

**Extra Care Units
-
Use Class Order**

DLP BRIEFING NOTE 30

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EXTRA CARE UNITS

There is currently a degree of ambiguity over the definition of the different care market sub sectors, including that of 'Extra Care'. *Extra Care* may be defined as a scheme where occupiers have their own self contained apartment or living space(s), and generally do not wish to live entirely by themselves without access to care, but do not require either, constant care. Such occupants would have the option of purchasing, as their needs require or are determined varying degrees of domiciliary care.

In terms of which use class order Extra Care falls within, its widely recognised definition, particularly regarding the varying degrees of care provided to residents, has led to debate over whether it comes under *C2 Residential Institution* or *C3 Dwelling Houses*. As the Extra Care market in the UK expands, 2009 saw an increase in provision of around 20%, this debate has become more common.

The definitions of use classes for England are set out in the Town and Country Planning (Use Classes) Order 1987 (as amended), with C2 Residential Institutions being defined as ***“Use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses)).”***

Although the majority of the debate has hinged on the level of care provided to residents, the physical layout of accommodation, and the way in which the households live, has also recently been taken into consideration. It has generally been found however, that in terms of accommodation, individual extra care units, with their own washing and cooking facilities, could fall within either C2 or C3 use classes, **and it is the provision of care that must separate them from C3 use.**

Article 2 of the Order defines “care” as ***“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...”***

Many developers, and elderly care providers, argue that where “care” is specified in the description of development, such as within 'Continuing Care Retirement Communities' (CCRC's), and where occupation is limited to over 65 years of age (or similar), and lease heads of terms or other contractual requirements restrict occupation to those in need of care, or require payment for on-site care services, **extra care units must be C2 use class.**

A requirement for most prospective extra care residents to undertake an assessment of their care needs, to be reviewed regularly, and with regular monitoring and care visits taking place outside of the formalised assessment programme, further re-inforces the argument for units to be categorised as a C2 Use. Notwithstanding this however, increasingly, some local planning authorities have not accepted this, and have sought to classify such developments as C3 uses. This has meant that the LPA's can argue that provision should be made for affordable housing. This has become an issue and there are a number of differing judgements on the matter:-

- **Appeal Reference: APP/J3720/A/07/2037666 – Tiddington Fields, Stratford upon Avon** In September 2007, an appeal against the refusal of planning permission for the development of a residential care home, incorporating 44 leasehold extra care apartments at Tiddington near Stratford upon Avon, was upheld. The Inspector, within his decision letter recognised that occupation was restricted to over 65s and others in need of specific care. The Inspector, further acknowledged that the degree of care would be established by means of interview/review, and that future occupiers would also effectively be restricted to those in need of care and required to pay a management charge for care services; thus dissuading those without such needs. In that case, a minimum of 1.5 hours care was provided within the service charge, half of which went towards meeting the costs of care staff, and as such **the Inspector found the level of care to be significantly above that of sheltered housing and sufficient to establish Class C2 use**. This view was further re-inforced by the fact that the average age of those entering extra care accommodation elsewhere was 84, and that the majority of residents remained there until their death;
- **Appeal Reference: APP/W1145/A/09/2106479 – Land at Raleigh Hill, Northam, Bideford**
In November 2009 an appeal against the refusal of planning permission for a retirement care village incorporating 84 independent living apartments at Bideford was dismissed. In this instance the Inspector concluded that the proposals were mixed C2/C3 Use Classes. The Inspector did not feel in this case that the independent units could be Use Class C2, as no care operator was in place, no clear operational practice was set out and the submitted undertaking failed to secure an ongoing C2 Use;
- **Appeal Reference: APP/Z3825/A/08/2090104 – Agates Yard, Faygate, Horsham**
In May 2009, an appeal against the refusal of planning permission for 148 retirement units and a 50 bed care home, along with other components, at Horsham was upheld by the Inspector. Although in this case there was no specific dispute over Use Class of the retirement units, the Inspector held that the units would be occupied almost exclusively by people with significant care needs, or couples where one or both have such needs, differing significantly from general market housing. Very few residents were likely to be employed and none likely to accommodate children of school age;
- **Appeal Reference: APP/N6845/V/08/2077860 – Land adjacent to Park House Court, New Hedges, Tenby**
In January 2009 a planning appeal against the refusal of planning permission for a retirement village in Tenby, Pembrokeshire was upheld by the Inspector. He held that for the foreseeable future the LPA could ensure that the development would not become Use Class C3 (a residential development) and that conditions and an amended S106 Agreement would ensure that occupancy and provision of care would accord with the Guidelines for Extra Care Housing in Wales;

- **Appeal Reference: APP/K6920/A/08/2074241 – Countryman Inn, Bedwellty, Blackwood**

An appeal against refusal of planning permission for an extra care facility in conjunction with a care home in Blackwood, Wales was dismissed in November 2008. In this instance the Inspector considered the level of care offered within Extra Care Units to be of little difference to that offered in general housing elsewhere;

- **Appeal Reference: APP/X1545/A/08/2081888 – Disused nurseries, Mayland, Essex**

In November 2008 an appeal was dismissed for a proposed development of extra care bungalows and nursing home in Essex. The Inspector noted that much of the appellant's evidence about accommodation needs in the district related to persons over 65, whereas age qualification to the extra care units was only 55 years. The Inspector also decided that there was insufficient evidence provided regarding the minimum care packages available at the extra care units, and their link to the proposed nursing home;

- **Appeal Reference: APP/M1710/A/08/2066746 – Land off Canada Way, Liphook, Hampshire**

An appeal against the refusal of planning permission for a CCRC which included 51 Class C2 assisted living apartments, 74 bed Class C2 nursing home, 49 retirement apartments for over 65s and a number of other components, at Liphook, Hampshire, was upheld by the Inspector in July 2008. In this case, the main issue regarded employment land implications; there was no discussion or dispute regarding the C2 Use Class for the assisted living apartments;

- **High Court Ruling: Leelamb Homes Ltd v SoS and Maldon District Council [2009]**

Robin Purchas QC, sitting as Deputy High Court Judge, quashed an appeal decision refusing the development of a CCRC, which included a 60 bed nursing home and 48 extra care units in Essex in July 2009. Leelamb Homes challenged the appeal decision on a number of grounds, including the Inspector treating the development as C2/C3 mixed use rather than as a C2 Use; also that the Inspector had failed to take into account part of the submitted draft unilateral obligation securing the use as C2. Leelamb Homes submitted that Inspector had erred in treating the requirement for satisfying use class C2 as 'any pre-existing medical condition requiring extra care'. The limitation in the submitted draft unilateral obligation was to those in need of care and support. The Inspector had clearly been concerned that the age limit was only 55 and had apparently also taken into account that the minimum care package could be as little as two hours per week. The Judge ruled that the Inspector had unreasonably rejected the draft unilateral undertaking limiting the use of the extra care bungalows. The proposed limitation of occupation to those in need of care and support was potentially overriding; the proposed age limit being only a qualification to this.

Local Planning Authorities, in order to validate a C2 use class for extra care units, generally require developers/care providers, to provide a minimum number of hours of personal care per week for occupiers of extra care units, often in the region of 2 hours, to be guaranteed by way of a planning obligation. This was the case in a development in Cheshire where the developers of 48 residential retirement apartments at Northwich, Cheshire were required to provide such an obligation. This was rejected by the applicants on privacy grounds because the LPA also required the care hours/type of care to be monitored by the Council to ensure compliance. In that instance, relevant decisions and decision notices/unilateral undertakings were presented to the Council, who later recommended that the applicant's estimate of between 2 to 4 hours care per week, be accepted as sufficient to allow C2 Use.

Counsel's advice provided further useful analysis on the definitions provided and how these may be interpreted. On this basis it was concluded that occupation restricted to those over a certain age could also apply to C3 uses, and that the main issue remained the level of care needs of the occupiers. The advice also concluded that the *minimum care package* offered to residents, following assessment of their care needs, did not necessarily indicate someone "in need of care", as defined in the Use class order. Further, whilst it was recognised that the scheme proposals in that case were for *stand-alone extra care units*, and were not linked to a nursing home or close care apartments, where there is a link, as residents require additional levels of care, they can (when available) move within the *community* to other more specific units or rooms. This it was concluded supported the arguments in favour of defining the scheme as a C2 use, through further distinguishing extra care units from C3 residential dwellings.

Additionally, the services included within the service charge in that scheme (hot water and heating, alarms etc.), were considered by Counsel to be exactly those which may be found in C3 residential units and did not support the C2 case. It is clear from this that in putting forward the arguments in favour of the extra care, consideration must be given to the **minimum care package provided**, and more particularly the services included as part of that package, especially where minimum hours of care are not specified or monitored. Counsel concluded that the issue could lay with the number of residents accepting only the minimum level of care (a care amount that may not be considered sufficient by a Council to warrant C2 use). It is accepted there is likely to be a range of care levels provided and this will change over time as a scheme matures and the residents' grow older. In some cases this will mean that units previously determined by an LPA to be C3 will move into a C2 category. Overall it is likely given the breadth of definitions and the differing priorities set by Councils that the mix of C2 and C3, and how this is determined remains an issue and can only be resolved by clear information on the level and types of care on offer, and is made subject to the right of access by the Council to a maintained register. This of course then raises privacy issues, as highlighted above.

DLP Planning have been heavily involved with the provision of new extra care units within CCRC's, including ongoing discussions and negotiations with local planning authorities over the use class of extra care units and the resulting issues for Section 106 agreements. In our experience we have found that, where extra care units are part of a larger retirement community, and linked to close care units and nursing rooms, where all residents have to be over 65 years of age and are required to pay care charges for services beyond those available to residential dwellings, they can be sufficiently distinguished from Class C3 and do in fact comprise Class C2 accommodation.

DLP Planning would be happy to explain further the policy definitions and operational requirements raised in this Briefing.

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