the main structure and common parts and keep them in good order.

(7) The landlord will provide communal areas and support including, e.g., heating and electricity for each unit; alarm links; 24 hour trained nursing staff; lounges; restaurant; library; laundry facilities; swimming pool;

fitness suite and spa; social programme; cleaning; IT/TV room and so on.

(8) It is perhaps worth noting that internal alterations will of course not normally require any form of planning consent (see s. 55(2)(a) of the 1990 Act) although in this case there is the complication of the listed building which may mean that listed building consent is necessary.

6. Use Class C2 refers to:

> *"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. ...."*

By contrast use class C3 is defined as:

> *"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 six residents living together as a single household (including a household where care is provided for residents)."*

7. The first issue is whether what is proposed falls within use class C2 or C3. That in turn depends primarily on whether the Close Care units are 'use as a dwellinghouse' within the meaning of C3 (in this context almost inevitably, it seems to me, under sub-paragraph (a)) and whether, if so, that is enough to take them from use for the provision of residential accommodation and care etc. or from use as a nursing home and also therefore from C2 to C3.

8. Whether a particular unit is capable of being a dwellinghouse is a question of fact. There is no definition of it in the Use Classes order. The test is whether it can afford to those who use it the facilities required for day-to-day private domestic existence (see *Gravesham BC v. SOSE* (1982) 47 P. & C.R. 142 and *Moore v. SOSE*

(1998) 77 P. & C.R. 114). Although I have not seen plans of individual suites and the nature of the accommodation, I have the clear impression, because of the reference to their 'independence' and 'self-containment', that the Close Care units are likely to pass this test, particularly if the facts in *Gravesham* are considered. But I do not think that this is enough.

9. Use class C2 refers to residential institutions of various sorts and uses for those purposes. The present use is capable of falling under the first two sub-paragraphs: *"Use for the provision of residential accommodation and care to people in need of care (other than a use falling within class C3 ...)"* and, alternatively, *"Use as a .... nursing home"*. It will be noted that the latter does not have the qualification relating to Use class C3 that applies to the former.

10. The issue centres on the proposed Close Care units that are to be developed. I say that because of the Council's letter of 16th December 2004 which refers to the *"proposed mixed use of the site, a significant element of which fall within Class C3 ..."* I take that to be a reference to the nursing home on the one hand and the Close Care units on the other. But if the Close Care units are developed as proposed, is the development still within the description of *"use for the provision of residential accommodation and care"* etc. or *"use as a ... nursing home"* within use class C2? To answer that question it is necessary to look closely at how the Close Care units are intended to operate.

11. As I have said they are capable of falling within the definition of 'dwellinghouse' but that by itself is not a complete answer. In dealing with use class C3 the test is "*use as* a dwellinghouse" [emphasis supplied] compared with "use as a ... nursing home" or (looking at the first part of use class C2) "use for the provision of

...". I have looked at the essential characteristics of the proposed Close Care units above. I have seen a draft lease and an outline nursing care plan. There are intended to be restrictions in the following areas:

(1) the units will be leasehold for a term of 125 years and subject to important restrictions which link them firmly to the complex and its use as a nursing home or one where residential accommodation and care is provided. The draft lease does not state the term but I take it from the other material with which I have been supplied.

(2) Although the definition of the 'tenant' under the lease does not appear to be restricted to elderly persons (and so the tenant could be, e.g., a trustee for an occupier) it is clear that only an 'Approved Occupier' can occupy the dwelling (other than as a temporary guest) (clause 4.7) and the 'Approved Occupier' is defined 'as at least one person or persons of' 65 years or over. There are provisions for obtaining the landlord's approval which can be withheld in the Landlord's complete discretion in respect of someone *under* 65 years (see cll. 1.3 and 1.4). Thus there is a clear restriction on occupation other than by the elderly. I will assume for simplicity that the tenant is the same as the occupier.

(3) The tenant cannot make material alterations, even of a non-structural nature, to the interior of the dwelling nor can he substantially change the layout (cl. 4.6(c)). That is a clear indication to me that the landlord is retaining a substantial measure of control over and above that of the ordinary landlord in a leasehold development and the purpose is, no doubt, to ensure that the character of the apartment remains that of one

to be occupied by the elderly and those in need of care.

(4) The tenant cannot 'assign underlet or part with or share the possession or occupation of the whole or any part of the dwelling' except by an approved assignment (cl. 4.8(a), (b)). In essence, this means that if the tenant dies or cannot continue to occupy the dwelling he must give notice to the landlord; the landlord can then give notice of his intention to purchase the dwelling and there are provisions for valuation; once this has taken place the landlord can serve a 'surrender notice' upon the tenant and the landlord then purchases the tenant's interest at valuation, less 10%. There are provisions which allow the landlord to start the process for surrender without waiting for the tenant's notice. These strike me as being important restrictions on a tenant's freedom of disposition which are not readily applicable to ordinary leasehold transactions but are consistent with the landlord retaining control over who occupies, how long any vacancy can be allowed to continue and maintaining the character of the complex as one for residential care and accommodation or, more simply, as a nursing home - otherwise there would be nothing to stop tenants leaving their apartments vacant or assigning them to a non-qualifying third party and thus altering the whole character of the home.

(5) There are further restrictions on assignment etc. (cl. 4.8(c), (d), (e)) which are important. In essence, these require the tenant to assign etc. only to an 'Approved Occupier'; give written notice to the landlord of his intention to assign and the price; this is so that the landlord can nominate Approved Occupiers from the waiting list at the same price and terms; alternatively, the landlord may require the

tenant to surrender the lease in the way described above. The surrender price will normally be the valuation less 10% (see cl. 4(8)(b)(iii)). And where the landlord nominates a person from his list in preference to a person with whom the tenant has made a private bargain for assignment further provisions about consideration apply. In essence, if the price negotiated from the person on the Landlord's list pays more than the price negotiated by the tenant then the tenant is to repay 50% of the excess to the landlord (cl. 4(8)(e)). Here again there is tight control by the landlord to ensure, I consider, that the character of the complex as one for residential care and accommodation and/or as a nursing home remains and that those who occupy will be occupying for such purposes and in accordance with the overall scheme. These are all restrictions one would not expect to see in an ordinary leasehold development. This is particularly true of the provisions dealing with consideration.

(6) Finally, the assignee is required to enter into direct covenants with the landlord in accordance with the terms of the lease, thus preserving the character and the terms of the scheme.

(7) The 4th Schedule contains important regulations about the use of the dwelling and the home generally. The dwelling can only be used for private residential use by an Approved Occupier or such occupier and another person approved by the Landlord. No trade or business or profession can be carried on from the dwelling. Nobody can be employed to carry out works, duties or perform any functions for the tenant in or about the home unless the landlord (who has complete discretion) consents. And the provisions of the TCPA 1990 and

any planning permissions must be complied with. Again these all allow the landlord to ensure that the character of the scheme is retained as already described.

(8) The tenant is to pay a service charge. In return for this the landlord provides a number of services some of which are specifically relevant to the provision of residential care and accommodation and/or nursing home facilities (cl. 5). Thus the landlord is to keep open a sitting room between specified hours. Each dwelling is to have an alarm link to a central control for emergency medical/nursing cover. There is to be a security system. The landlord is to provide and maintain the gas and electricity for the dwelling and to provide hot water and heating (an unusual provision in leases of modern flats); he is also to provide trained nursing staff on a 24 hour basis; he will provide regular refuse collections from the dwelling and will provide newspaper deliveries and a library. Having provided these facilities the tenant is given the right to use them, particularly the services of the nurse and the nursing and care facilities at the complex and the right to use the restaurant and bar there and any other services which may be made available by the landlord (1st Schedule part II), subject to paying for such facilities as are not included in the service charge. Again these are all clearly related to the use of the complex as one providing residential care and accommodation and nursing home care and show the clear link between the dwelling and the nursing home facilities.

(9) In summary, the way in which the lease is drafted and the obligations and rights which are intended to be placed upon the parties seem to me to show that the Close Care units are related to the provision of residential care and accommodation

and the function of the nursing home and are not independent units in any meaningful sense. They would not detract from, but would complement, the nursing home use. Because of the clear links and restrictions which I have described it seems to me to be artificial to consider them as separate planning units. Their use is plainly linked to and part of the overall nursing home and/or residential care and accommodation uses. In this connection, it is also perhaps worth noting that McCullough J. in *Gravesham* (at p. 146) stressed the distinction between a dwellinghouse and institutions where people may spend 24 hours a day but are plainly not dwellinghouses. Although his analogy cannot be pressed too far, it is I think of some assistance in the circumstances of this case. It also may be relevant to take into account the quality of the user (see at p. 147) as part of taking into account all the relevant circumstances to solve what is stressed to be an issue of fact.

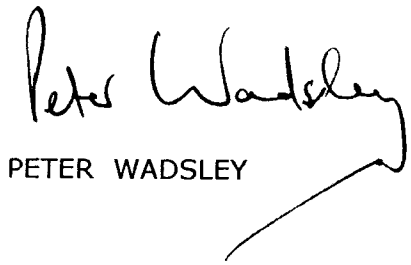
12. It is relevant to stress one other feature of the scheme. Although I have (unsurprisingly) concentrated on a number of legal issues, I am instructed that the way in which Ashwicke Hall is to be run means that the occupants whether of the Close Care units or the nursing home part must have a Care Plan to deal with their medical needs. Thus there will be an initial assessment by nursing staff on taking up residence; an organised plan of care will then be produced; it will be constantly monitored and evaluated. It is described as an "Individualised Nursing Care" procedure.

13. The charges (as I have indicated above) will be the service charge under the lease and a Care Charge for nursing and related care. Since individual assessments will vary, a range of 'Support Bands' are provided ranging from 'A', where relatively little support is required, to 'F', where there is a 12 hour full nursing service and,

e.g., visits throughout the night.

14. All this emphasises the nursing and care aspects of the proposed use. Having said that, I am not sure exactly where the emphasis of the scheme should be placed. I suppose that it is on the 'use for the provision of residential accommodation and care to people in need of care' within the meaning of the first part of class C2. That is because of the predominance of the Close Care units. That is sufficient for present purposes but, if it becomes necessary to consider it, it is also fair to say that I have assumed (as will be clear from what I have said above) that, potentially, there is a 'nursing home' use within class C2 of the 1987 Use Classes Order. That is because the scheme properly emphasises that nursing home care is at the core of the development. I consider therefore that the proposed use does not fall into class C3 for the reasons given above namely, that the use is essentially a residential accommodation and care use or an institutional nursing home use and the way in which the Close Care units are to be set up and run will not amount to a use as a dwellinghouse. They will be an essential part of the other use(s).

15. If my Instructing Solicitors have any queries I hope they will not hesitate to contact me whether by telephone or otherwise.



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