

OUR REF GSLE/BUR/0247/00001
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mms | Maclay Murray
& Spens LLP

Ms Karen Bradshaw
Principal Planner
London Borough of Bromley
Stockwell Close
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BR1 3UH



13 April 2016

Dear Ms Bradshaw

Mr Marcin Burda and Others
Planning Application ref: DC/15/02145/FULL1 ("the Application")
Former Care Home Site, St Raphael's, 32 Orchard Road, Bromley ("the Property")

We are instructed on behalf of (1) Mr and Mrs Marcin Burda of 7 Bay Tree Close, Bromley BR1 2TS, (2) Mr John Wright of 34 Orchard Road, Bromley BR1 2PS and (3) Mr Vincent White of 36 Orchard Road, Bromley BR1 2PS (together "our Clients") in relation to the Application lodged on behalf of Methodist Housing Association ("MHA") for the proposed development of the Property for retirement living with care.

We have reviewed the Application, supporting documentation and e-mail correspondence among yourself on behalf of the London Borough of Bromley as local planning authority ("the LPA"), the Greater London Authority ("GLA"), MHA and our Clients and other objectors and we have also had an opportunity to review the letter dated 24 March 2016 prepared by MHA's agents, Savills. We set out below our Clients' key concerns which primarily are (1) the overdevelopment of the Property which arises as a direct result of (2) an incorrect designation of the proposed development as falling within Use Class C2 of the Town and Country Planning Use Classes Order 1987 ("the UCO"), which subsequently leads to (3) adverse impact on traffic and on-street parking in Orchard Road and its surroundings.

Overdevelopment of the Property

Notwithstanding MHA's submission of revised plans showing a reduction from 77 to 75 units, the proposal which is currently before the LPA still represents gross overdevelopment of the Property.

No cognisance has been taken of the scale and design of the existing surrounding properties and the proposed building would be out of keeping and inappropriate.

Policy H7 of the LPA's Unitary Development Plan sets out the considerations which are applied to housing density and design in relation to Class C3 developments. By inappropriately agreeing to designate the proposed development as Use Class C2 the LPA is allowing MHA to contravene several policies of the Unitary Development Plan which would otherwise apply to Class C3 residential development, a distinction which suits MHA's purposes. This has resulted in a development proposal which significantly deviates from planning norms in terms of bulk and mass, is not in keeping with the residential character of the area and will have a detrimental effect on our Clients' enjoyment and use of their property, due to overlooking, overshadowing, loss of privacy and impact on residential amenity.

Failure by the LPA to have proper regard to the material considerations referred to above would be an infringement of our Clients' rights in terms of Articles 1 and 8 of the First Protocol of the European

Convention of Human Rights, being the substantive right of peaceful enjoyment of one's possessions (including one's home and land) and the right of respect for a person's home. In addition, our Clients are entitled to the protection afforded by Article 14 (the prohibition of discrimination).

Designation of the Development as Use Class C2

Our Clients' key concern stems from the designation of the proposed development as a use falling within Class C2 of the UCO. The Application seeks permission for the demolition of an existing care home and the erection of a part one/two/three storey building with an additional storey within the roofspace comprising 75 (originally 77) retirement living apartments, with basement level ancillary facilities, car parking, cycle parking, refuse storage and landscaping.

MHA's contention is that the proposal would fall within Use Class C2 of the UCO, being "use for the provision of residential accommodation and care to people in need of care (other than a use within Class 3 (dwelling houses))..."

There is no debate that the previous use of the Property, as a care home, fell within Use Class C2, but, in our Clients' view there is no doubt that the proposed redevelopment falls outwith a C2 classification.

In Savills' letter of 24 March 2016 they correctly state that the most up to date relevant policy guidance is the Mayor's Housing Supplementary Planning Guidance ("SPG") which was adopted in March 2016, but what they do not do is accurately refer to critical paragraphs of the SPG which make it clear that the case should be made for the proposed development falling within Use Class C3 of the UCO. Following the issue of Circular 8/2010, Class C3 is a dwelling house which is defined as "... C3(b) those living together in a single household and receiving care", which definition clearly applies to the proposed development.

"Care" is defined in the UCO as "personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or past or present mental disorder".

MHA propose to provide residential accommodation with care, to individuals or couples living in their own self-sufficient apartment, but having access to various communal facilities on site, such as a dining room/restaurant, residents' lounge and well-being suite/therapy room.

The SPG at paragraph 3.7.4 refers to categories of older persons' and specialist housing (Use Class C3) where planning policies to increase supply are likely to be required. This includes "extra care accommodation (Use Class generally C3); self-contained residential accommodation and associated facilities designed and managed to meet the needs and aspirations of people who by reason of age or vulnerability have an existing or foreseeable physical, sensory or mental health impairment. Each household has self-contained accommodation and 24 hour access to emergency support. In addition, extra care accommodation includes a range of other facilities, such as a residents' lounge, a guest room, laundry room, day centre activities, a restaurant or some kind of meal provision, fitness facilities and classes and a base for health care workers. The exact mix of facilities will vary on a site by site basis. Some domiciliary care is provided as part of the accommodation package, according to the level of need of each resident. Extra care housing aims to create a balanced community, bringing together a balanced proportion of people with different levels of care needs." It can be seen from this wording that MHA's proposal clearly falls within the category of "extra care accommodation", which in turn is stated to be "generally Class C3".

Further supporting our assertion that the proposal for extra care accommodation should be designated as Class C3 is the LPA's own Local Plan Draft Policies and Designations Consultation document which acknowledges that whilst there is currently ambiguity in the Use Class classification for the range of specialist accommodation for the elderly, "extra care" type housing developments "are treated as residential dwellings (C3) and therefore subject to other residential policies, including affordable housing policies".

The Consultation document goes on to state that "the application of affordable housing principles to specialist elderly accommodation which falls within Class C3 would undermine the Specialist & Older Peoples Accommodation policy, which seeks to encourage provision of specialist, and supported accommodation, and would create a perverse financial incentive favouring the provision of care homes over Extra Care Housing. It is the Council's intention to amend Bromley's adopted Affordable Housing SPG removing the requirement for affordable contributions from the full range of elderly specialist

accommodation". Whilst this document is a consultation document, it is of value in that it demonstrates the LPA's view that extra care accommodation should be designated as Class C3 but that, going forward, the LPA would be looking to remove the requirement for affordable housing, recognising that developers seek alternative use class designations in order to circumvent the current policy requirement to provide affordable housing as part of a C3 development.

The SPG also recognises that there has been debate about how to categorise specialist older persons' accommodation in terms of the UCO. At paragraph 3.7.18 it is noted that consultants suggest that the most robust way of distinguishing between C2 and C3 use is the "front door" test; ie if the unit of accommodation has its own front door then it is usually C3. If not, then it is C2. It is our understanding that every unit within the proposed development will be self-contained, with its own living room, bedroom, bathroom, kitchen and front door. The provision of communal facilities and care do not by themselves change the nature of the character of the use. The availability of communal function rooms and the option of communal dining do not alter this characteristic. It is also worth noting that each resident will be responsible for payment of their own Council Tax.

It is accepted that appropriate account should be taken of the components of care and support and level of communal facilities provided. Most extra care housing is designed for people who have a range of needs from little or no care to a high level of care. It is not like a residential care home where everyone has a similar, high level of need from the outset. Care is made available on an individual basis, using a domiciliary care model where care and support staff visit the individual in their own personal dwelling, further supporting the C3 use argument.

Very little information has been provided on behalf of MHA as to the level of personal care to be provided should the development proceed and our Clients are concerned that the information provided has been set at a level which would favour a C2 designation, without acknowledging that many of the residents may only commit to the minimum level of care available or no care at all. From the information which has been made available, it appears that the level of care may be as little as two hours per week, which we would contend is insufficient to constitute Class C2 use, a view which was shared by both the LPA and the GLA in e-mail correspondence from November 2015. We note further that there is nothing in the proposed Section 106 draft agreement that makes provision of care mandatory, beyond what is covered by the well-being charge, a view supported by the information about levels of care usage at MHA's development in Portishead where today only five residents have subscribed to any care package out of the total of fifty or so residents. Hence we are struggling to understand how the proposal can now be recommended by the LPA for approval as a C2 development.

Savills have argued that the principles of the Portishead appeal decision (appended to the Planning & Affordable Housing Statement and the Addendum thereto) which concluded that the use in that particular case was C2, should be applied in relation to the Application. The LPA will be well aware that one appeal decision reached in specific circumstances in relation to the planning policies of a particular Development Plan for a particular planning authority cannot be universally applied to all planning proposals of a similar nature in other parts of the country and whilst MHA may argue that the Portishead decision should be taken as an all-encompassing precedent, it would be inappropriate and unlawful for the LPA to have scant regard to its own Development Plan and supplementary guidance.

In any event, it should be remembered that every planning decision is a matter of professional judgement for the decision maker (in this case, the LPA), having regard to the individual circumstances of the particular Application and it is our contention that the current proposal can be distinguished from the Portishead decision when one has regard to the relevant Development Plan policies and current guidance contained in the SPG. In the Addendum to the Planning & Affordable Housing Statement Savills agree that an assessment has to be made on the individual circumstances of the proposed development.

Further, it is interesting to note that in the GLA report on the Application dated 11 August 2015, it states that previous cases have shown that where independent living units can be bought as if they were residential properties (as is the case here), they should be treated as C3 use and, therefore, subject to affordable housing policy (amongst other relevant policies). The Council's view at that time was that the proposed development could be more closely classified as C3 sheltered accommodation and that the level of care to be provided did not constitute a Class C2 use.

There are several reasons why it suits MHA for the proposed development to be categorised as C2. Firstly, Policy C1 of the LPA's Unitary Development Plan seeks to retain community uses, including health and social uses, unless there is no longer a need for the facility or alternative provision is made for the facility. Therefore, it can be seen that if the proposal was deemed to be Use Class 3, it would be deemed to be contrary to Policy C1.

As mentioned above, a C2 designation avoids the need for the proposed development to comply with Policy H7 of the LPA's Unitary Development Plan and, accordingly, the opposite would hold true should the proposed development be correctly designated as C3.

Perhaps most significantly, a C2 designation generally avoids the requirement to provide affordable housing

It is also worth mentioning that there can be tax advantages to a Class C2 designation, in that HMRC accept that extra care units can meet the definition of "dwelling" for VAT purposes despite having a C2 planning use, in situations where a Section 106 Agreement is not used in order to restrict disposal of the units. This means that the construction costs of units meeting the definition of "dwelling" are also zero rated and that the sale of such units will also be zero rated for VAT purposes. Where a Section 106 Agreement is utilised to restrict disposal of the units, this can lead to overdevelopment of sites in order to minimise the losses which would be incurred by the imposition of the ongoing C2 use.

Transport Assessment

We have seen the previous comments made by our Clients and other residents in relation to the inadequacies of the original Transport Statement carried out in May 2015 by Northern Transport Planning Limited and we note that a further assessment was carried out by Mayer Brown on 22 March 2016. We would urge caution when considering the detail of the further assessment as we are advised by our Clients that the figures do not accurately reflect the day to day operation of the local highway network, due to the fact that (1) attendance at both of the nearby schools, Breaside Preparatory School and Scotts Park Primary School, was likely to be lower than usual in the run up to the Easter holidays at the time of the assessment; (2) Thames Water were carrying out works in Orchard Road and temporary traffic signals were in use, resulting in (i) a single flow of traffic and (ii) traffic utilising alternative routes as to avoid being detained by the signals; and (3) Scotts Park has a greater number of pupils than Breaside and would have been a far more relevant and representative basis for assessment than Breaside. We are of the view that the most recent assessment has been carried out on a particularly selective manner. Further, it is of great concern that the assessment takes no account of the extension at Breaside School and the proposed extension to Scotts Park (submitted November 2015), both of which developments will exacerbate the already considerable traffic congestion issues in Orchard Road.

In summary, we are fully supportive of our Clients' view that the LPA has no option but to refuse the Application based on the facts before it and the material considerations set out in this letter. Should the LPA not do so, our Clients will be forced to take further legal advice on the options available to them to challenge the LPA's decision. Please acknowledge receipt of this letter and confirm that it will be passed to all members of the relevant Committee.

Yours faithfully

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For Maclay Murray & Spens LLP

Cc: Mr Jim Kehoe, Chief Planner, London Borough of Bromley