

Planning for an ageing population

Rachael Herbert outlines how planning law and policy are affecting the delivery of homes for older people and whether more can be done to accelerate extra care housing



Rachael Herbert is a senior associate in Dentons' planning team

'As residential institutions within use class C2 are not usually expected to provide affordable housing, LPAs will regularly argue, at least at first instance, that an extra care scheme falls within use class C3 and is therefore required to make an affordable housing contribution.'

The housing shortage and the inability of young people to get onto the property ladder, particularly in the south-east of England, is a near-constant media headline. But what about the needs of older people and the mounting undersupply? Where is the build-to-rent style government support that seeks to incentivise older people's housing and give the older generation the range and quality of accommodation that they need in retirement?

According to research by Savills, there are currently 726,000 specialist homes for older people across the UK (56,418 units in London in 2017 – *GLA Older Persons Housing Needs Assessment Report 2017* para 1.2) and more than half of this stock (52%) is sheltered (social) housing built or refurbished more than 30 years ago (*Retirement Living UK Residential – 2018 Spotlight*, Savills). Based on international standards the UK should have 1.2 million specialist homes, which shows a shortfall of almost 500,000 homes before the challenges of an ageing population are even considered. With an additional 7.9 million people over 65 expected by 2036 (taking the total number of people over 65 to 17 million, ie 30% of the population), the government must, as it promised in 2017, 'explore ways to stimulate the market to deliver new homes for older people' (para 4.42 in the housing white paper – *Fixing our broken housing market* (February 2017)).

What is extra care housing?

Extra care housing means different things to different developers and local planning authorities (LPAs).

Some see it as market housing for older people, others see it as older people's housing with care. Extra care housing is defined in the Department of Health's *Extra Care Housing Toolkit* dated October 2006 as 'purpose-built accommodation in which varying amounts of care and support can be offered and where some services are shared'. Although an old definition, the intent, clearly, is that the provision of care is an integral part of the residential development, in contrast to market housing, where the sole purpose is to provide housing.

However, as will be discussed later in this article, uncertainty or distrust about the level of care to be provided has, in recent times, created mischief for this form of housing and stunted its growth.

The benefits of extra care housing are significant and can properly be categorised into those for the occupier and those for the wider community:

Benefits for the occupier

- The communal facilities usually exceed those found in conventional housing schemes and are focused on maintaining the health and independence of its resident, not purely for their recreational needs. In addition to swimming pools and gyms, these schemes may include medical suites, restaurants/cafés, a bar, communal space such as lounges and halls, greenhouses and IT and educational resources.
- The provision of regulated care services (typically 24 hours per day, seven days a week) enables residents to 'age in place' for longer and often at a lower health cost due

- to the economies of scale with on-site support.
- The design of the units is aesthetically pleasing while being designed with physical health and safety in mind. The layouts are designed to cater for mobility devices and often the units are fitted with assistive

- The location of the scheme is usually close to good transport connections to enable residents to maintain their independence without the use of cars.

Is there a current delivery problem?

The *GLA Older Persons Housing Needs Assessment Report 2017* advises that

There is no quick fix, but clearly there is a need for significant and immediate government intervention.

- technology to help manage wellbeing and reduce the risk of falls, etc.
- The shared spaces are designed to enable informal connections, reducing loneliness and isolation. It is also common for there to be organised communal activities to promote mental and physical wellbeing.
- The units often have access to, and views of, outside green space as well as sustainable/low energy and lower utility bills.
- The development does not feel 'institutional'; it allows older people to be part of a community while maintaining privacy in an independent self-contained property.

Benefits for the wider community

- Reducing pressure on local emergency services, on length of hospital stays and on social services. Research in 2015 showed that the cost of services across the NHS was £1,115 lower per person per annum for residents living in properties run by the ExtraCare Charitable Trust, creating a 38% reduction in NHS spending for residents (www.legalease.co.uk/extra-care).
- Freeing up under-occupied large family homes into the local market.
- Generating local jobs for health workers.

between 2015 and 2017 planning consent was granted for an average 470 specialist older persons' housing units in London per year, but that during this period the total number of specialist older persons' housing in London fell by just over 600 units to 56,418 units (81% being housing for rent). Benchmarked against the then need of 3,900 homes per annum (which has since increased to 4,115 new homes per annum in the draft London Plan), this is clearly a mounting undersupply issue. Research by Carterwood Analytics demonstrates this further by revealing that only 34% of all applications made (not granted) in 2015 were built out within three years.

The stark reality of the situation was made clear by Renaissance Retirement, PegasusLife, McCarthy & Stone and Churchill Retirement Living (the consortium) in their joint representations on the draft London Plan. Despite being responsible for delivering over 90% of the supply of new specialist housing across the UK for sale, they had in January 2018:

- not secured any new sites in London over the past year due to the economic uncertainty and the uncertainty caused by the draft London Plan; and
- six sites (171 units) between planning application and decision, five of which were at appeal with decision expected in early 2019 and nothing thereafter.

There is no quick fix, but clearly there is a need for significant and immediate government intervention if the consortium only has a pipeline that meets 4.16% of the annual need (171 out of 4,115 homes).

What are the planning barriers to delivering extra care housing?

One of the largest hurdles to development progress is the length of time which it takes to get a planning decision from LPAs. In London it takes almost ten months for older persons' housing planning consent to be granted (Carterwood Analytics), against a statutory period of 13 weeks. The leading cause of this delay, at least in recent times, is the difficulty officers are having in classifying applications for extra care for the purposes of determining whether affordable housing and the community infrastructure levy (CIL) should apply. As explained below this has often descended into an argument about the use class that the accommodation would fall into if built. This is probably the wrong starting point. There needs to be a far clearer debate at local plan and CIL examinations about the justification and logic for asking extra care housing plans to provide affordable housing, and the rate of CIL that can be justified. The commercial and economic models for extra care facilities and for market housing are very different. They have different social consequences. In different areas different decisions should be made, at a policy level, about whether extra care accommodation triggers the need for affordable housing, and the applicable CIL rate.

Unfortunately, that debate has rarely happened. Instead, depending on the particulars of the scheme, there is an argument about whether developments for extra care housing fall into either use class C2 of the Town and Country Planning (Use Classes) Order 1987 (the UCO), which covers 'residential institutions', or use class C3, which is 'dwelling houses'. It is not always clear which is the better classification and this uncertainty has led to delays with approvals, conflicts with developers and other agencies and, crucially, planning refusals and appeals.

As residential institutions within use class C2 (such as nursing/care homes) are not usually expected

to provide affordable housing, LPAs will regularly argue, at least at first instance, that an extra care scheme falls within use class C3 and is therefore required to make an affordable housing contribution. This position has become more entrenched in recent times due to the Mayor's position in the draft London Plan that:

- all 'self-contained residential accommodation' is considered as being in use class C3, irrespective of the level of care and extent of communal facilities provided. In particular, it states that extra care housing is:

... self-contained residential accommodation and associated facilities, designed and managed to meet the needs and aspirations of older people, and which provides 24-hour access to emergency support...

and

- 'the affordable housing exemption applies to developments which cater specifically for older people including those falling within use class C2'.

Development plans take precedence

Before delving straight into the use class debate, it is important to first set the context. A specific development plan policy relating to affordable housing will normally take precedence over the generic policies in the London Plan, and the emerging policies in the draft London Plan. Accordingly, in the Borough of Westminster, it is Policy S16 (November 2016) of the Westminster City Plan that is the determinative policy for the purposes of affordable housing. Policy S16 provides that (emphasis added):

The Council will aim to exceed 30% of *new homes* to be affordable homes, and will work with its partners to facilitate and optimise the delivery of new affordable homes.

Proposals for *housing developments* of either 10 or more additional units or over 1,000 sqm additional floorspace will be expected to provide

a proportion of the floorspace as affordable housing.

The supporting text to Policy S16 recognises that while affordable housing will often be delivered as social or intermediate housing it could also include 'specialist provision for specific groups such as the elderly', meaning that there would be no

A specific development plan policy relating to affordable housing will normally take precedence over the generic policies in the London Plan.

need for affordable housing to be provided in schemes that provide specialist accommodation for the elderly. Critically, Policy S16 only applies to 'new homes' and 'housing developments' and does not refer to the UCO for the purposes of indicating which uses will fall within the scope of the policy.

Thus, the question is whether the development is providing 'new homes' or is a 'housing development' and, read objectively, should be construed to mean market/private housing development. This should be contrasted to specialised accommodation for the elderly such as extra care housing (which would qualify for the exemption to provide affordable housing). (Note that the correct interpretation of planning policy is a matter of law. Policy statements should be 'interpreted objectively in accordance with the language used, read as always in its proper context': see Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] at para 18.)

The use class debate

While an LPA should feel empowered to apply its own policies irrespective of any use class advice from the GLA, particularly if it has an affordable housing policy similar to Policy S16 of the Westminster City Plan, in reality they are hesitant to do so. Instead, they are adopting the Mayor's classifications of C2 and C3 development and insisting that extra care schemes make affordable housing contributions despite the examiner not having yet

issued their report on the soundness or otherwise of the draft London Plan.

While the draft London Plan Policy H15 purports to assign a use class designation to the different types of specialist accommodation for older people – sheltered accommodation or extra care accommodation as use class C3 and residential nursing care accommodation as use class C2 –

how a particular form of development is described in policy (especially in draft policy) cannot be determinative about which use class it falls into as a matter of law. The descriptions of each use class are set out in legislation, in the UCO. Determining which use class a particular development falls within is a question of applying the descriptions in the UCO to the facts of a particular case. (See, for example, *R (on the application of Tendring District Council) v Secretary of State for Communities and Local Government* [2008] at para 31.)

Use class C2 is described in Part 3, Sch 1 of the UCO as:

Use for the provision of residential accommodation and care to people in need of care (other than a use within a class C3 (dwelling houses)).

Use as a hospital or nursing home.

Use as a residential school, college and training centre.

Putting it simply, the key questions to consider when determining whether a development falls within use class C2 are:

- Will it include the 'provision of residential accommodation and care'?
- Will it be occupied by 'people in need of care'?
- Will the use of (any part of) the development fall within use class C3 (dwelling houses)?

Under Art 2 of the UCO, care is defined as:

Personal care for people in need of such care by reason of old age, disablement, past or present

least 60 years of age and in need of care by way of a section 106 planning obligation (see the appeal decisions in *Tiddington* at para 13, *Ticehurst* at para 8 and *Sidmouth* at para 43);

household where care is provided for residents;

- (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).

In the recent appeal decision in Sidmouth, the provision of two hours of care per week was found to be sufficient to ensure that the extra care accommodation should be treated as use class C2.

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.

Critically, this definition does not limit ‘personal care’ to medical care and treatment or quantify the amount of care that must be provided to fall within use class C2.

Appeal decisions provide some guidance on these issues. For example, in the recent appeal decision in *Sidmouth*, the provision of two hours of care per week was found to be sufficient to ensure that the extra care accommodation should be treated as use class C2 accommodation, but before this a number of decisions found that a mandatory care package of one and a half or more hours of personal care a week was enough to fall within use class C2 (see the appeal decisions in *Portishead* at para 21 and *Cranbrook* at paras 47-48).

In terms of whether the development will be occupied by ‘people in need of care’, inspectors have held that this element can be achieved through a combination of:

- restricting the occupation of the development to older people of at

- occupiers needing to undergo an initial care needs assessment by a trained domicile care provider and only being allowed to occupy an extra care unit if they were assessed as needing at least the minimum level of personal care (*Leelamb Homes Ltd v Secretary of State for Communities and Local Government* [2009] at paras 22 and 28-31); and
- requiring payment of a care service charge, in addition to a general service charge, as this cost should deter those not in genuine need of care (see appeal decisions in *Tiddington* at para 14, *Ticehurst* at para 8, *Stratford-upon-Avon* at para 85 and *Portishead* at para 21).

The final limb is whether (any part of) the development falls within use class C3. Class C3 is also described in Part 3 of the UCO as:

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

While the definitions for use classes C2 and C3 could give rise to an overlap between them, the uses are mutually exclusive given the qualification in the definition of use class C2. This means that, if an individual extra care unit can, in itself, be considered to constitute a ‘dwelling house’, then the whole extra care development cannot fall within use class C2. This is a question of fact and degree for each unit. It is not as simple as concluding, as the Mayor would have it, that a unit with its own front door is a dwelling house. While the guidance in Circular 03/2005 *Changes of Use of Buildings Land* (the circular) has since been revoked, it helpfully explained (at para 71) that:

The criteria for determining whether the use of particular premises should be classified within the C3 use class include both the manner of the use and the physical condition of the premises. Premises can properly be regarded as being used as a single dwelling house where they are:

- a single, self-contained unit of occupation which can be regarded as being a separate ‘planning unit’ distinct from any other part of the building containing them...

Helpfully, the question of what constitutes a separate ‘planning unit’ has been considered in a number of appeal decisions, including the former *Portishead Primary School* site, where the inspector found (*Portishead*, paras 20 and 28-29):

On their own, and looked at in isolation, I have no doubt that each of the apartments is capable of being seen as falling squarely within use class C3, because they would provide all the necessary attributes of a separate dwelling. However, it is necessary to look

Appeal references

<i>Cranbrook</i> : APP/M2270/W/1163161379	<i>Stratford-upon-Avon</i> : APP/J3720/2153222
<i>Portishead</i> : APP/D0121/A/12/2168918	<i>Ticehurst</i> : APP/UI430/A/08/2091935
<i>Sidmouth</i> : APP/UI105/W/17/3177340	<i>Tiddington</i> : APP/J3720/A/07/2037666

at the interrelationship between the apartments and the rest of the building, and this goes beyond the physical arrangement, and involves an examination of the use of the separate parts and the building as a whole...

Here, I find that the primary purpose of the building as a whole is to provide residential accommodation and care to people in need of care, as the care element is the reason people choose to live there, and is an integral part of everyday life. The facilities provided for residents are not only significant in terms of their extent, but... they are well used by residents, and are an integral part of many residents' lives. I consider that it would be wholly artificial to regard the apartments as being so independent of the rest of the facilities as to amount to one building in separate planning units – the whole of the building is used for residential accommodation with care to people in need of care, and thus falls within Class C2.

It is clear from the UCO definitions for use class C2 and use class C3 and how they are interpreted in the numerous appeal decisions to date that:

- it is wrong for draft policy H15 to try to rigidly classify all self-contained extra units as falling within use class C3; and
- calls for changes to the UCO to create a new category for extra care housing are misguided and unnecessary. The definitions for use classes C2 and C3 work as they are, in combination with the appeal decisions.

How could planning incentivise this form of housing?

The House of Commons has called for a national (England) strategy that brings together and improves the policy on housing for older people to facilitate increased delivery rates. While there are a number of areas that could be improved over time, initial recommendations for change include:

- The creation of guidance that clarifies for developers and

LPAs what the true determinants of C2 extra care housing are, to overcome the use class debates that cause delays to planning approvals.

- National guidance on how older persons' housing should be

The House of Commons has called for a national (England) strategy that brings together and improves the policy on housing for older people to facilitate increased delivery rates.

considered within CIL charging schedules and other obligations such as affordable housing. Schemes can be offered part or full relief even if they do not strictly fall within use class C2. It is entirely a matter for the LPA to decide what is appropriate to deliver its local needs and LPAs should be encouraged to make bold decisions to stimulate older person investment in their areas, at least in the short term.

- Relaxation of parking standards in the knowledge that occupants are less likely to drive.
- Support for tall buildings in the right locations.
- LPAs being required to have a specific requirement for older persons' housing and allocating specific sites for this form of housing, including the tenure that is required, similar to that in Annex 5 of the current London Plan. (Research from Lichfields has found that only 11% of LPAs across the UK have a specific requirement for older persons' housing; only 4% of LPAs have allocated sites for older persons' housing; and only 17% of LPAs within England and Wales monitor the delivery of older persons' housing.) Without this tenure breakdown there is a danger that local planning authorities will apply normal open market tenure requirements to special older persons' housing, despite the needs for both being very different.

- LPAs being more accountable for the delivery of older persons' housing and potentially being subjected to an older persons' housing delivery test that could result in them entering special measures or facing government intervention to increase delivery rates.

- Support for LPAs exercising their compulsory purchase order (CPO) powers to help assemble the land that is needed to bring forward these large schemes.
- Replacing stock that is not fit for purpose with new schemes that are future-proofed and achieve higher levels of density.
- Consideration of a new exception to what would otherwise be inappropriate development in the Green Belt.

Despite the National Planning Practice Guidance identifying retirement housing as being in 'critical' need, little has been done in recent years to boost the delivery of older persons' housing. With an estimated 7.9 million additional people in the UK aged over 65 by 2036, and an existing undersupply of fit-for-purpose stock, urgent and radical action needs to be taken if there is to be any hope of the UK meeting the forecasted needs of its ageing population. ■

Leelamb Homes Ltd v Secretary of State for Communities and Local Government [2009] EWHC 1926 (Admin)
R (on the application of Tendring District Council) v Secretary of State for Communities and Local Government [2008] EWHC 2122 (Admin)
Tesco Stores Ltd v Dundee City Council [2012] UKSC 13