

McCARTHY & STONE

EXTRA CARE ACCOMMODATION

Gravesham Borough Council

INTRODUCTION

This Statement considers specifically the type of accommodation that is provided by the proposed applicant's Extra Care developments in the context of the Town and Country Planning (Use Classes) Order (1987) and the application of affordable housing and contributions policies.

The issue has been the subject of much consideration and debate particularly in respect of affordable housing over the years and there had been a number of papers and some appeal decisions which related to various types of older persons accommodation and whether or not these fell within Use Class C2: "Residential Institutions" or within Use Class C3: "Dwellinghouses".

Given the wide range of accommodation types for older people ranging from traditional sheltered housing (with or without a warden) to close care retirement communities/villages and care homes, when considering policy, guidance appeals or case law, caution must be exercised to ensure that it relates to the specific Extra Care model proposed (that is an Extra Care Scheme with all communal, staffing and care facilities in one block). Reference to others only serves to cloud or overcomplicate consideration of the accommodation and operation being proposed.

The Planning Statement explains how the Applicant's Extra Care concept has been conceived and evolved, how it is laid out to deliver care to its residents, how this care is delivered in its operation and how then it is a form of Extra Care housing. This statement again considers these but in the context of how they result in schemes of this nature falling within Use Class C2.

It considers the proposal against most recent guidance in the form of the Housing Learning and Improvement Network (Housing Lin) Fact sheet No1 (November 15 "Extra care Housing – What is it in 2015) which itself brings together previous advice and guidance. It also refers to recent and directly relevant counsels' opinions and appeal decisions. These are of course material as precedents and also very usefully serve to consider the issues key to determination as to whether or not the proposal falls within Use Class C2 or C3 in a reasoned, cogent and succinct manner, drawing together (as an appeal decision would) on all relevant considerations and reaching a balanced conclusion. In other words, they serve to bring all material considerations together, and establish why such developments fall within Use Class C2.

The questions most frequently raised by LPA's relate to the seeming self-containment of the accommodation and the extent of care that is provided as indicative of a C3 use. This Statement focuses on these two questions. In respect of the issue of self-containment it may be the case that a Council has guidance, perhaps in an SPD that suggests that if a unit of accommodation is physically self-contained it falls within Use Class C3. As this Statement explains, such an approach is far too simplistic and runs counter to the guidance and precedent that is available. Any SPD should therefore be applied with caution in this respect and subject to "other material consideration" including those set out in this statement.

1.0 THE PROPOSED EXTRA CARE ACCOMMODATION

- 1.1 The proposed development constitutes Extra Care Accommodation and is aimed at providing independent living for the frail elderly, with day to day care tailored to the owners' individual needs. It provides purpose-built, specifically designed accommodation in a safe and secure environment whilst facilitating an independent lifestyle through care and support. In doing so it meets better the on-set and increasing problems of mobility/frailty. Independence in later life is now recognised as central to well being. Independence is achieved in an Extra Care scheme by providing the care and support that people need to enable them to be so. The level and type of care will increase as abilities decrease.
- 1.2 In promoting independence, Extra Care accommodation lies at the heart of the emphasis and policy of government through the Care Act towards well being and delivering choice and services in later life. Appropriate accommodation is of course recognised as key to health and well being, particularly for those in their latter years.
- 1.3 The Planning Statement discusses the key components and attributes of the proposed Extra Care development. This clearly demonstrates that underpinning the occupation of the accommodation units is the provision of care, through that which is "set" and paid for, through to the continuing oversight care that happens naturally as a result of the development and its staffing. Care "pervades" the development to quote one Inspector.
- 1.4 In respect of the question of Use Class, it is useful to consider how such a scheme differs from conventional retirement housing (otherwise known as Category II sheltered housing). The differences are marked and of course will be more so when compared with conventional flatted development.
- 1.5 Physical characteristics. The Extra Care apartments themselves have significantly larger units with all rooms purpose designed to meet wheelchair rather than mobility standards, and layouts and equipment appropriate to the needs of older people. This fosters safety, security, easier living and with it increased independence and, as a result, improved wellbeing. It is not a care "unit" as may be found in a care or nursing home – it is first and foremost a person's home and one that is most likely to be considerably better than their previous residence in terms of "liveability". It contains one or two bedrooms (NB the nature of residents being downsizers, over 70 years of age and in need of care means two bedrooms is the maximum size delivered), bathroom, kitchen and living space all behind its own front door. On a superficial level it might be claimed that each unit is "self contained", but this is to ignore the remaining elements of the scheme and the extent of staffing and care which residents are obliged to pay for. The front door leads into the spine corridors or any other circulation spaces of the scheme if immediate to the communal spaces. Ground floor apartments may have patio doors leading into the communal gardens but in order to foster interaction with other residents and staff and oversight care as a result, access to and from the scheme is not promoted via these external doors but through the main entrance, reception and communal areas. All external space is communal and managed centrally.
- 1.6 Whilst in Category II sheltered housing schemes the communal facilities are limited to essentially a residents lounge, the communal areas in the Extra Care schemes are far more extensive, comprising:

- **High specification and larger residents' lounge;** centrally located with other facilities close by and opening up into the circulation areas to foster interaction between those using the facility and those staff and residents passing by. Used for informal gathering and interaction and also organised activities (coffee mornings etc).
- **Reception area and office;** where staff are based and available to assist residents by phone or through a visit to reception and also to assist and advise visitors all who would have to access the development through one electronically controlled entrance and who would have to pass reception to enter the development. There is a reception desk with notice board and the area designed to have the feel and operation of a hotel reception.
- **Bistro / restaurant (with catering/commercial kitchen);** this caters for at least one meal every day for each resident, while being open throughout the day for coffee, homemade cakes, snacks, sandwiches etc. The kitchen is fully equipped to commercial standards. Meals in the bistro / restaurant and the interaction that comes with it with staff and residents is for most residents part of their functioning daily routine.
- **Laundry;** this has an incidental function of acting as an informal meeting place.
- **Accommodation for 24 hour staffing comprising Manager's office, staff restroom overnight suite** for those staff who remain on site all night. The manager's office will have a CCTV link to the front door and external areas if necessary and securely store medical records and other personal information as required or requested.
- **Wellness Suite.** This is laid out and equipped to serve a number of purposes which would include hair dressing/beauty and health/medical treatments.
- **Larger Lifts.** These are similar to that found in hospitals and enables the movement of stretcher borne residents; and two lifts provide consistent services in the event of breakdown/servicing of one of them (Dependent on size and fire regulations a Retirement Living development may have only one lift).

The following facilities will be found within both types of development:

- **Internal refuse room;**
- **Battery car charging store;**
- **Guest suite;**
- **Secure entrance lobby with CCTV link to individual apartments;**
- **Emergency help line available within each residents' apartment and communal areas to summon assistance in the event of an emergency;**
- **Gardens;**

1.7 In an Extra Care development as proposed, all key care and communal facilities will be focussed in one location on the ground floor close to the entrance to the development and

given the extent of facilities will occupy a significant part of that floor. This is then the heart of the Extra Care complex, a key part of the living environment and a key contributor to a resident choosing to reside in the development and pay for the facilities that come with it. In consideration of the issue of Use Class, it is wrong to separate this from the accommodation units themselves and/or to rely on the physical self containment of the units as a C3 Use Class as is confirmed by reference to relevant and up to date reports and guidance and appeal precedents as discussed later in this statement.

Age Occupancy Restrictions and the Nature of Residents

- 1.8 As with a retirement living scheme, the apartments will be offered for sale on a long leasehold basis and the services provided on entry will be subject to an annual service charge. An age restriction is set at 70 years of age. This is higher than the age restriction for McCarthy and Stone's Category II sheltered housing schemes which is set at 60 years. It is also higher than those set by other operators of similar Extra Care schemes including all of those schemes referred to as Appeal Precedents later in this statement. Through its extensive record in delivering housing for older people, the age of residents on occupancy can be accurately assessed. For Category II schemes the average age on entry is 74 years. For this type of development it is 85 years. In a Category II scheme, the occupant may have no care needs but is looking to downsize and seeks the safety, security and companionship that such schemes have to offer. Through evolution of the product too, the hope is that this will become much more of an aspirational and downsizing based choice than needs based choice whereas the move to an Extra Care development remains very much needs based, requiring the facilities and care that the development has to offer in later life to support independence.
- 1.9 There will be a greater preponderance of couples in a Category II scheme, due in part to the relative age of residents on occupation but the majority in both schemes remain single widowed females. Early research shows that single widowed males are more inclined to make the move to an Extra Care scheme when the time comes to consider a move from the family home than they would be to a category II scheme, valuing the support and care that the Extra Care scheme can offer, and may have recently sadly disappeared from their lives. This reinforces the "care" credentials of the development. The same would be said of course of any "lonely" person, loneliness now being recognised as a very significant health issue, which in turn places burden and drain on the finances of health and public services, something which such schemes can play their part in addressing.

Staffing

- 1.10 Staffing for a Category II sheltered housing development is limited to the services of a Day Manager and occasional groundsmen and maintenance. Typically for a McCarthy & Stone development, the Day Manager is employed on a full time basis (Monday to Friday, 37 hours per week) but for some developments by other operators this is part time (i.e. 22 hours). Outside of these hours emergency support is provided through a "cord pull" system to a central support service which would either summon relatives or emergency services dependent on the circumstances.
- 1.11 In the Extra care development, as proposed, management staff provide 24 hour cover for the benefit of the residents, and will consist of a Manager, assisted by a team of Deputy Managers. There are care staff, who provide the set care through the service charge and in co-ordination with managers will provide the further tailored care to residents. They will also be involved

with maintaining and the good management of the communal areas and as with management staff are visible and available throughout the building (as well as there being a manned reception desk). Staff being on site throughout the day and night provide immediate “on hand” support and assistance. There are also catering staff including trained chef and grounds management staff. The scheme can be expected to employ the equivalent of 17 full time persons soon after opening. Staffing would increase in line with the needs of residents for additional care as that need arises and is bound to increase as the development ages and with it the age of residents.

Services to Residents

- 1.12 How care is delivered in the scheme is discussed at greater length later in this statement and goes significantly beyond services that are paid for via the set service charge for the development and includes (a) care assessed and tailored to meet an individual’s agreed care needs, (b) “oversight care”, which “happens” as a natural consequence of the operation of the building and the caring environment which is created. As already noted care “pervades” such developments.
- 1.13 The service charge in Category II schemes is, on average, approximately £40 - 50 per week for 1-bed flats and £60 – 70 per week for 2-bed flats. This will cover the services of a House Manager and the maintenance and management of the communal areas. This compares to approximately £120-130 per week for 1-bed, and £165 -175 for 2-bed apartments a typically sized (i.e. approximately 55 unit) Extra Care scheme. The service charges are much higher to cover the extra facilities and services being provided. Smaller schemes will incur higher service charges as the costs are shared by fewer residents. For this higher service charge the resident receives:
- 24 hour staffing (with a dedicated staff room and overnight facilities);
 - On-site catering 365 days per year;
 - The “physical” facilities referred to above;
 - Care included in the Service Charge;
 - Access to further care and support;
 - On-site storage and re-charging for mobility scooters;
 - Management, maintenance and replacement of communal facilities;
- 1.14 Dependent on the scheme, between two thirds and three quarters of this cost is attributed to the provision of staffing, care and catering. These are direct services to residents and fundamental to what makes the development “Extra Care”. With a Category II scheme this is reversed with only 25% of that reduced charge associated with care
- 1.15 Of the care and support services directly to residents included in the service charge this can be broken down into
- a) 24 hour cover;
 - b) Catering
 - c) Initial assessment and periodic review of the occupier’s need for personal and other forms of care and support; and

d) The provision of care through the service charge which will include care and support, daily check and provision of a meal

- 1.16 The additional care that is provided through the agreement of a personal care plan and the oversight care that happens as a natural part of the development is of course additional to that of a traditional retirement/sheltered housing development.

2.0 ONGOING CARE AND SERVICES TO RESIDENTS

- 2.1 The Applicant's Extra Care concept is designed to be flexible so that beyond the set care and that care which occurs naturally as part of the development (oversight care), residents pay for the further individual and focussed care they need when they need it. This can be provided as ongoing and increasing (as needs increase with old age and infirmity) and for a short term (e.g. During post-operative recuperation). This of course fosters well being and independence and is therefore central to the Extra Care concept and underlies the emphasis of the Care Act. The availability of 24 hour care in a barrier free level access environment which is entirely wheelchair accessible in both communal and private areas is a fundamental requirement.
- 2.2 Additional hours of care are available as and when required by the residents and can be tailored to their varying needs. Care could be delivered by external providers but such instances are unlikely as residents will get to know and trust the inhouse team on a day to day basis and are most unlikely to have bought into services that they do not intend to use. This additional care is provided from the care team based in the building, from the team of employed carers. Managers will determine the staffing levels required to meet the needs of the time which will inevitably increase overall as the overall age of resident's increases.
- 2.3 When an expression of interest for purchase is made from a potential resident (or often their family) an appropriate person will meet with any potential residents and discuss and assess needs in this regard. A plan is then put into place. Once the resident enters the development, as well as being introduced to all facets of the development and its operation, needs and the Plan will be discussed once more to ensure that there has been no change in circumstances, and if there has been, these can be acted upon and changes made accordingly. Care Plans are agreed and maintained by the CQC qualified Manager.
- 2.4 Staff keep in regular contact with residents, checking that all is well each day, helping out in emergencies and suggesting steps that might be taken to improve their independence, health and well being. This will include simple steps or measures to be taken by residents themselves to changing or increasing the care packages that they have. So as to promote a sense of independence and well being, discussions relating to change of package, if not prompted by the residents themselves (which is often the case) will be undertaken as sensitively as possible when the appropriate opportunity arises. If a resident is avoiding such an opportunity, then an appointment may be arranged. The Manager may consult the resident's family to make sure that any assessed support is provided. The Manager will also ensure that consultation takes place regularly even if there seems outwardly to be little change in circumstances of the individual concerned.
- 2.5 As referred to, "oversight care" is constantly being delivered as part of the day to day operation of the development and the "caring" environment which is naturally created. Additionally, the regular and "natural" contact between residents and qualified staff means that there is continuous oversight care of residents. Staff can and will take the opportunity

through day to day interaction to ensure that residents well being, health and independence is optimised. A casual “chat” can identify issues or problems, which may be as slight as being unable to open a food package (but which of course may be indicative of a wider problem if happening regularly) to changes to their mental and physical wellbeing which a resident may not be prepared or able to acknowledge to act upon themselves. A sense of independence and well being may be significantly enhanced by a helping hand with a simple activity such as making a cup of tea in the residents lounge, something which a frailer resident would have perhaps stopped doing for lack of faith in themselves as they age. There are numerous ways in which care is provided in a discrete way which transcends the minimum package and delivers continuous care and sense of care to the residents.

- 2.6 The importance of round the clock and particularly overnight staffing to attend to situations as they arise or provide care that is required in night hours should not be overestimated. Whilst care will not be being directly delivered to an individual resident, throughout that time, the fact that it is there and readily available is a very important contributor to the “caring” nature of the development. The staff involved will be contactable through the personal alarm system which can be activated throughout the individual apartments and communal areas as well as being available by phone. They are therefore able to respond immediately to all situations able to administer the care that is required themselves or be qualified to make the appropriate judgement about calling in other services. Experience is that residents particularly value this reassurance and indeed are content to see a significant part of their service charge payment directed towards it although they will (hopefully) not be using it. They know someone is there for them 24 hours a day
- 2.7 If residents are not engaged with on any particular day or if their daily pattern appears to have altered, then a discreet call will be made to check on them. Importantly the Manager holds a key to each apartment that will be used should there be any concern or an emergency. This is noteworthy in itself in that whilst the apartments may be described as physically self-contained, the holding of a key means that they are not in practice actually self-contained.
- 2.8 Over time, the frailty and dependence of all residents will increase. The design of the apartments and communal facilities, and the availability of an on-site care team, means that virtually all care needs can be met without the resident needing to change accommodation. Because Extra Care housing is based upon a balanced community of older people with varying care needs, the development acts as community, and residents feel that they are able to participate in the provision of their own care. Some individuals are highly dependent at the point of entry and it is likely that such people would otherwise have needed to enter residential care. Care will always be delivered so long as it is within McCarthy & Stone’s ability to do so. If not, it will work with external agencies to do the best it can to ensure that residents can remain at the development.
- 3.0 **GUIDANCE ON THE ISSUE**
- 3.1 As mentioned, the issue has been the subject of much consideration and commentary over the years as the Extra Care concept has itself evolved. As also mentioned, caution is required in the application of much of this as it may relate to forms of development that are not sufficiently similar to proposals now under consideration to be of assistance or may now be superseded by more informed and/or up to date guidance.

3.2 Housing Learning and Improvement Network (Housing Lin) Fact sheet No1 (November 15 “Extra care Housing – What is it in 2015) has sought to bring much of this together and therefore offers both guidance and good practice on the issue. Housing Lin was formerly responsible for managing the Department of Health's (DH) Extra Care Housing capital programme, and is now is the leading 'knowledge hub' for a growing network of housing, health and social care professionals in England involved in planning, commissioning, designing, funding, building and managing housing with care for older people. Not only then is this a valuable and considered contribution to the matters at hand, it is also very up to date in its analysis and is informed by the “thinking” that has gone before it.

3.3 Section 2.1 considers the Core Ingredients of an Extra Care scheme as follows:

- *Purpose-built, accessible building design that promotes independent living and supports people to age in place*
- *Fully self-contained properties where occupants have their own front doors, and tenancies or leases which give them security of tenure and the right to control who enters their home*
- *Office for use by staff serving the scheme and sometimes the wider community*
- *Some communal spaces and facilities*
- *Access to care and support services 24 hours a day*
- *Community alarms and other assistive technologies*
- *Safety and security often built into the design with fob or person-controlled entry*

3.4 The proposal provides all these services and facilities. It therefore fits squarely in the Extra Care concept and therefore falls to be considered against the other advice within the document.

3.5 Section 5.3 deals specifically with the question of planning use classes, and states;

‘The planning classification of extra care housing is far from straightforward, reflecting the broad range of philosophy and types that extra care covers. Whether it is seen as primarily housing or as a proxy for a care home depends on the nature of the scheme and the services provided. The planning Use Class applied to Extra Care confirms this distinction because some schemes are defined as C3 (Dwellings) and some are C2 (Residential Institution).’

3.6 It goes on to say:

For well integrated extra care communities, with clear linkages between the various elements, the predominant function of the ‘planning unit’ as a whole usually prevails.

3.7 The Fact Sheet sets out the key determining factors in assessing the Use Class of an Extra Care scheme:

- The extent of any legal restrictions on purchase and occupation;
- Availability of care via a registered provider;
- Arrangements for the regular assessment of individual care including upon occupation;
- The availability of meals;
- Extent and scale of community facilities.

3.8 These are addressed in turn below:

3.9 **Legal restrictions on purchase and occupation** – McCarthy & Stone will be prepared to accept reasonable restrictions by way of planning conditions or legal condition as the Council sees fit. It is acknowledged that these will be (a) appropriate to satisfy the Council that the development is maintained as such in perpetuity (b) necessary if other contributions are not sought as a consequence of it being accepted as C2. It will also provide reassurance to the Council that the development is indeed Use Class C2 and controlled appropriately.

3.10 Should a Council consider it necessary to restrict the use of the development directly, the following conditions/clauses might be considered.

‘None of the individual units of residential accommodation at the development shall be used otherwise than as a private place of residence for a person or persons of whom at least one must be a “qualified person” (defined below) at the date of his or her first occupation of the unit in question’.

For the purposes of this schedule “a qualified person” means a person who is or has attained the age of 70 years and thereby in need of personal care by reason of old age or by reason of disablement. (whether or not such person suffers from a registered disability under the terms of the Chronically Sick and Disabled Persons Act 1970). An occupier of one of the individual units of residential accommodation who is not a “qualified person” but who shares or previously shared the accommodation with a “qualified person” (e.g. a spouse or surviving spouse) must have attained the age of at least 60 years.’

The development hereby permitted shall only be used for the purposes specified in the application and for no other purpose (including any other purpose in Class C2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 or any provision equivalent to that Class in any Statutory Instrument revoking and/or re-enacting that Order).

A minimum of (to be agreed)% of the total ground floor area shall be used as communal rooms (not including corridors, stairways, lifts, lobbies, plant rooms and toilets).

3.11 McCarthy and Stone would be content to submit to similar restrictions and discuss any other reasonable additional clauses or restrictions that the Council may wish to apply. An alternative would be for an obligation to include terms for the submission of a management plan, accommodating the operations and services described in the Planning Application.

3.12 **Availability of Care via a Registered Care Provider** - As mentioned previously, the application will be submitted in the name of McCarthy & Stone and the Provider and the Scheme Manager will be registered with the Care Quality Commission.

3.13 **Regular Assessments of Individual Care** - An assessment of existing and likely immediate care needs is made of all potential purchasers by the scheme manager and if he or she is not yet in place (which may be the case for purchasers of developments nearing completion) this will be carried out by a regional manager who is CQC registered. The Care Plan arising from this will be subject to regular review and the health and well being of residents will be kept under continuing review through the day to day running of the development as already described.

- 3.14 ***The Availability of Meals*** - As discussed in the Planning Statement, there is a waiter staffed restaurant that serves hot meals as well as providing drinks, snacks and other snacks through the day. Meals can also be delivered to apartments. A number of meals options will be available for any setting and menus will be made available from which residents can choose prior to the setting.
- 3.15 ***The Extent and Scale of Community Facilities*** - These too have been described in considerable detail in this statement and the Planning Statement. This form of Extra Care proposal includes all the facilities that are listed in Housing Lin paper as “Core Ingredients”.
- 3.16 It is clear then that the proposal when assessed against the Housing Lin determining factors for a C2 or C3 use, that the proposal is a C2 use.

Relevant Counsels Opinion

- 3.17 Attached to this statement as Appendix 1 is a Counsel’s opinion that McCarthy & Stone commissioned, dating from 2010 by Jerry Cahill QC. On recommencing its Extra Care development activity in anticipation of the end of the recession it sought an opinion generally on the issue.
- 3.18 The opinion concludes that the Extra care model Retirement Living Plus (then known as Assisted Living) falls within Use Class C2. In doing so it draws on analysis of the Use Class Order and the concept itself. It also discusses the Tiddington Fields appeal decision (2009) which is therefore not analysed in this statement but provides something of a benchmark for the decisions that were referred to and have followed it. They all relate to Extra Care developments that have similar attributes to the Extra Care proposal now presented.
- 3.19 The opinion also provides a useful commentary in respect of the term “dwelling” and “dwellinghouse” and its relationship with Use Classes C2 and C3 (Paragraphs 8 to 10)
- 3.20 Whilst the whole of the discussion (commencing Paragraph 6) remains relevant, the following references are highlighted as they succinctly get to the heart of considerations

9. *It will be noted that the Class C2 provision is “residential accommodation and care” [emphasis added]. This must be borne in mind and the fact that accommodation is provided does not mean that what is being made available is a dwelling house (see the Tiddington decision discussed below).*

11. *Some Local Planning Authorities have previously erred in merely looking at the characteristics of the personal accommodation to “inform” a conclusion that what was to be provided was a number of class C3 dwelling houses. Certainly, the developments are designed to foster the highest degree of independence that occupants can attain, in accordance with Government objectives; but given the age of such occupants and the inevitable reduction in independence that increasing age necessarily involves, the nature and quantity of care can be increased whenever necessary without destroying at least the spirit of independence. To that end each unit of accommodation does afford the facilities required for day to day private domestic existence, being single, self-contained units of occupation, designed for residential purposes and containing facilities for cooking, eating and sleeping and each is occupied by a single person or a couple as a single household. However, the approach of merely considering the basic components of the accommodation is both selective and simplistic.*

16. *Reference to the Article 2 definition of care reveals that “personal care for people in need of care by reason of old age” is not limited to medical care and treatment, but simply embraces the concept of “care”. The assistance that a frail elderly person may need is not therefore necessarily medical care and may amount to domestic help or precautionary supervision. Similarly, need by way of disablement is a separate category from need by way of old age, thus old age need not be accompanied by disablement for the definition to apply. There is no minimum requirement in time (nor any mechanism for establishing a time based criterion) regarding the care provided.*

18. *In some cases apartments are occupied where the onset of particular physical needs care requirement is imminent but such need is limited; however it would appear perverse to contend that care by the provision of assistance or protective oversight to the person of such occupants was not needed. Certainly, the new Assisted Living residents must be of that belief, because they would not otherwise pay the higher service charge. The Assisted Living scheme provides to an individual, from entry, not simply care but control over the nature and level of care to be maintained. Throughout, the service charge reflects the additional overheads of a serviced, caring environment. Government is encouraging the transition, by the elderly, to a residential model where care is readily available at a time when its requirement is foreseeable but the degree of future care is not immediately ascertainable.*

- 3.21 Fundamental to consideration of the issue in the Use Class Order is that Extra Care development is a type of housing with care. Class C2 accommodation embraces residential accommodation (i.e. housing) and care. To be Use Class C2, a proposal does not need to be a nursing home (as also directly cited in the Order), nor a “residential school, college or training centre” (also cited) or other form of development where the residential accommodation is not self contained. It should also be understood that the reference to “personal care” in the UCO is not synonymous with the use of Personal Care in the Care Acts. The UCO’s definition is self evidently wider and preceded the term “Personal Care” in the Care Acts by some considerable time and there having been no indication of linking the two in any statutory provision or guidance.

Relevant Appeal Precedent

- 3.22 There is significant precedent set by recent and the most relevant appeal decisions all for Extra Care developments where the residential accommodation and the communal/care facilities and staffing are all “under one roof” and have the same “core ingredients” as the McCarthy & Stone (formally known as Yourlife) model, which include of course the accommodation units themselves being physically self contained. These decisions whilst of important material considerations in their own right as precedents, directly and succinctly get to the core of the issues at hand and are therefore also a helpful source of reference.
- 3.23 They consider the issues that have typically been raised in the past in respect of Extra Care schemes including the often cited premise that simply because the apartments have a front door and can be argued as self-contained, they must therefore be Use Class C3 (and sometimes argued more specifically by planning authorities as Use Class 3(b) and that set levels of care are lower than they could be (something which runs counter of course to the purpose of Extra Care housing).
- 3.24 Only once has the Use Class issue directly had to be subject of an Appeal by McCarthy & Stone, LPA’s accepting the evidence being submitted that the proposal was Use Class C2 and

agreement having been reached in respect of appropriate planning obligations and conditions (a list of those authorities that have accepted the position together with Planning Officer reports can be provided on request. The exception was a proposed development of 58 Extra Care units at Wood Lane, Tettenhall, (Wolverhampton City Council in 2016). There though on consideration of evidence for the Inquiry, the Council withdrew its objection. The Inquiry was held and the Inspector allowed the Appeal. Inspectors have however deliberated over the acceptability of schemes as falling within Use Class C2 on two occasions at Horsham and Lancaster). These Appeal decisions are also now considered.

The Evesham Appeal decision. Brooklands Farm, Cheltenham Road, Evesham, Worcestershire WR11 2LW. Dated 15th December 2012. Appeal Ref: APP/H1840/A/13/2193666 (Appendix 2)

- 3.25 In introduction, **Paragraph 7** identifies the development:

“The proposal is for a continuing care retirement community. It would comprise a 75 bed care home with nursing and specialist care for the frail elderly and dementia sufferers, and 50 Extra Care, one and two bedroom apartments. The residents of the Extra Care apartments would subscribe to a care package which would include overnight staff, care, cleaning, catering, laundry and other services. Each building would have its own communal facilities and outdoor amenity areas”.

- 3.26 **Paragraph 15** explains that it is the Extra Care element that is in dispute:

“The proposal does not include provision for affordable housing. The Council accept that the proposed care home comes within Use Class C2 (residential institutions) of the Town & Country Planning (Use Classes Order) 1987 (UCO), but consider that the Extra Care apartments come within Use Class C3 (dwelling houses) and are therefore required to contribute towards affordable housing”.

- 3.27 Mindful that the Inspector allowed the development, it is worthwhile to note here that the fact that the care home element of the proposal was agreed by all parties as C2 from the outset, reinforces the consideration that was given by the Inspector to the other element (i.e. it is not only a “care home” that falls within Class C2).

- 3.28 The Inspector then turned to consider the issue, first referring to the Use Classes Order and the Council’s application of it. At **Paragraph 17**, he commented:

“The Council submit that the Extra Care apartments constitute a number of individual planning units each of which constitute a dwelling and therefore come within Class C3 of the UCO. It refers to paragraph 71 of Circular 03/2005 Changes of Use of Buildings and Land - The Town & Country Planning (Use Classes) Order 1987. This states 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; designed, or adapted, for residential purposes, containing the normal facilities”.

3.29 In considering the scheme against this at **Paragraph 18** he commented:

"Each apartment would have its own living room, bathroom, kitchen and either one or two bedrooms and would therefore have the necessary attributes to be occupied as a single self-contained unit of occupation. However, in addition to the individual apartments, the proposal would provide a communal dining area and kitchen, a communal lounge, a function room, office, reception desk, laundry for use by staff, communal seating areas, a staff rest area, a staff sleepover suite, guest suites and 24 hour staffing in addition to other care services. These communal facilities would be spread throughout the building and would occupy a significant proportion of the proposed floor space. Together with other communal areas such as the extra wide corridors and the plant room they account for about 35% of the floor space. This compares to about 10% for conventional Class 3 housing and 20-25% for category II sheltered housing". (emphasis added)

3.30 Once more we find that this Appeal proposal has very similar facilities and services as an Extra Care scheme. All the facilities and services listed appear in the McCarthy & Stone scheme. Communal areas typically add up to about 35% of the total floor area.

3.31 The Inspector then notes at **Paragraph 19**:

"The occupants of the proposed accommodation would pay a service charge to provide a minimum level of care, which would include both personal care and the cost of overnight staff. They would also be able to purchase additional care as the need arises".

3.32 He then determines (**Paragraphs 20-22**):

"Paragraph 71 of the Circular states that it is the manner of the use, as well as the physical attributes of the building, that determines whether a use falls within Class C3. Use Class C3 does not preclude the provision of care to the occupants. Indeed, it is not unusual for many people, particularly the elderly, to receive care within their own homes on a regular or daily basis. Notwithstanding this, the primary purpose of the proposal is to provide care for the residents. The need for this care is reflected in both the physical form of the building, as well the manner in which the building will be used. In this respect the proposal would be fundamentally distinct from use as a dwelling house.

The communal and staff facilities are dispersed throughout the building and do not occupy a discrete area. The size of the individual apartments is greater than for category II sheltered housing reflecting the need to provide for wheelchair mobility standards. In addition, the service charges for Extra Care apartments are considerably higher by comparison with sheltered housing, reflecting the significantly greater level of care provided.

If each individual apartment were to constitute a separate planning unit, then it must follow that the communal and other facilities within the building also form a separate planning unit or units. However, the primary purpose of these other facilities and services is to meet the identified care needs of all residents within the apartments on a 24 hour basis. I consider the individual apartments and the other areas and uses within the proposed building to be inextricably linked. I therefore consider that the proposed Extra Care building forms a single planning unit and the proposal does not fall within Use Class C3. Its purpose is to provide residential accommodation and care to people in need of care, and therefore it falls within Class C2 of the UCO". (emphasis added)

3.33 These short paragraphs reinforce many of the key contentions made in this paper:

- The need for care is reflected in both the physical form of the building and the manner in which it is used
- Services charges are higher reflecting the care provided
- The primary purpose of the development is to meet the care needs of its residents on a 24 hour basis
- The proposal forms a single planning unit and this unit does not fall within Class C3

The Stratford –upon- Avon Appeal decision. Land off Manor Road, Stratford-upon-Avon CV37 7EA dated 20 June 2012. Appeal Ref: APP/J3720/A/11/2153222 (Appendix 3)

3.34 A further decision relates to Aspen Retirement Ltd scheme. Before considering the issue itself, the Inspector also referred to the Council presenting numerous appeal decisions and the Appellants having to rebut these (**Paragraphs 70 and 83**). The Inspector states:

The Appellants’ necessarily lengthy cross examination of the relevant witness was helpful in focussing attention on the most relevant considerations, as the councils’ evidence was both confused and confusing on this particular matter, an approach that I did not find especially helpful.

3.35 This reinforces the point already made that whilst there are many decisions that relate to older persons housing and the C2 issue, it is the ones that are relevant to a single building extra care development and bears the closest similarities to the proposal in question that should be considered. Reference to others only confuses and clouds the issues that are relevant to consideration

3.36 The Inspector himself then refers to a relevant older decision at Tiddington Fields (**Paragraph 84**), to be “instructive”

“not least in view of its physical parallels with the proposal in this case, which although comprised of self-contained apartments, is far from being analogous to a block of flats, but rather, with the range of communal indoor facilities, numbers of staff employed on a daily basis and service options such as communal dining, would be distinctly institutional in form and function.

3.37 Tiddington Fields is also referred to in the J. Cahill QC opinion.

3.38 The Inspector goes on to comment at **Paragraph 85**:

“I cannot imagine there would be many potential residents who were not in need of, or not anticipating being imminently in need of, at least a modicum of regular care. Moreover, reinforcement of the premises-specific culture of care and support would be effected by the terms of occupation based on minimum age and minimum take-up of care services (albeit limited in terms of hours) and the substantial service charges well beyond those that might reasonably be expected in non-institutional accommodation. The illusion of independent living would come through the physical self-containment and saleability (to qualifying occupiers) of the individual units, whereas the reality would be one of a tightly knit community unified by

access to a dedicated enterprise of specialist care and security for the elderly. (emphasis added)

3.39 That emphasised point is an interesting view of Extra Care Housing / Housing with Care. At the heart of this concept (and indeed of the Care Act) is the maintenance of independence and with that health and well being through independent living. The Inspector describes this in the context of the proposed Housing with Care development as an “illusion” because residents have their own homes but at the same time are actually being “cared for”. The “illusion” of independence when older people are in fact actually being “cared for” is a very positive thing and exactly what Extra Care is meant to achieve.

3.40 The inspector determines these characteristics as being of a residential institution and Class C2 (**paragraph 86**):

“These characteristics, when combined with a binding legal agreement as proffered in the form of a unilateral undertaking in this case, lead me to the conclusion, in the context of the threads of relevant reasoning permeating the appeal decisions canvassed by the Council, that the proposed development in this case is properly classified as within the C2 use class, i.e. Use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses)). (Emphasis added)

The Portishead Appeal Decision. Former Portishead Primary School Site, Slade Road, Portishead, BS20 6BD) 9 October 2012 Appeal Ref: APP/D0121/A/12/2168918 (Appendix 2)

3.41 In considering both the C2 and Class C3 uses, the Appeal decision determines that the proposal is Use Class C2.

3.42 The whole appeal decision is relevant as it deals with:

*“The sole issue between the main parties is whether or not the proposed use falls within Class C2 of the Town and Country Planning (Use Classes) Order 1987 (as amended). (**Paragraph 7** refers)”*

3.43 The Inspector first acknowledges (paragraph 12) the Appellants admission:

“The Appellants say that the proposal is not a care home’ but is termed Housing with Care (HwC), providing residents with independence but with care provided, the extent of which would vary depending on individual needs, although a minimum amount of care would be paid for and provided for all residents”.

3.44 This acknowledges itself that housing with care can be Use Class C2 and that the residential units do not have to be non self contained.

3.45 The Inspector advises at **Paragraph 15** that:

“Both parties agree that the starting point to assess the relevant use of the proposal is to establish what is the planning unit involved in this case”

3.46 This sensible approach of course accords with the more recent Housing Lin advice and confirms that self containment of the individual accommodation units is not the determining factor in itself.

3.47 The Inspector begins the assessment by first considering the accommodation units noting at **Paragraph 16:**

“Each of the apartments would have its own living room, bathroom and toilet and fully equipped kitchen, and one, two and three bedroom apartments are proposed; in other schemes residents often use the third bedroom as a dining room or for some other purpose. The developers aim to provide high quality accommodation, and on the basis of what I saw in what I am told is a broadly comparable scheme at Arlington House, Rhos-on-Sea, I would agree that each of the apartments would provide well-designed and high quality accommodation”.

3.48 Such will be the case at a McCarthy & Stone development although it should be noted that no three bedroom units are proposed. The nature of the expected residents (i.e. typically 85 years + and in need of care) means that more extensive apartments are not in delivered by the McCarthy & Stone model.

3.49 **Paragraph 17** identifies the leading case in respect of assessing the appropriate planning unit:

The leading case of Burdle v Secretary of State for the Environment [1972] sets out three broad categories for assessing the appropriate planning unit. Firstly, where it is possible to recognise a single main purpose of the occupier’s use of his land to which other activities are incidental, the whole unit of occupation should be considered. The entire unit of occupation may also be considered where a number of activities are carried on, and where it is not possible to say that one is incidental or ancillary to the other. A third situation is that where within a single unit of occupation, two or more physically different and distinct areas are occupied for substantially different and unrelated purposes. In such a case, each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

3.50 Simply put, it identifies three categories

1. A main purpose and incidental purposes which should be identified as a single unit
2. A number of purposes which should be identified as a single unit
3. Two or more distinct purposes which are substantially different and unrelated should be regarded as separate planning units

3.51 **Paragraph 18 and 19** sets out the Council’s position in respect of its application:

“The Council argues that the third Burdle category applies here, and that each of the apartments is a self-contained unit of accommodation, occupied independently of other parts of the building, and falls within Use Class C3.

The Council suggests that the communal facilities and staff accommodation falls within separate planning units. Each of the flats would provide all the facilities necessary for independent living. They would be leased by the occupiers, who would have possession of their own property, and would have a lockable front door”.

3.52 The Inspector also mentions at Paragraph 19, key holding and access by the Care provider. The proposed scheme adopts the same arrangement.

3.53 The Inspector concludes from this at **Paragraph 20**:

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 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.

3.54 The Inspector then advises at **Paragraph 21**:

"It seems to me that the provision of care pervades the whole of the development, and this is demonstrated in a number of ways". (Emphasis added)

3.55 He then goes on to consider these dealing with (a) care provision and how it is provided, paid for and administered (b) staffing (c) fire evacuation (d) events.

3.56 Applying these to the Your Life Extra Care Model delivers the same outcomes as those reached by the Inspector with the Gladman Appeal. This led him to conclude at **Paragraph 29**, in allowing the appeal:

"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 it is also clear from Ms Britton told me and from what I saw on my visit to the Rhos-on-Sea premises, that 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". (emphasis added)

3.57 It is noteworthy too that the Council and Appellant agreed an age restriction of 65 years (having previously been proposed at 55 years (**Paragraph 3**). This is still 5 years less than the McCarthy & Stone Age occupancy restriction.

3.58 As stated these three appeal decisions bear the closest relevance and relationship to the proposal in their overall approach and operation. They are all single building Housing with Care schemes with independent living apartments built around a central communal "core" of facilities and where care is tailored to meet individual needs and requirements. As part of the concept too they are almost entirely one and two bedroom apartments served of a central spine corridor. As said, they all have the same Housing LIN "core ingredients" as the McCarthy & Stone model.

YourLife (as McCarthy & Stone Extra Care was formally known) , Tettenhall College, Wood Road, Tettenhall, Wolverhampton WV6 8QX dated 17th January 2017. Appeal Ref: APP/D4635/W/16/3150728

3.59 As already referred to in introduction, the proposal for 58 Extra Care units was refused by the Council solely on the basis that the units involved were considered to be Use Class C3 and that therefore an affordable housing contribution was appropriate. The Officers Report to Committee tells us that (a) the suggested self-containment of the apartments proposed (b) the fact they are for sale and (c) a “*minimal level of compulsory care package*” led to their conclusion in this respect.

3.60 On consideration of the evidence and submissions put forward by McCarthy & Stone in preparation for the Inquiry, including a draft Planning Obligation, the Council sought Counsel’s advice and following that advice revised its position to one of acceptance that the appropriate Use Class is indeed Class C2 and from which, it is inappropriate to seek an affordable housing contribution. Consequently no evidence was offered by the Council to the Inquiry in respect of this matter.

3.61 The Inspector allowed the Appeal and concluded at paragraph 49:

Withdrawal of the Council’s evidence in relation to the only reason for refusal was based on the very specific nature of the accommodation proposed not engaging policy HOU3 of the Core Strategy. It is necessary, therefore, to define the permission as being for that stated purpose and no other.

Conditions were applied and there was felt to be no requirement for the Planning Obligation that had been offered by the Appellant. The Conditions are set out below at Section 4:

YourLife. Greaves Hotel, 142 Greaves Road, Lancaster, LA1 4UW dated 24 September 2013. Appeal Ref: APP/A2335/A/13/2195739

3.62 In respect of the Appellants’ proposal at Lancaster, the appropriate Use Class was a matter raised by third parties in an effort to thwart its development and therefore had to be dealt with by the Inspector at the hearing. There, the Inspector determined that:

“The development would provide a specialist form of leasehold, independent living accommodation for the frail elderly 70 years and older, and would include various care packages to suit individual needs, over and above normally associated with sheltered housing accommodation. Given the nature and extent of communal facilities and the level of care initially offered and included in the service charge, the Council consider that the proposal would fall within a C2 “Residential Institution” Use Class with which I agree.” (Emphasis added)

YourLife. Prewetts Mill, Worthing Road, Horsham, West Sussex, RH12 1ST dated 22nd March 2016 Appeal Ref: APP/Z3825/W/15/3133676

3.63 Here, the Council accepted that the proposal was use Class C2 but contended that it was representative of a Close Care Retirement Community (CCRC) for which it suggested it had a policy that sought affordable housing. Therefore the inspector was obliged to consider “what” the proposed development was. At paragraphs 20 he found:

“Turning to the justification under Policy 16 the Council says that this relates to all types of housing. However, although it refers to meeting local housing needs the requirement for an affordable housing contribution arises when over a specified number of dwellings are

provided. The proposed development is agreed by the parties to be a Class C2 use in the Use Classes Order notwithstanding the proposed flats being self-contained. A C2 use is 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)). With that distinction having been drawn I consider that the proposed development cannot be considered as providing dwellings and thus Policy 16 cannot apply.

- 3.64 In then considering at paragraph 21, whether or not the proposed development was representative of a CCRC covered by Policy 18 of the Core Strategy, he found the development to be:

“Whether Policy 18 applies depends upon whether the proposed development is a large scale “continuing retirement community”. The appellant company is, with development of the kind proposed, moving into a slightly different segment of housing for the elderly from the one it has so far provided for. What is proposed is “Assisted Living Extra Care” development. Along with the 55 proposed apartments would be communal facilities such as a residents lounge, restaurant, function room, well being suite, quest suite, mobility scooter, house managers office and staff accommodation. The scheme age would be restricted to 70, with a younger spouse of 60 where relevant. However, the appellant has found the average age of first occupancy to be the early 80’s. Domiciliary assistance is provided along with further care and assistance if required.” (Emphasis added)

- 3.65 These decisions relate to schemes that has very similar attributes and characteristics to the McCarthy & Stone scheme before you. I would reiterate once more that these are the only appeal decisions that offer such a direct reference to the scheme now under consideration.

4.0 **POSSIBLE PLANNING CONDITIONS/OBLIGATIONS AND CONCLUSION**

- 4.1 The scheme will be self-regulating in the sense that the combination of the extra cost of larger units of accommodation plus the additional communal facilities, and services together with the extra costs to the owners of the service charge in having 24 hour staffing, on-site catering and domestic assistance et al, will deter those who do not need this type of accommodation.
- 4.2 Under the McCarthy & Stone standard lease, the entry age for ‘Assisted Living’ Extra Care (Use Class C2) is set at 70 years of age, allowing for a younger spouse / partner where necessary. In addition the resident must meet the Qualifying Person Criteria set out in the lease and agree to sign up to a residency agreement.
- 4.3 Should the Council consider it necessary to restrict the use of the development further, McCarthy & Stone suggests and is prepared to agree to appropriate restrictions by way of legal obligation or planning condition. Mindful of the guidance of the NPPG that it is preferable to use conditions rather than planning obligations if these are sufficient to overcome objections to a scheme, and given to that in the case of the Appellants schemer at Tettenhall, neither the Council or the Inspector saw the need for a Planning Obligation, it is submitted that conditions are entirely appropriate to tie the scheme as a Class C2 use. Whilst the Applicant would of course be content to discuss terms of conditions with Officers, the following are suggested as appropriate should the Council see the need to restrict any permission:

- (1) Following the “Tettenhall” conditions, considered appropriate by the Inspector:

- i) *There shall be no subdivision of apartments, and communal areas shown on the approved plans shall be provided and retained as such for the lifetime of the extra care accommodation hereby permitted.*
- ii) *The extra care accommodation hereby permitted (excluding staff and guest accommodation) shall only be occupied by persons aged 70 years or older, unless otherwise agreed in writing with the local planning authority.*
- iii) *The extra care accommodation hereby permitted shall only be used for the provision of residential accommodation and care to people in need of care, being a use within Class C2 of the Town and Country Planning (Use Classes) Order 1987, as amended, and for no other purpose.*

(2) Other conditions, suggested by the Applicant:

- (i) *'None of the individual units of residential accommodation at the development shall be used otherwise than as a private place of residence for a person or persons of whom at least one must be a "qualified person" (defined below) at the date of his or her first occupation of the unit in question'*

For the purposes of this schedule "a qualified person" means a person who is or has attained the age of 70 years and in need of personal care by reason of old age or by reason of disablement. (whether or not such person suffers from a registered disability under the terms of the Chronically Sick and Disabled Persons Act 1970). An occupier of one of the individual units of residential accommodation who is not a "qualified person" but who shares or previously shared the accommodation with a "qualified person" (e.g. a spouse or surviving spouse) must have attained the age of at least 60 years.'

- (ii) *The development hereby permitted shall only be used for the purposes specified in the application and for no other purpose (including any other purpose in Class C2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 or any provision equivalent to that Class in any Statutory Instrument revoking and/or re-enacting that Order).*

4.4 The Statement details the core defining characteristics of the applicant's (Extra Care) accommodation and considers them against recent policy guidance, relevant Counsels opinion and appeal precedent for similar developments.

4.5 This considerable body of recent and relevant guidance and evidence confirms that supporting the applicant's rationale that the proposed development falls within *Use Class C2: Residential Institution* of the Town and Country Planning (Use Classes) Order (1987).