



Neutral Citation Number: [2019] EWHC 892 (Admin)

Case No: CO/2831/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 April 2019

Before :

MRS JUSTICE LANG DBE

Between :

THE QUEEN
on the application of

Claimant

RESIDENTS LOCAL TO ELMBANK
- and -

WOKING BOROUGH COUNCIL
HENLEY SECURE INCOME
PROPERTY MANAGING TRUST

Defendant

Interested Party

James Neill (instructed by **Carbon Law Partners**) for the **Claimant**
Timothy Straker QC (instructed by **Legal Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 26 March 2019

Approved Judgment

Mrs Justice Lang :

1. The Claimant applied for judicial review of the decision of the Defendant (“the Council”), dated 6 June 2018, granting the Interested Party’s application to vary a condition attached to a planning permission restricting the use of a property known as Elmbank Rest Home, 27 Woodham Road, Horsell, Woking, Surrey (“Elmbank”), by way of fresh grant of planning permission.
2. The Claimant is an unincorporated association of residents, represented by its officers in these proceedings. The Interested Party is the owner of Elmbank.
3. The Claimant’s grounds for judicial review were:
 - i) The Officer’s Report (“OR”) misinterpreted Policy CS13 of the Woking Borough Council Core Strategy and so failed to advise members that existing accommodation for elderly persons was protected unless it could be demonstrated that there was insufficient need or demand for that type of accommodation.
 - ii) There was insufficient evidence before the Council to conclude that it was not viable to operate a care home for the elderly at the Property.
4. On 10 September 2018, permission to apply for judicial review was granted by Mr John Howell QC, sitting as a Deputy Judge of the High Court.

Facts

5. On 15 September 1982, permission was granted for a change of use of Elmbank from a single family dwelling to a residential retirement home for elderly people. There were approximately six elderly persons at that time. Condition 5 to the planning permission provided:

“The use hereby approved shall only be as an elderly persons home and for no other purpose within Class XIV of the Town and Country Planning Use Classes 1972.”
6. In May 1984, permission was granted for a single storey front extension to provide two extra bedrooms.
7. In August 1985, permission was granted for two single storey extensions to provide additional facilities, including two additional bedrooms.
8. In March 2017 the Care Quality Commission rated the service at Elmbank as inadequate. By January 2018, it had closed and the building was vacant. It had last been used to provide care for up to 14 persons over the age of 65, including those with dementia.
9. On 12 January 2018, the Interested Party applied to the Council to vary the 1982 grant of planning permission, by removing condition 5, so that Elmbank could be used as a

Care Home for vulnerable adults, whether or not they were elderly. It would remain in Use Class C2.

10. There were objections to the application on a number of grounds, including that it would result in a loss of accommodation for the elderly, contrary to Policy CS13.
11. On 5 June 2018, the Planning Committee accepted the recommendation in the OR to grant the application. Planning permission was granted, subject to conditions.

Statutory framework

12. Section 73 of the Town and Country Planning Act 1990 (“TCPA 1990”) provides:

“73.— Determination of applications to develop land without compliance with conditions previously attached.

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

...”

13. A successful application to vary a condition under section 73 TCPA 1990 results in a fresh grant of planning permission.

Ground 1

14. The Claimant submitted that the OR misinterpreted the second paragraph of Policy CS13, which reads:

“Existing specialist accommodation will be protected unless it can be demonstrated that there is insufficient need/ demand for that type of accommodation.”

15. According to the Claimant, the correct interpretation was that it protected specialist accommodation in its current specific use (i.e. for elderly persons). It was not intended to prevent a change of use from specialist accommodation for older people and vulnerable groups to some other type of use. The dispute between the parties was identified by Mr Howell QC, when granting permission, as whether what is to be protected under Policy CS13 is use for a particular type of specialist accommodation (as the Claimant contended), or whether it is use as any kind of specialist accommodation, as described in the policy (as the Council contended).
16. Policy CS13 is preceded by a description of its purpose and followed by a reasoned justification. The terms of the Policy are demarcated by a box, which cannot be replicated in this judgment, and so the text has been underlined instead.

“Older people and vulnerable groups

- 5.96 National policy requires local authorities to meet the specific accommodation needs of older people and other vulnerable groups. Following the national trend, the Borough is forecast to see growth in the proportion of older people and older person households (around 5,000 more people aged 65+ are forecast to live in Woking Borough by 2026). It is important that the Council provides increased housing choices in terms of specialist accommodation, and appropriate dwellings that are suitably located close to public transport and other key local services. In addition, offering attractive alternative housing choices for older people and other vulnerable groups will assist the Council in freeing-up family sized homes that are currently under occupied.
- 5.97 The ‘Supporting People’ programme is a Government scheme that aims to support people in their own homes so that they can lead more independent lives. In terms of vulnerable groups, the programme covers a number of groups including people who are older, ex-offenders, at risk from domestic violence, homeless, mentally and physically disabled, have alcohol and drug problems, or are young people at risk. The main objective of this programme is to give people the opportunity to improve their quality of life by providing a stable environment which enables greater independence. This includes providing high quality, cost effective, accessible housing and related support services that meet identified need. This is likely to result in the need to develop specific types of accommodation, and address the requirements of wheelchair users, for example.

CS13: Older people and vulnerable groups

The Council will support the development of specialist accommodation for older people and vulnerable groups in

suitable locations. The level of need will be that reflected in the latest Strategic Housing Market Assessment. This will include the provision of new schemes and remodelling of older, poorer quality sheltered housing which is no longer fit for purpose.

Existing specialist accommodation will be protected unless it can be demonstrated that there is insufficient need/ demand for that type of accommodation.

New specialist accommodation should be of high quality design, including generous space standards and generous amenity space

New specialist accommodation should incorporate “Lifetime Homes” standards and be capable of being readily adapted to meet the needs of those with disabilities and the elderly. A percentage of new specialist accommodation will be required to be fully wheelchair accessible.”

The Council will work with partners to seek to provide the necessary infrastructure to support specialist accommodation, including homes for the elderly. The Council will seek to develop the role of the community centres and where feasible seek to provide new schemes such as community hubs which provide leisure, recreation, and education and community activities for older people and vulnerable groups.

Reasoned justification

5.98 There are certain types of residential accommodation which cater for sectors of the community with specific needs. These are often related to the more vulnerable members of society, or those who would benefit from a higher level of on-site support. This need can be divided into two broad groupings – the growing elderly population, and those who may need specialist social support. The isolation of such groups is not conducive to social inclusion, balanced communities and sustainable development. It is therefore important for these types of development to be located in accessible areas, close to main facilities and public transport routes to best cater for residents, staff and visitors, and promote social inclusion. The Council acknowledges that land values within the urban area can make securing sites for such developments difficult in terms of viability and availability. The Council will allocate specific sites through the Site Allocations DPD to assist in bringing suitable sites forward to meet need.

5.99 Evidence from the SHMA shows that over three-quarters of older person only households are owner

occupiers and just over 70% of these households do not have a mortgage. This evidence suggests that there is significant potential for equity release schemes or leasehold accommodation that would meet the needs of older people and would free up larger units for younger families.

5.100 A proportion of two bedroomed units for older people will be required as this takes into account residents' future needs. By ensuring there are a number of larger properties it will take into account the ongoing needs of older people who may require an additional bedroom for a live-in carer or for a family member to stay. This will ensure that older people are able to remain living independently for longer with additional support as a positive alternative to residential care. In providing two bedroomed units, it will also provide an additional incentive to encourage older people who are under-occupying family sized social housing units. The Government is changing the regulations regarding housing benefit through the Welfare Reform Act 2012. Flexibility will be required for determining applications which include affordable sheltered and supported units to reflect those changes.

5.101 These specialist types of accommodation have specific design requirements

17. On my reading of Policy CS13, it supports the provision of "specialist accommodation" for a wide range of groups, with differing accommodation needs. Whilst the specific needs of older people are recognised, they are not prioritised ahead of other groups.
18. The term "specialist accommodation" is used generically throughout, to refer to all types of accommodation covered by Policy CS13 (emphasis added):
 - i) Introductory paragraph 5.96: "It is important that the Council provides increased housing choices in terms of **specialist accommodation**...".
 - ii) CS13:

"The Council will support the development of **specialist accommodation** for older people and vulnerable groups in suitable locations."

"Existing **specialist accommodation** will be protected unless it can be demonstrated that there is insufficient need/ demand for that type of accommodation."

"New **specialist accommodation** should be of high quality design"

“New **specialist accommodation** should incorporate “Lifetime Homes” standards and be capable of being readily adapted to meet the needs of those with disabilities and the elderly ...”

“The Council will work with partners to seek to provide the necessary infrastructure to support **specialist accommodation**, including homes for the elderly.”

iii) Reasoned justification: “5.101 These **specialist types of accommodation** have specific design requirements

19. The Claimant relied, in particular, upon the second paragraph of Policy CS13. It has to be read in context. It appears under the heading is “Policy CS13: Older people and vulnerable groups”. Immediately below that heading, the first paragraph states that the “Council will support the development of specialist accommodation for older people and vulnerable groups”. This paragraph expresses the Council’s policy of supporting the development of specialist accommodation for all the groups at which the policy is directed – older people and vulnerable groups. The second paragraph states that “Existing specialist accommodation will be protected unless it can be demonstrated that there is insufficient need/ demand for that type of accommodation.” This paragraph expresses the Council’s policy of protecting existing specialist accommodation for all the groups at which the policy is directed – older people and vulnerable groups. Although it does not include the words “older people and vulnerable groups”, on my reading, it bears the same meaning as the previous paragraph, which is a parallel provision. The first paragraph supports new development and the second paragraph protects existing development.
20. As this is a planning policy, the “protection” in question must be understood in a planning context. In my view, it means protection against a grant of planning permission for a use other than specialist accommodation for older people and vulnerable groups. For example, a developer applying to re-develop a residential care home into flats for general residential use.
21. The OR gave the following guidance to members:
 - “3. Policy CS13 of the Woking Core Strategy states ‘*existing specialist accommodation will be protected unless it can be demonstrated that there is insufficient need/ demand for that type of accommodation*’.
 4. This planning application proposes to remove condition 5 of planning application 82/0212 restricting the use of the property to elderly people. The use of the property would remain within Use Class C2 and allow the building to provide residential accommodation and care to people in need of care, residential schools, colleges or training centres, hospitals and nursing homes.
 5. A report published by the Quality Care Commission in March 2017 rated the service at Elmbank Rest Home as

inadequate as the service was not safe, efficient, caring responsive or well led.

6. The applicant has advised that the care home is currently deregistered. Due to the small scale of the care home the average weekly fees are not enough to provide sufficient staff and management to provide a high quality of service to the most vulnerable group of people. The removal of the elderly person condition is imperative in ensuring the viable long term use of the property as a care home.

...

8. It is proposed that the property would provide a service for those with mental health issues. The introduction text to Policy CS13 of the Woking Core Strategy (2012) advises vulnerable groups includes people who are mentally or physically disabled.

9. The removal of condition 5 would enable the property to retain a viable C2 use and continue to provide specialist accommodation for vulnerable groups in accordance with Policy CS13 of the Woking Core Strategy (2012). At present the property is vacant and does not have the required facilities to provide an acceptable level of care for elderly people.”

22. In my judgment, the Officer’s advice was based upon a correct interpretation of Policy CS13, and she was entitled to advise members that the removal of condition 5 would enable the property to retain a viable use under Use Class C2 and to provide specialist accommodation in accordance with Policy CS13.

23. The grant of planning permission gave effect to Policy CS13 in condition 03, by safeguarding the use of the property as specialist accommodation for older people and vulnerable groups:

“03. The development hereby permitted shall only be used for residential accommodation and care to people in need of care and vulnerable groups. Vulnerable groups includes people who are older, ex-offenders, at risk from domestic violence, homeless, mentally and physically disabled, have alcohol and drug problems, or are young people at risk. The development shall be used for no other purpose within Class C2 of The Town and Country Planning (Use Classes) Order 1987 ... without the prior written consent of the Local Planning Authority.

Reason: To safeguard the use of the property as specialist accommodation for older people and vulnerable groups for which there is an identified need in accordance with Policy CS13 of the Woking Core Strategy 2012.”

24. For these reasons, Ground 1 does not succeed.

Ground 2

25. The Claimant submitted that there was insufficient evidence before the Council to conclude that it was not viable to operate a care home for the elderly at the Property.

26. The written application from the Interested Party explained that “[w]hilst the property may well continue to house elderly persons, removing condition 5 will enable the property to accommodate vulnerable adults of all ages, who are most in need of supported living accommodation the applicant is seeking to remove Condition 5 to enable the property to continue to operate as a Care Home; albeit with a more inclusive tenant base”.

27. The Officer had obtained further information about the existing care home use by the time she wrote the report: see the extract from the report at paragraph 21 above. In summary, the Quality Care Commission had rated the service as inadequate; the care home was currently deregistered and vacant; due to its small scale, the average weekly fees were insufficient to provide the required level of service; and the removal of the elderly person condition was imperative in ensuring the viable long term use of the property as a care home.

28. At the meeting of the Planning Committee, a representative of the Interested Party spoke in support of the application. She said:

“To confirm, the care home has been deregistered for a long period of time as the care home for elderly became unviable. This is due to the average weekly fee rates linked to that client group not being high enough to afford the amount of staff and management needed to provide the service required to that particular group of vulnerable people. As such the removal of this planning condition is imperative in ensuring the valuable and long term use of the property as still a care home.”

29. In my view, there was sufficient material before the Planning Committee to conclude that it was no longer viable to operate Elmbank as a care home for the elderly.

30. In any event, the protection afforded by the second paragraph in Policy CS13 would only have been engaged where the proposed new use was not specialist accommodation for older people and vulnerable groups, within Policy CS13.

31. For these reasons, Ground 2 does not succeed.

Conclusion

32. For the reasons set out above, the claim is dismissed.