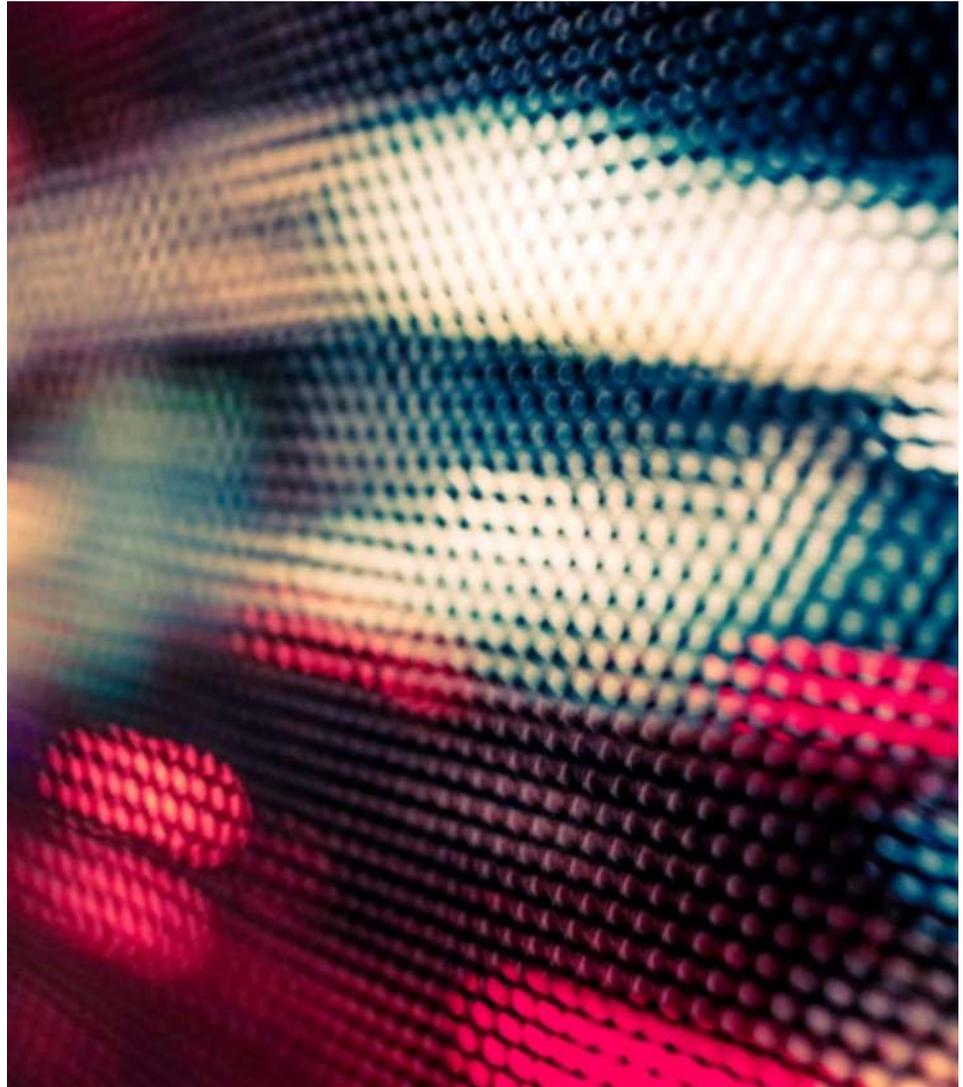


 **NORTON ROSE FULBRIGHT**

What is the state of play on C2/C3 planning distinction, affordable housing and scheme viability following the Rectory Homes case?

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Town and Country Planning (Use Classes) Order 1987 (“UCO”)

C2 and C3 are use classes, use classes are found in the Town and Country Planning (Use Classes) Order 1987.

The UCO was initially made under s.22(2)(f) of the Town and Country Planning Act 1971. The current statutory power for the Order is s.55(2)(f) of the Town and Country Planning Act 1990. Amendments to the Order are made under this section.

The UCO operates by prescribing a number of classes of use at a comparatively high level of abstraction, such as “shop” or “office.”

What is a C2 use?

Schedule 1 part 3, paragraph 2

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)). Use as a hospital or nursing home. Use as a residential school, college or training centre. [emphasis added]

What is a C3 use?

Schedule 1 part 3, paragraph 3

Class C3. Dwellinghouses

Use as a dwellinghouse (whether or not as a sole or main residence) by—

- (a) a single person or by people to be regarded as forming a single household;
- (b) not more than six residents living together as a single household where care is provided for residents; or
- (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4).

Interpretation of “care”

UCO Article 2 - Interpretation

“care” means 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 [emphasis added]

What are the obvious differences between C2 and C3

- C2 : no restriction on the number of residents
- C3(b): no more than 6 residents
- C2: type of accommodation not specified
- C3(b): use as a dwelling house
- C2: how residents are to live is not specified
- C3(b): living together as a single household
- C2: care is provided to people in need of care by reason of old age, disability, alcohol or drugs dependence, mental disorder, personal care of children and medical care and treatment
- C3: care is provided to people in need of care by reason of old age, disability, alcohol or drugs dependence, and mental disorder
- C3(a): use as a dwelling house, single household

What if the accommodation is not C2 or C3?

Sui generis uses

- A term given to the uses of land or buildings, not falling into any of the use classes identified by the Use Classes Order, for example theatres, nail bars, laundrettes, landfill sites, and filling stations.
- More than 6 residents living together as a single household and receiving care would likely be a sui generis use.

Different types of housing with care 1/3

There are no real definitions of housing with care. Housing with care services are varied and diverse. Terms you may come across include:

- Sheltered housing
- Retirement village / retirement living
- Assisted living facility
- Supported living facility
- Extra care housing
- Close care housing
- Elderly housing (nursing home / care home)

Schemes are typically run by housing associations, local authorities, voluntary organisations or private companies. Properties may be available for rent, mixed tenure or to purchase.

Different types of housing with care 2/3

What differentiates these types of housing with care can be the type of care provided, and whether units are self-contained or whether facilities are communal:

- Sheltered housing – independent living, but with a scheme manager based on the site or visits regularly, and an alarm call service. Limited communal facilities e.g. lounge / laundry.
- Retirement village / retirement living – a community of flats/houses for independent living, exclusively for retired people. Offers flexible care on a menu basis. Extensive communal facilities and activities. Residents can benefit from varying levels of care as time progresses.
- Assisted living facility – independent living in a specialist complex. Usually provide care staff onsite. Suitable for low level care needs. Aimed at the elderly. Communal facilities and activities.
- Supported living facility - younger adults with special needs such as a learning disability or mental health condition, usually rent their home, and their personal care or support is arranged separately. Care tailored to individual need and can be 24 hours if necessary.

Different types of housing with care 3/3

- Extra care housing - purpose-built or adapted units with a medium to high level of care available, 24 hour access to support services/staff, meals also available. Extensive communal areas, organised activities. Aimed at the elderly and adult with disabilities.
- Close care housing - various models of elderly people's housing where there is sheltered/retirement accommodation linked to or on the same site as a care home. Suitable for couples where one partner needs to be in a care home and the other does not, but they do not want to be separated.
- Residential care homes and nursing homes - individual rooms within a residential building, provide a high level of care meeting all activities of daily living. Do not usually include support services for independent living. Includes dementia care homes.

Arrangement of accommodation

The accommodation might be lawfully arranged as follows:

- A care home
- A village / community with separate properties and communal facilities
- A single property with individual bedrooms, and shared facilities for up to 6 residents or for more than 6 residents. Could be 5 children plus a carer.
- A single property converted into separate flats
- A purpose built flatted development perhaps with a wardens flat
- A single property with some shared facilities (e.g. a lounge or laundry) and some private facilities (e.g. en suite bathrooms, kitchenette) for up to 6 residents or for more than 6 residents
- A single property with shared facilities for up to 6 residents plus a self-contained annexe
- A development that provides both independent living units and a care home

In each case there may be live-in or visiting care. Other accommodation combinations are also possible.

What does the Planning Practice Guidance say?

It is for a local planning authority to consider into which use class a particular development may fall. When determining whether a development for specialist housing for older people falls within C2 (Residential Institutions) or C3 (Dwellinghouse) of the Use Classes Order, consideration could, for example, be given to the level of care and scale of communal facilities provided.

Paragraph: 014 Reference ID: 63-014-20190626

Why can there sometimes be a fine line between C2 and C3 and sui generis uses? 1/2

- What is a dwelling house?
- What is a single household?
- What is a resident?
- What is care?
- What level of care is provided?
- What is the nature of the care provider's operation?
- How do the residents choose to live?

Why can there sometimes be a fine line between C2 and C3 and sui generis uses? 2/2

Operational considerations

- What use class a property falls within can depend on the amount of care provided and the type of operation of the care provider. Where there is a change of care provider, or a change in a care provider's mode of operation then a change of use can occur.

Examples

- Where a property is divided into 6 self-contained flats, this would normally be considered 6 separate planning units. However, if a care provider removes locks from flat doors, creates a communal laundry (e.g. washing machine in a cupboard) , and has a single operational team on site who go into each flat and perform the same service to each resident e.g. serving a communal lunch, giving medication, taking round a tea trolley then this is may be treated as a single planning unit. A change from 6 dwellings to 1 dwelling is a change that needs planning permission. If a different care provider didn't remove the door locks, and had different carers visiting the different residents performing different care services then this is likely to be considered as 6 self-contained flats. In all cases the use would be C3. Either C3(a) or C3(b).
- A property with 6 residents receiving a care visit a week changes to 6 residents receiving round the clock care with a high degree of medical intervention. This is likely to be a C3 to C2 change of use.
- Residents in 6 self-contained flats each receiving care may choose to live communally, sharing meals and facilities. Either C3(a) or C3(b).

What does the case law say? 1/2

Dwelling house

In *Gravesham BC v Secretary of State for the Environment* (1984) 47 P. & C.R. 142 McCullough J suggested that the common feature of all premises which could ordinarily be described as dwellinghouses was that they were buildings which ordinarily afford the facilities required for day to day private domestic existence. That characteristic was lacking in hotels, holiday camps, hostels, residential schools, and naval and military barracks.

Single household

In *R (Hossack) v Kettering BC [2002] EWCA Civ 886* (Simon Brown, Robert Walker and Clarke L.JJ.; June 25, 2002) the court held that "... the smaller the number of occupants, the more intimate, integrated and cohesive their occupancy is likely to be and the more apt, therefore, to describe it as a single household" (per Simon Brown L.J. at para.26). The nature of the relationship between the residents will be a material consideration, but it is not necessarily determinative.

For Class C3(a) "single household" is construed in accordance with s.258 Housing Act 2004.

What does the case law say 2/2

Resident

In *R. v Bromley LBC Ex p. Sinclair* [1991] 3 P.L.R. 60 the High Court confirmed that Class C3 does not require that the staff providing care for residents need themselves be resident.

Macintyre v The Scottish Ministers [2021] CSIH 10, 2021 WL 00327870 2 February 2021. First Division, Inner House, Court of Session. Guidance but not binding precedent.

Case on the interpretation of Class 9(a)(ii) of the Schedule to the Town and Country Planning (Use Classes) (Scotland) Order 1997, equivalent of Class C3(b). Who is a “resident” for the purposes of calculating the number of persons whose residence is limited by the Order? Lord Menzies at para 40:

“We do not consider that the caring staff attending on a shift basis can properly be categorised as residents. Certainly, those members of staff who attend during the day would not in our view fall within the definition of a “resident”, nor would a member of staff attending for the nightshift who is not provided with any bed or sleeping provision. We are inclined to the view that the single member of staff for whom a bed and en suite facilities are provided would also not fall to be categorised as a resident for the purposes of the Order.”

What was Rectory Homes about? 1/6

Rectory Homes Ltd v (1) Secretary of State for Housing Communities and Local Government; (2) South Oxfordshire DC [2020] EWHC 2098 (Admin), 2020 WL 04370737 31 July 2020. Holgate J.

Facts

Developer Rectory Homes applied for planning permission for "the erection of a 'Housing with Care' development (Use Class C2), a communal residents centre" and other works to SODC. The question for the HC was whether on a proper interpretation of the development plan, a proposal for extra care housing within the Use Class C2 fell within the scope of the local plan policy requiring schemes for 3 or more dwellings to provide affordable housing.

The scheme would provide 78 units of residential accommodation. Each unit would have its own front door, between one and four bedrooms, a living room, bathroom and kitchen allowing for independent living. Communal lounge, dining, treatment and gym facilities were proposed. The site was to be operated by a Care Quality Commission registered provider, with residents buying care packages commensurate with their needs.

Policy CSH3 of the South Oxfordshire Core Strategy provided that *"40% affordable housing will be sought on all sites where there is a net gain of three or more dwellings subject to the viability of provision on each site."*

What was Rectory Homes about? 2/6

Discussion

Rectory Homes and SODC agreed that the development fell within C2. Rectory Homes argued that because the development fell within C2 and not C3 that therefore policy CSH3 did not apply because it refers only to “dwellings”.

Planning legislation, including the UCO does not define “dwellinghouse”.

“... the Courts have accepted that the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. In this case each of the units has all the necessary said facilities, that is kitchens, washing facilities, bedrooms and living areas.”
(para 15)

Rectory Homes pointed out that the UCO at C2 specifically excludes “C3 (dwelling houses)”, and the local plan did not provide a definition of “dwelling” either.

What was Rectory Homes about? 3/6

Judgment

Reminder from Holgate J on how planning policy should be interpreted (paras 44 and 45):

- Interpreted objectively in accordance with the language used, read in its proper context
- Should not be interpreted as if these were statutory or contractual provisions
- Planning policies are intended to guide or shape practical decision-making, and should be interpreted with that purpose in mind. These have to be applied and understood by planning professionals and by the public to whom they are primarily addressed
- However well or badly it may be expressed, it is for the courts to provide a straightforward interpretation of policy
- Reading a policy in accordance with the language used and its proper context means reading the plan as a whole, or at least the relevant parts of it
- The supporting text of a Plan is an aid to the interpretation of its policies

What was Rectory Homes about? 4/6

- Where development plan policies are intended to implement national guidance, that guidance forms part of the relevant context to which regard may be had when interpreting those policies
- The public nature of development plans is of "critical importance". Referring to earlier drafts of a local plan or to an Inspector's report on the examination of the plan is generally inappropriate. *"The public is in principle entitled to rely on the public document as it stands, without having to investigate its provenance and evolution"*
- Neither the public relying on the development plan, nor the court having to interpret a policy, should be expected to delve into background documents to the plan's preparation
- If there is a particular difficulty in interpreting a policy which *can only be resolved* by looking at a document incorporated into the plan or explicitly referred to in it, then that extrinsic material may be examined

What was Rectory Homes about? 5/6

Key paragraph of the judgment from Rectory Homes' perspective was para 47:

"I have come to the clear and firm conclusion that policy CSH3 does not use the word "dwelling" as a term restricted to the C3 Use Class. The policy makes no reference, expressly or by implication, to the Use Classes Order at all."

This meant that a C2 assisted living scheme could fall within policy CSH3.

At para 61 Holgate J addressed Rectory Homes' observation that C3 uses were excluded from the C2 use class:

"...a Class C2 development may include accommodation in the form of dwellings, for example flats and bungalows, each of which has facilities appropriate for private, or independent, domestic existence. But their use would only fall within the C2 Use Class if "care" is provided for an occupant in each dwelling who is in need of such care."

What was Rectory Homes about? 6/6

So a building can be identified as a “dwelling” if it has the characteristics of a “dwelling”. The use of the “dwelling” may fall within C2, C3, sui generis, or some other use.

Para 63:

“Care may also be provided to one or more occupant of a dwelling falling within the C3 Use Class. A distinguishing feature of Class C2 accommodation is that occupants are in “need of care”.”

So, units of accommodation that allow for independent living are ‘dwellings’ but their ‘use’ can still fall within Class C2 if care is provided for an occupant of a dwelling and, the occupant is in need of care.

Para 65:

“In summary, there is no reason why a C2 development or scheme may not provide residential accommodation in the form of dwellings. That possibility is not precluded by the operation of the C3 Use Class and its interaction with the C2 Use Class. Thus, the language of the Order does not support the Claimant’s argument that the extra care accommodation proposed could not represent dwellings and therefore could not trigger the application of policy CSH3.”

What does this mean for developers? 1/3

C2/C3 distinction

Previously, applicants had focussed on whether units of occupation were “self-contained” in determining whether a development fell within C2 or C3. Focus is now likely to shift to whether units fall within the definition of a dwelling and the need for care. However, the judgment hasn’t changed what we understand by C2 and C3 uses and what may or may not fall within these use classes. It will be a matter of fact and degree in the circumstances of each case.

Affordable housing

The judgment clarifies that extra care developments falling within the C2 Use Class will not be exempt from the requirements of affordable housing policies unless the relevant policies in the plan distinguish between C2 and C3 uses so as to restrict the application of affordable housing requirements to dwellings in the C3 use class.

Most development plans will not provide this distinction.

What does this mean for developers? 2/3

Scheme viability

A Financial Viability Assessment (FVA) will need to be undertaken at planning application stage if policy requires affordable housing. Why is requiring a FVA and potential affordable housing delivery a problem?

- Later living / extra care developments have different financial models to housing to sale.
 - Upfront costs are much higher because large parts of a site are taken up with communal facilities, so the portion of the site that can be sold/let as dwellings is lower. Establishing care / social facilities in advance are important to attracting residents.
 - The return profile is usually much longer. Depending on the model, viability may rely more on rental income and not capital receipts.

Surveyors undertaking /reviewing FVA's will need to understand a different model. Where a FVA is required it will usually take longer for a planning application to be determined. Costs will be associated with paying for an FVA and paying for the LPA's assessor to review the FVA.

- Developers of later living developments will need to review local policy and factor in possible affordable housing requirements when acquiring sites. Competition for sites in centre/edge of centre is fierce.

What does this mean for developers? 3/3

- The sector is underprovided for an ageing population. Affordable housing requirements may disincentivise supply.
- Local authorities benefit from private sector housing with care schemes. It reduces the burden on the NHS, frees up family homes, and provides an alternative to the traditional care home. Incentivising delivery is important.
- Developers should consider making local plan representations to remove later living schemes from affordable housing policies, or aim to frame policies so that viability issues don't threaten delivery of later living schemes.
- It may not be viable to provide general affordable housing as on site provision, or off site provision, a payment in lieu may be required. Alternatively LPA's may seek affordable housing with care on site if policy requires an affordable component.
- Care minister Helen Wheatley paid tribute to the "vital role" extra care providers have played during the pandemic by protecting their residents. Lobbying for changes to the NPPF may be the key to ensuring the sector is exempt or low rated for CIL and affordable housing contributions.

