Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

Heard on 5 to 9 August 2019 at Leeds Magistrates Court

Case No: [2018] 3613.EA

BEFORE
Tribunal Judge - Timothy Thorne
Specialist Member – Libhin Bromley
Specialist Member- Marilyn Adolphe

BETWEEN

Action For Care Limited

Appellant

-v-

Care Quality Commission (CQC)

Respondent

DECISION

The Appeal

1. This is an appeal by Action For Care Limited, the Appellant pursuant to section 32 of the Health and Social Care Act 2008 (HSCA 2008) against the decision of the CQC dated 21 December 2018 to refuse an application to vary conditions of registration as a service provider in respect of a regulated activity.

Factual Background

2. The Appellant company provides residential care for individuals who have a learning disability with additional complex needs including autism, challenging behaviour, epilepsy and communication difficulties.

3. The Appellant's registration provides that it must only accommodate a maximum of 6 service users at the site located at The Orchard, Garmancarr Lane, Wistow, Selby, YO8 3UW. This is one of 8 premises registered by the Appellant.

The Appellant's Proposal

4. On 6 February 2018, the Appellant made an application to vary the condition of its registration to increase the maximum number of service users from 6 to 8.

5. For the purposes of the proposal, The Orchard can be divided into 2 areas: the main house and a bungalow (converted from a double garage) situated in the garden at the rear of the main house.

The Main House

6. The Appellant proposes to provide accommodation for an extra resident in an existing vacant en-suite bedroom in the care home. The panel attended a site visit on the first day of the hearing and noted that this room is on the first floor directly at the top of the stairs and contains a single bed, storage units and a small shower room.

The Bungalow

7. The Appellant proposes to provide accommodation for an extra resident in what is referred to as "the Bungalow". This was recently converted from a double garage and workshop in the back garden of the care home. It has been developed for an individual known as "SB" who is currently residing elsewhere. SB does not have capacity and is the subject of Court of Protection proceedings pursuant to section 21A of the Mental Capacity Act 2005.

8. The panel attended a site visit on the first day of the hearing and noted that the Bungalow is fenced off from the communal garden of the care home and has its own small private patio. It looks different from the main house and has the obvious appearance of a converted garage / workshop. Entry from the patio is via conservatory type doors and leads into a small sitting area with a 2 seater sofa, a wall-mounted TV and a small dining table. Directly off this area the panel noted a bedroom containing a small double bed and a small wardrobe. There is no door between the sitting area and the bedroom. The bedroom has split doors leading to a small wet room with a toilet.

9. Also off the sitting area the panel noted a very small room which looks like it was designed to be a very small kitchen except that apart from some kitchen type cupboards there is no other kitchen equipment within it. There is no door separating the 2 areas. Also off the seating area the panel noted a door which leads directly out to a tarmacked area which obviously served the building when it was a garage. Next to this door the panel noted another door leading onto a self-contained and very small kitchenette with only a small fridge, kettle and toaster. Directly off this room is a small toilet.

Procedural History

10. On 6 February 2018, the Appellant made an application to vary the condition of its registration to increase the maximum number of service users at the Orchard from 6 to 8.

11. The CQC conducted a site visit on 9 May 2018. Subsequently, on 19 September 2018, the CQC issued a Notice of Proposal ("NOP") refusing the application. On 18 October 2018, the Appellant made representations in

response to the NOP. Documentation was submitted by the Appellant on 7 November 2018 including a letter from Vale of York CCG and an "estates assessment" of "the Bungalow" carried out by Vale of York CCG estates department.

12. The representations were considered by the CQC and rejected. On 21 December 2018, the CQC issued a Notice of Decision ("NOD"), upholding the original decision. On 25 January 2019, the Appellant lodged an appeal. On 19 March 2019, the respondent lodged reasons for opposing the appeal.

13. It later became apparent during a Tribunal telephone case management hearing on 18 March 2018 that the appeal in respect of the Bungalow was not in relation to the specific service user, SB, but was now in relation to an increase of one generic service user who would use the Bungalow.

14. The CQC offered to allow a variation to the conditions of registration to allow an increase in the main house from 6 to 7 service users, but only if the Appellant provides an adequate impact assessment in respect of the main house. The Appellant rejected the offer.

15. The Respondent also offered a condition in respect of the Bungalow in that it could be registered but only for use for short breaks for up to a maximum of 7 days with a minimum of 28 days between stays for each service user. This offer was also rejected by the Appellant.

Issues

16. Put simply (and as partially identified in the Appellant's written closing submissions argument) the issues are as follows:

    a. whether the Appellant has established on the balance of probabilities that it has had regard to the views of the service users and has actively consulted with them on the changes so that the proposal is person centred and that service users' needs are not prejudiced.

    b. whether the Bungalow is suitable for a service user of the type catered for by the Appellant. As outlined in the Appellant's counsel Mr. Butler's closing submissions, the Appellant provides residential care for individuals who have a learning disability with additional complex needs including autism, challenging behaviour, epilepsy and communication difficulties. The service user SB was put forward by Mr. Butler as an example of the type of service user for whom the Bungalow was designed and whom the Appellant's envisage accommodating.

17. In the judgement of the panel the issues can also be articulated as follows:

    a. Is the Appellant's proposal to increase the number of service users from 6 to 8, contrary to the policy guidance contained in (inter alia) Registering the Right Support 2017 ("RRS") and Transforming Care 2012 ("TC") and other relevant guidance?

b. If the Appellant's proposal does breach the relevant policy and guidance are there compelling reasons to depart from the relevant policy and guidance and which nonetheless requires registration?

Representation

18. Before the Tribunal, the Appellant was represented by Mr Simon Butler and the CQC by Ms. Anna Wilkinson.

Restricted Reporting Order

19. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the users of the service in this case so as to protect their private lives.

Late Evidence

20. The Tribunal was asked to admit additional evidence by the Appellant, i.e. a record of email correspondence between the CQC and the Appellant's solicitors between 20 June 2019 and 02 July 2019. The CQC's counsel did not oppose the application.

21. In relation to this new material, the Tribunal applied rule 15 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 and took into account the overriding objective as set out in rule 2 and admitted the late evidence as it had some relevance to the issues in dispute.

RELEVANT FRAMEWORK

22. This is divided into 2 sections:

a. The Statutory Framework.

b. Policy & Guidance.

STATUTORY FRAMEWORK

<u>The Role of the CQC & Registration</u>

HSCA 2008 section 3

(1) The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services.

(2) The Commission is to perform its functions for the general purpose of encouraging;

(a) the improvement of health and social care services;

(b) the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services, and

(c) the efficient and effective use of resources in the provision of health and social care services.

HSCA 2008 section 12

23. This requires the CQC to grant or refuse an application, according to whether it is satisfied that the requirements of any relevant regulations or enactment are being and will be complied with.

HSCA 2008 section 4

24. In considering an application, the CQC ("the Commission") must have regard to the matters prescribed by section 4 HSCA 2008:

(1) In performing its functions the Commission must have regard to;

(a) views expressed by or on behalf of members of the public about health and social care services;

(b) experiences of people who use health and social care services and their families and friends;

(c) views expressed by Local Healthwatch organisations or Local Healthwatch contractors about the provision of health and social care services;

(d) the need to protect and promote the rights of people who use health and social care services (including, in particular, the rights of…persons detained under the Mental Health Act 1983, of persons deprived of their liberty in accordance with the Mental Capacity Act 2005 (c. 9), and of other vulnerable adults);

(e) the need to ensure that action by the Commission in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed;

(f) any developments in approach to regulatory action, and

(g) best practice among persons performing functions comparable to those of the Commission (including the principles under which regulatory action should be transparent, accountable and consistent).

(2) In performing its functions the Commission must also have regard to such aspects of government policy as the Secretary of State may direct.

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the Regulations")

25. These set out Fundamental Standards which providers must comply with when carrying on a regulated activity. They include;

    a. Person-centred care - requiring care and treatment to be appropriate, meet service users' needs and reflect their preferences (Reg.9);

b. Premises and equipment - requiring that all premises must be suitable and appropriately located for the purpose for which they are being used (reg.15).

c. In order to comply with the requirements set out in these Regulations, the registered person must have regard to the guidance issued by the Commission under section 23 HSCA 2008 (Reg.21)

GUIDANCE AND POLICY

Registering The Right Support ('RTRS')

26. RTRS is the guidance issued by the CQC under section 23 HSCA 2008 and was published in June 2017. It adopts the approach contained in other policy and guidance documents, including Transforming Care ("TC") and Building the Right Support ("BTRS") referred to below.

27. RTRS can be summarised as follows:

a. The CQC is 'committed to taking a firmer approach to the registration and variations of registration for providers who support people with a learning disability and/or autism'.

b. The CQC intended to make decisions ensuring that care for vulnerable adults were 'developed and designed in line with Building the Right Support and other best practice guidance'.

c. The CQC "will expect providers to demonstrate in their application that their proposals comply with the principles of this guidance and the accompanying service model, or to explain why they consider there are compelling reasons to grant an application despite it departing from best practice guidance."

d. "providers can discuss proposals in advance to gain a better understanding of what is expected and improve the prospects of a successful application by developing such models of care".

e. CQC would adopt 'the presumption of small services "usually accommodating six or less"' in line with current best practice in Building the Right Support, albeit this not a 'rigid rule'.

f. RTRS would not be applied retrospectively as this might disrupt the lives of vulnerable people who were happily settled.

Transforming Care (TC)

28. TC was published in 2012 and can be summarised as follows;

a. The norm should always be that children young people and adults live in their own homes with the support they need for independent living within a safe and caring environment. Evidence shows that community-based housing enables greater independence, inclusion and choice, and that challenging behaviour lessens with the right support. People with

challenging behaviour benefit from personalised care, not large congregate settings.

b. Best practice is for children, young people and adults to live in small local community-based settings.

c. NICE Clinical guidelines for autism recommend that if residential care is needed for adults with autism it should usually be provided in small, local community based units of no more than six people and with well supported single person accommodation.

d. where children, young people and adults need specialist support the default position should be to put this support into the person's home through specialist community teams and services; the individual and her/his family must be at the centre of all support - services designed around them and with their involvement; and that people's homes should be in the community, supported by local services.

e. The CQC 's role is "to take action to ensure this model of care is considered as part of inspection and registration of relevant services…[and] CQC will also include reference to the model of care in their revised guidance about compliance."

Building the Right Support (BTRS)

29. BTRS can be summarised as follows:

a. People should have a choice about where they live and who they live with.

b. The right home and the right environment can improve independence and quality of life and can help reduce behaviours that challenge.

c. People should be supported to live as independently as possible, rather than living in institutionalised settings. Housing with occupancy of six or more, or which does not have a small, domestic feel, can quickly become institutionalised.

d. There is a preference for "mainstream" housing either provided by a housing association, private landlord, family or ownership schemes such as HOLD (Home Ownership for people with Long-term Disabilities).

e. Housing should not create new campus sites; hence commissioners should be cautious of contracting with providers keen to create schemes of multiple units within close proximity.

f. It has been shown that people who present with behaviour that challenges can be effectively supported in ordinary housing in the community.

g. Decisions should be based on what is right for each individual, but for most people, supporting them in a home near their families and friends,

and enabling them to be part of their community will be the right decision. This is in accordance with the Valuing People principles of rights, independence, choice and inclusion.

h. People should not be placed in voids in existing services or group living arrangements if it is not based on individual need and based on a person centred approach to planning

NICE guideline "Learning disabilities and behaviour that challenges: service design and delivery" (March 2018)

30. This states that if adults prefer not to live alone a "small number of people in shared housing that has a small-scale domestic feel" is appropriate. The guideline's overall aim is to "enable children, young people and adults to live in their communities."

Other Relevant Guidance

31. The panel takes the view that in interpreting the aforesaid guidance we should have regard to other guidance provided to us which may assist. In so doing we take account of the following documents which we note were not the subject of any challenge as to their admissibility in evidence for this purpose:

Living in the Community. Housing Design for Adults with Autism

32. This deals with kitchens and their uses and size in accommodation for persons with autism and complex needs. It also states that "people with autism can be particularly sensitive about the amount of personal space they occupy in group situations and may feel threatened if distances are insufficient."

Planning Your House by the Challenging Behaviour Foundation

33. This deal (inter alia) with the recommended size of accommodation for persons with certain needs. It states, "A self-contained flat will usually be about 40 square meters and 50-55 square if built to wheelchair standards".

Creating Autism Friendly Spaces

34. This states "Proxemics is the measure of personal space around the body. For people on the autism spectrum it is much greater than it is for others. [Therefore] Design spaces and buildings that have larger spaces than normal".

Good outcomes in community based services for people with learning disabilities and people with autism by Julie Beadle-Brown**.**

35. This states, "research has shown that people experience more choice and control when living in settings that are for 6 people or fewer and this increases the smaller the setting".

The Burden and Standard of Proof

36. Applying the rationale identified in **Care Management Group Ltd v CQC [2017] 316.EA**, the panel is required to determine the matter de novo and make its own decision on the merits. Both counsel in opening submissions agreed that the test to be adopted is whether as at the date of the hearing the decision to refuse to vary the registration should be confirmed or directed to be of no effect. The panel can take into account all the evidence submitted including new information

or material that was not available (or presented) when the CQC made its original decision. The Appellant bears the burden of establishing on the balance of probabilities that the variation to the existing registration should be granted.

37. The panel "stands in the shoes of the CQC" in carrying out this function and must therefore apply the same statutory framework, policy and guidance as the CQC as set out above.

The Hearing

38. As outlined above, the panel attended a site visit at the site on the first day of the hearing. The panel also took into account all the documentary and oral evidence that was presented. The panel heard evidence from a number of witnesses on behalf of the CQC and Appellant. The following is a precis only of what was said.

39. The panel first heard oral evidence from **Ms Sarah Jordan**, CQC Registration Inspector. She adopted her witness statement in which she explained that she had in-depth experience as a qualified social worker working for a local authority in the Adult Care Management Team and Social Care Assessor. She had a lot of experience working with adults with autism and mental and physical health problems.

40. She adopted her witness statement in which she explained the process by which the CQC assesses such an application in general and how she dealt with the Appellant's application in the case before the panel. She described why she had refused the application because it did not accord with the policy and guidance set out above. In particular in her opinion it breached regulations 9 & 15.

41. In relation to regulation 15 she explained that she was concerned that there was no kitchen. This was not the least restrictive approach to SB's particular needs and in any event she had to consider the needs of future service users in general who would need a kitchen. In addition there would be practical difficulties in transporting food from the main house to the Bungalow with no on site kitchen.

42. There were also concerns about the lack of space for a service user with complex needs and also for the likely staff required for their support, especially for someone needing 2 staff 24 hours a day.

43. She said that in relation to Regulation 15 she had concerns about the lack of laundry facilities and a kitchen and problems with transporting food. There was also a lack of furniture and little flexibility to move furniture around to suit a service user's preferences.

44. Also the accommodation was too small to deal with concerns about a service user's deteriorating health in the future. Although the ceiling of the bedroom had been reinforced and electrical plugs fitted to allow a hoist system to be installed, the wet room and bedroom were too small to accommodate many of the appliances required for someone with mobility issues. For example there would be problems manoeuvring a wheelchair.

45. There was also inadequate room for staff to give a service user room and privacy when required. There were no doors and nowhere for the service user "to escape to" if they wanted privacy from staff. There was also nowhere inside for the staff to be away from the immediate vicinity of the service user.

46. In addition it was difficult to understand how visits from family members could be accommodated in such a small space with the service user and staff being in attendance as they would most likely be.

47. She concluded that the proposed accommodation in the Bungalow was not suitable to accommodate any service user with autism and learning disabilities and complex needs such as behaviours which challenge and a deteriorating health condition. The guidance indicated that inadequate accommodation could have a serious impact on persons with autism and learning difficulties.

48. She said that in relation to Regulation 9 she had concerns about the lack of evidence of meaningful consultations with the 6 existing service users in the main house as to the likely impact of their being 2 extra service users (and a new Bungalow) on site. There was also inadequate evidence of an impact assessment on service users and staff. Moreover, there was also inadequate evidence of any sort of plan to try and reduce or manage such impact.

49. She concluded that the proposal to add an additional service user in the main house was not suitable because of the apparent failure to recognise the impact on existing residents and the lack of evidence of an impact assessment on service users and staff.

50. In oral evidence she said that in her opinion the proposed accommodation in the Bungalow (even with a kitchen installed) was not suitable to accommodate any service user with autism and learning disabilities and complex needs such as behaviours which challenge and a deteriorating health condition.

51. She also explained that under the guidance such accommodation should be as like a normal home as possible. The Bungalow was not like a normal home. It was not homely and comfortable. She later expressed concerns about it being in the garden of a care home. That was unlike a normal house and thus went against the policy behind the guidance contained in TC.

52. Under cross examination she maintained her position that there was always a risk that if the number of service users in a care home was increased, the quality of care could be reduced overall. She explained why in her opinion there was no meaningful discussion with existing residents on the site about the possible impact of increasing the number of service users. She pointed out that the minutes of such discussions disclosed that they only took place after the application had been made and did not provide adequate information so that any resident or relative could make an informed choice. In addition she noted that one relative had been given the bland assurance that there would be no impact.

53. She agreed that nowhere in Regulation 9 was it spelt out in terms that a specific impact assessment document was required. However, she explained that what was required (and was missing in this application) was evidence that an assessment of the impact of the proposal had been conducted in any meaningful way. What was also required (and missing) was evidence that the risk of any such an impact had been identified and that plans had been put in place to mitigate and manage such risk. She also explained about the various ways in which service users (even those with very limited mental capacity or cognitive abilities could be consulted and their opinions taken into account.

54. In relation to the size of the Bungalow her professional view was that it was too small for the type of service user who was envisaged to be using it. She agreed that the regulations and CQC guidance did not specify minimum required dimensions or provide a definition of when a place would be "overcrowded". It was "a judgement call." Using her judgement and having seen the Bungalow she maintained that it did not meet the standards of the Regulations and the relevant policy guidance. She added "it's not suitable for any service user with complex needs and deteriorating health." She accepted that it might be suitable for very short term respite care for up to a maximum of 7 days with a minimum of 28 days between stays for each service user, but that was all.

55. The panel then heard oral evidence from **Ms Jennifer Herbert**, CQC specialist advisor in occupational therapy. She adopted her witness statement in which she explained that she had been an Occupational Therapist (OT) since 2004 and specialised in working with adults with learning disabilities and autism as well as complex needs and challenging behaviours. She also worked on an ad hoc basis as a specialist advisor to the CQC.

56. She had been instructed by the CQC to provide an independent assessment of the suitability of the Bungalow which she visited and inspected on 29/03/19 and again on the first day of the hearing. Her instructions were to assess its suitability for "individuals with complex needs. This involved "assessing the environment for appropriate facilities, space for an individual and up to 2 supporting staff and whether the environment would facilitate opportunities for additional person centred activities." She also made it clear that she was tasked to assess it objectively and therefore she "had to carefully discount the fact that the Bungalow was designed with someone specific in mind." She had also taken into account the contents of a document Living in the Community. Housing Design for Adults with Autism which she exhibited in evidence to the Tribunal as JLH/01.

57. By reference to JLH/01 she opined that if the room that is now the calm room was made into a kitchen it would possibly not have sufficient space for the type of service user she was assessing. She also noted that there was a small kitchenette next door to the Bungalow, but this could only be accessed by a staff member by leaving the Bungalow. Tis meant that "regardless of whether the [service user] has 1:1 or 2:1 support another member of staff from the main building would therefore need come down from the main building to relieve the person who needs to use the facilities."

58. She had also taken into account the contents of a document Planning Your House by the Challenging Behaviour Foundation which she exhibited in evidence to the Tribunal as JLH/02.

59. By reference to JLH/02 she opined that the Bungalow was too small for the type of service user she was assessing. JLH/02 stated that "A self-contained flat will usually be about 40 square meters and 50-55 square meters if built to wheelchair standards". The evidence from the Appellant indicated that the Bungalow was only between 38.9 and 39.27 square meters. She had particular concerns about the size of the wet room and the feasibility of someone with mobility issues to be able to use it safely and with dignity.

60. She had also taken into account the contents of a document Creating Autism Friendly Spaces which she exhibited in evidence to the Tribunal as JLH/03. This stated "Proxemics is the measure of personal space around the body. For people on the autism spectrum it is much greater than it is for others. [Therefore] Design spaces and buildings that have larger spaces than normal".

61. By reference to JLH/03 she opined that the Bungalow would be too small and crowded for the type of service user she was assessing. She opined, "the space in the [Bungalow] is potentially going to fall short for people who have proxemic issues and wheelchair users."

62. She also stated that the bedroom would have "space limitations" if a person was not mobile and over the longer term in relation to the sitting area, "this space may become less functional and space limitations will become more of a challenge." She also had concerns about support during the night because the only place for staff to sit was on the sofa or table located near to the opening to the bedroom where there was no door. This would have an impact on the privacy and dignity of the service user.

63. She also said that "the inside space is limited and may not adequately meet the changing physical needs of an individual as outlined." She was also concerned about the impact there may be on the provision of care in the main house. She said, "there is potential this would impact on support within the main home and potentially put residents and staff at risk." Moreover the alarm system in the Bungalow was designed to sound within the main house.

64. She had also taken into account the contents of a document Good outcomes in community based services for people with learning disabilities and people with autism by Julie Beadle-Brown, which she exhibited in evidence to the Tribunal as JLH/04. This stated, "research has shown that people experience more choice and control when living in settings that are for 6 people or fewer and this increases the smaller the setting".

65. By reference to JLH/04 she opined that "increasing the numbers at this particular service will have an impact and may possibly be detrimental to others already residing there."

66. She concluded by saying that as the result of her experience, “having any more than 5 or 6 people with complex needs on one site as a permanent home [makes it] more difficult to promote choice and quality of life for users of the service.” She also opined that the Bungalow would “make a fantastic short-term breaks provision for someone with less intensive support needs.” She added in oral evidence , “the size doesn’t allow for a lifetime’s possessions to be kept” in the Bungalow and “it feels like a holiday let.”

67. In cross examination it was put to her that because she had said in her witness statement that the Bungalow was “functional”, she must therefore accept that the Bungalow could function for the purpose to which it was put. She stated that it could only function to meet the needs of the type of service user who had fewer complex needs and required less intensive support and only for a limited time. Also it did not function like a home. She also said that in general most service users would require a kitchen. She also stated that the wet room is not suitable for a non-ambulant person.

68. She also reiterated that she had not assessed the Bungalow by reference to the specific needs of SB. She had assessed it by reference to the type of service user identified by the Appellant in their Statement of Purpose which stated that they provided accommodation and care for “individuals who have learning disability with complex needs”.

69. The panel then heard oral evidence from **Ms Suzanne Howard**, CQC registration manager. She adopted her witness statement in which she explained that prior to her work with the CQC she worked in adult social care for over 25 years in a number of different roles. She explained the process of management review of the decision of the CQC to refuse the Appellant’s application. She explained that the application relating to the Bungalow only referred to the specific needs of SB. However the CQC could “not assess registration applications based on the needs of specific individuals because it does not assess individuals”. She added, that this was why the CQC can only assess applications based on the likely suitability for a service type or an intended service user group. The Appellant had made clear that the Bungalow “will be utilised by someone with complex needs, someone who would require a high staffing ratio and segregation in this building for their own benefit and the benefit of others.” On that basis the CQC were of the firm view that the Bungalow was just too small for that purpose and therefore was in breach of regulation 15. She had been to visit the Bungalow herself and had inspected it. As a result of her observations she was of the view that it was just too small for the purpose envisaged by the Appellant in their application.

70. Moreover, as part of the regulation process the CQC asked the Appellant for evidence of consultations with service users and their families and advocates to demonstrate they had made informed choices about the proposals and that the Appellant had recognised and planned to mitigate the risks inherent in increasing the number of service users at the site in the way proposed. In her opinion adequate evidence of these things had not been provided.

71. She referred to the principles set out in Transforming Care that quotes the NICE Clinical guidelines for autism which recommend that if residential care is needed for adults with autism it should usually be provided in small, local community based units of no more than six people and with well supported single person accommodation

72. In her opinion the Appellant had not acted in accordance with this aforementioned guidance. She was concerned that the documentary evidence provided by the Appellant only indicated minimal retrospective consultation for the purpose of merely validating a decision already made by the Appellant to increase numbers.

73. She referred to the guidance contained in Living in the Community. Housing Design for Adults with Autism which states that "people with autism can be particularly sensitive about the amount of personal space they occupy in group situations and may feel threatened if distances are insufficient." By reference to that guidance she opined that the Appellant had failed to evidence that they appreciated this risk and had planned to mitigate it.

74. She concluded that this constituted a breach of Regulation 9(3) which specifically requires service providers to involve service users in decisions. She was not satisfied that the existing residents at the Orchard (who had made it their home over many years, had been given the opportunity to express their views on what was a radical change in their home and living arrangements.

75. She readily acknowledged that "the Orchard currently conforms to all best practice principles contributing to good outcomes for the service users. For this reason any proposed change to the service must be carefully considered and justified to avoid moving towards a service model that is less successful, most especially for those who have already made the environment their home." She also opined that the "Appellant has not presented any compelling reasons why the CQC should depart from best practice guidance in this case."

76. In oral evidence she reiterated why the evidence provided by the Appellants in relation to consultations and risk assessment was inadequate. In particular she said that "the option of nobody moves in was not explored." She was also concerned that some service users were left with the impression that the proposed new service users would just be visiting rather than being new long term residents. She also gave examples from her experience of what other providers had done to ensure meaningful consultation with service users and their families and advocates had taken place.

77. In cross examination she agreed that the NOP did not specifically identify the need for an impact assessment document but she concluded that the Notice of Proposal at A93 B3.3, was a verbose way of asking for what was needed, i.e. documentary evidence that the Appellant's had assessed the impact and had formulated a plan to deal with it.

78. She also made it clear that she was not seeking to criticise the decision of the Court of Protection but her role was to assess the property by reference to

different criteria. The CQC were not involved in the proceedings in the Court of Protection but had read the documentation and reports that were associated with those proceedings.

79. She also explained why so much time had elapsed between the Appellant's application and the appeal being heard.

80. The panel also read the agreed witness statement of **Ms Emily White**, CQC Head of Registration in the North Region dated 29/04/19, in which she said that in her opinion the Appellant had failed to evidence that their proposals met the requirements of the NICE Guidance [NG93] which recommends designing and delivering services which maximise people's choice and control, promotes person centred care and takes "a whole life" approach. It also emphasised the importance of promoting choice for all service users.

81. In addition she said that in her opinion the Appellant had failed to evidence that their proposals met the requirements of the guidance in RTRS. This was because they had failed to submit "a thorough impact assessment and action plan in relation to mitigation of impact on existing residents." In addition the guidance was not followed because "the annexe Bungalow does not provide a model of care consistent with best practice which is principally in relation to a model which supports "ordinary living"."

82. The panel then heard oral evidence from **Ms Jane Kennedy**, the Appellant's Operations Director. She is also a Registered Nurse (Learning Disabilities) and had worked with adults with learning disabilities since 1987. She was also the nominated individual for a number of services operated by the Appellant, including The Orchard. She adopted her 2 witness statements in which she explained in great detail about the history of how the Bungalow came to be designed specifically to meet SB's needs. She explained that was the reason there was no kitchen in the Bungalow.

83. She also said that the development of the Bungalow came about in response to "a local need for a placement of the type that could accommodate an individual with more complex needs such that they cannot tolerate being around groups of others for sustained periods of time, in an established residential service."

84. She said that "SB is an example of the type of service user who would be accommodated in the Bungalow" and "the Bungalow would also be suitable to accommodate other service users with complex needs similar to SB".

85. She explained that because the Bungalow had no kitchen hot meals for SB would be prepared by staff in the main house and then transported in a special insulated container. Laundry would also be transported to and from the main house to the Bungalow. They would develop contingency plans if the weather was bad and or the path between the main house and the Bungalow became affected by snow or ice.

86. She also said at para 97 that “SB’s staff team will have access to the kitchen facilities in the main house and the laundry” because there was no kitchen or laundry facilities in the Bungalow. However she said, “it is submitted that the impact of this on the residents of the main house would be minimal.” In oral evidence she also added that SB might also use the garden of the main house as well. When this happened other service users would not be able to use the garden.

87. She also explained that the Bungalow had its own alarm system which if activated would create flashing blue and red lights and give off an audible sound in the kitchen of the main house. Staff from the main house would respond by running over to the Bungalow. The control panel with the sounder and flashing lights was an new addition to the kitchen in the main house as a result of the development of the Bungalow.

88. She also said that “SB has an immediate and local need for the Bungalow” and that the Vale of York Clinical Commissioning Group (CCG) had concluded that his needs could not be met at the Appellant’s other site, Advent House. They had tried to find alternative accommodation but had found none therefore the Appellant had looked to develop the Bungalow for SB.

89. She produced a number of documents relating to the Court of Protection;

    a. copies of the Court of Protection Order (JAK1&2) which stated that the court approved the placement of SB at the Bungalow as being in his best interests “subject to the CQC varying the registration of the Orchards to include the placement.”

    b. Physiotherapy report by Kaye Millard which appeared to be undated. It stated that SB would need 2:1 support over the long term and it was likely that his skill levels would deteriorate over time.

    c. Independent Social Worker report dated 03/11/17, by Nicholas Robinson. This concluded that it was not in his interests to stay at Advent House. However until a long term placement that would be a final move is identified, his best interests are to stay at Advent House. It was also recorded that SB’s mobility was deteriorating and would continue to do so.

90. She also produced a report by Stephanie Porter dated 05/11/18 (JAK11). The author was the director of Estates & Capital Programmes and she visited the Bungalow on 30/09/18. She opined about the Bungalow that “while it is a small space it is a functional space and able to adapt to a deteriorating and cognitive condition and designed with deep knowledge about the Client and how he currently responds to his environment.”

91. She also produced a document which was undated (JAK15) which indicated that The Orchard had been awarded accredited status by the National Autistic Society.

92. She also produced a CQC dated 30/06/17 (JAK5) which indicated that the Orchard had been found to be "Good".

93. At para 64 of her witness statement she explained in relation to the "impact of additional places on existing service users" that "we have had meetings with individual service users. Those who have been able to express a view have not raised any concerns about the prospect of additional service users moving in." As evidence of this consultation she produced her exhibit JAK14 which were documents entitled "A25 Service User Meeting" dated 19/04/18. They were minutes of meetings with 2 service users on that day.

94. She explained that "due to the impact of autism and having a learning disability it has not always been possible to discuss fully the potential placement of further service users…until there is a definite decision regarding registration and the placement." She added that some of the existing service users "simply cannot process abstract concepts about people who might move in in the future." She explained, "where individuals are not able to fully express a view on the matter we have also sought the views of carers and relatives." She also said that "as a provider we are very experienced in managing transitions……The whole process has to be planned and a number of factors taken into consideration." She said that the Appellant had successfully increased numbers before in other care homes they operated.

95. In oral evidence she said that she had never been asked for a specific impact assessment. She did not agree that the Notice of Proposal made it clear that is what the CQC were looking for. She said that she had discussed matters with residents but "its difficult to make them understand and make an informed decision. Some don't have capacity." She accepted that the minutes of conversations with residents submitted to the CQC all happened after the Bungalow was built and after the application to vary the registration was made.

96. She made it clear that the consultations with residents were about their preferences about the type of new residents rather than asking their opinions as to whether the numbers should be increased at all. She explained "we wouldn't include them in that because today they might say no whereas tomorrow they might say yes." She added that there was a limit to how much consultation there could be with service users because they lacked capacity and "don't choose to live there." She confirmed that the none of the residents had an expert by experience or advocate during the consultation process. Only staff were present with the residents.

97. Moreover she said that the Occupational Therapist had not seen the plans for the Bungalow before it was built. Also no one from the Court of Protection came to see the site. She also said that SB's current accommodation was bigger than the Bungalow. His present wet room was twice the size of that in the Bungalow. Since the Court of Protection decision, SB can now use the stairs more often and can mobilise downstairs.

98. She said that the alarm system in the kitchen of the main house was only there because of the Bungalow. She also confirmed that the original plan was for SB to live at the Bungalow for the rest of his life. There was no certainty that he would lose his mobility or have to use bulky equipment. She also said that the existing residents had been to the Bungalow but the novelty had now worn off.

99. The panel next heard oral evidence from **Ms Sharron Webster**, the registered manager of the Orchard since 2014. She adopted her witness statement in which she explained that she had 15 years' experience working in Health and Social Care specifically with adults with learning disabilities and complex needs.

100. She said that the Bungalow (which in oral evidence she described as "the annexe") could provide accommodation for a number of different types of service user. This included "individuals with more complex needs and individuals whose needs and preferences are such that they cannot live close to others in the main house but who are not suited for independent or supported living." She said that spurs were fitted in the bedroom to support the installation of hoists.

101. At para 29 of her witness statement she explained in relation to the impact of additional places on existing service users that they had had meetings with individual service users and their families and other professionals. She referred to the minutes referred to above as evidence of such discussions.

102. In addition there had been discussions evidenced in the quarterly quality assurance questionnaire. However, she explained in oral evidence that this had never been submitted to the CQC or the Tribunal. She also said that a "Transition Plan" would be put in place but only when that person was identified. She was confident that existing service users would not be negatively impacted by new residents. She produced examples of 2 anonymised updated behaviour plans but they did not deal with the possible impacts on existing service users of additional residents.

103. In oral evidence she said that she thought the Bungalow had "ample space" although she agreed that if a kitchen was installed there would be nowhere for the 2nd member of staff to stand away from the service user if they needed to. She agreed that the Bungalow had been designed specifically for SB. She also agreed that "it's always been a possibility that SB's mobility will decrease with his condition" That's why she explained there was a reinforced ceiling and spurs for a hoist. She thought that there would be enough room even if his mobility deteriorates. She said, "If there is a need for bigger equipment we might need to have a talk about that". She then said that she thought it was the best place for SB now. She was asked about the future and she replied, "It depends on whether he deteriorates much." She later said that she could envisage no circumstances in which SB would deteriorate so much that he would ever have to move out of the Bungalow.

104. She also said that in her opinion there would be no negative impact on existing service users of additional residents. She explained, "If we do what we are doing now, I don't think it will have any impact."

105. She said that the staff had been consulted and were happy with the proposed changes but there were as yet no formal risk management plans in place for them.

Closing Submissions

106. The panel heard oral submissions and read written submissions as well. The Appellant's submissions are well summarised in the written submissions as follows:

a. The additional room in the main house is suitable. There is a dispute as to whether the Appellant has meaningfully engaged with the service users in respect of obtaining their views and any impact it may have on the other service users.

b. The Tribunal are in a position to determine whether the Appellant has failed to engage with the service users. There is no requirement in the regulations or guidance for an "impact assessment report". The approach adopted by the Respondent is unreasonable.

c. Whether or not the Bungalow is suitable for a service user is an objective assessment having regard to all relevant evidence.

d. The Respondent does accept that the Bungalow is suitable for short-term accommodation. Ms Herbert accepts that the Bungalow is suitable as short-term accommodation.

e. Regulation 15(c) provides that the premises must be suitable for "the purpose for which they are being used". If premises are suitable for a service user to use, then that is the end of the matter. Regulation 15 cannot have the meaning suggested by the Respondent. Regulation 15 requires the registrant to keep suitability of premises under review, and to respond to any relevant change in circumstances which may affect suitability.

f. The Bungalow may currently be suitable for SB's current needs but may become unsuitable in the long-term if his needs change. That does not have any impact on the Tribunal determining the suitability of the Bungalow. This applies to any service user. The suitability test applies to a service user in light of his/her given needs, requirements and circumstances of the service user. This will include physical access to and around the Bungalow, space, bathroom and other facilities and potential for modifications to assist service users with mobility needs.

g. The Tribunal can have regard to the best interests of SB and the evidence from the CCG when determining whether the Bungalow would be suitable for his "current" needs. Whether it remains suitable in the future is irrelevant. One is having regard to current evidence and suitability.

h. The Tribunal can and must have regard to the open concessions made by the Respondent to the Appellant in communications.

107. This last point refers to the record of **email correspondence between the CQC and the Appellant's solicitors** between 20 June 2019 and 02 July 2019. This can be summarised as follows:

a. The CQC stated that they would be willing to vary the condition and increase the number of service users from 6 to 8 if the Appellant will agree to provide a satisfactory assessment of impact as required by Regulation 9 and only use the Bungalow for short term respite care.

b. The Appellant's solicitors rejected the offer and stated that "Providing CQC with more detail on the risk assessment process at this stage is not necessary". They also stated that the Bungalow was designed for long-term residential placement and respite care was not part of the Appellant's business model.

Conclusion & Reasons

108. For reasons given below the panel concludes that the appeal should be dismissed because the Appellant has failed to prove on the balance of probabilities that the application as now envisaged would comply with the relevant statute, regulations, and the national policy and guidance referred to above.

109. Standing in the shoes of the CQC, the Tribunal concludes on the basis of all of the evidence before it (for the reasons given below) that the application should not be granted.

110. We deal firstly with the issue as to whether the Appellant has established on the balance of probabilities that it has had regard to the views of the service users and has actively consulted with them on the changes so that the proposal is person centred and that service users' needs are not prejudiced.

111. This issue revolves around **Regulation 9**. This Regulation reads in full as follows:

Person-centred care

***9.**—(1) The care and treatment of service users must—*

(a) be appropriate,

(b) meet their needs, and

(c) reflect their preferences.

(2) But paragraph (1) does not apply to the extent that the provision of care or treatment would result in a breach of regulation 11.

(3) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include—

(a) carrying out, collaboratively with the relevant person, an assessment of the needs and preferences for care and treatment of the service user;

(b) designing care or treatment with a view to achieving service users' preferences and ensuring their needs are met;

(c) enabling and supporting relevant persons to understand the care or treatment choices available to the service user and to discuss, with a competent health care professional or other competent person, the balance of risks and benefits involved in any particular course of treatment;

(d) enabling and supporting relevant persons to make, or participate in making, decisions relating to the service user's care or treatment to the maximum extent possible;

(e) providing opportunities for relevant persons to manage the service user's care or treatment;
(f) involving relevant persons in decisions relating to the way in which the regulated activity is carried on in so far as it relates to the service user's care or treatment;
(g) providing relevant persons with the information they would reasonably need for the purposes of sub-paragraphs (c) to (f);
(h) making reasonable adjustments to enable the service user to receive their care or treatment;
(i) where meeting a service user's nutritional and hydration needs, having regard to the service user's well-being.

(4) Paragraphs (1) and (3) apply subject to paragraphs (5) and (6).

(5) If the service user is 16 or over and lacks capacity in relation to a matter to which this regulation applies, paragraphs (1) to (3) are subject to any duty on the registered person under the 2005 Act in relation to that matter.

(6) But if Part 4 or 4A of the 1983 Act applies to a service user, care and treatment must be provided in accordance with the provisions of that Act.

112. The panel interprets this regulation to require the Appellant before applying to vary the registration to increase the number of residents at the Orchard and before building the Bungalow to have involved the existing residents (and their family and advocates) in meaningful discussion about not only the identity of the new residents but whether there should be an increase in numbers at all.

113. We conclude that in order to meet the requirements of regulation 9 the Appellants must have not only have involved the existing residents (and their family and advocates) in meaningful discussion but to have provided the CQC and the Tribunal with adequate evidence that they have done so.

114. We conclude that there is inadequate evidence that the Appellant has in planning the expansion of the care home involved the existing residents (and their family and advocates) in meaningful discussion to reflect their preferences, meet their needs. There is also inadequate evidence that the Appellant has enabled and supported existing residents (and their family and advocates) to understand the care or treatment choices available to the service users.

115. After considering all of the evidence in the round, the panel accepts the evidence of Ms Suzanne Howard, CQC registration manager and her analysis of the relevant policy and guidance contained in in Transforming Care that NICE Clinical guidelines for autism recommend that if residential care is needed for adults with autism it should usually be provided in small, local community based units of no more than six people and with well supported single person accommodation. We also agree with her analysis of the guidance contained in Living in the Community. Housing Design for Adults with Autism which states that "people with autism can be particularly sensitive about the amount of personal space they occupy in group situations and may feel threatened if distances are insufficient." By reference to that guidance she opined that the Appellant had failed to evidence that they appreciated this risk and had planned to mitigate it.

116. The panel also accepts the evidence of Ms Jennifer Herbert, CQC specialist advisor in occupational therapy about the policy document "Good outcomes in community based services for people with learning disabilities and people with autism by Julie Beadle-Brown (JLH/04) which stated, "research has shown that people experience more choice and control when living in settings that are for 6 people or fewer and this increases the smaller the setting". The panel also accepts her evidence about the impact there may be of the Bungalow on the provision of care in the main house. She said, "there is potential this would impact on support within the main home and potentially put residents and staff at risk" and that "increasing the numbers at this particular service will have an impact and may possibly be detrimental to others already residing there."

117. In those circumstances we accept that increasing the numbers from 6 to 8 and building a Bungalow in the garden is very likely to have some sort of negative impact on the 6 existing residents which needs to be acknowledged by a service provider, identified and risk assessed. In addition by reference to regulation 9 this assessment must be undertaken along with meaningful consultation with existing residents.

118. In the opinion of the panel, the evidence from the Appellant's witnesses indicates that this risk of negative impact was not considered adequately or at all. Ms Jane Kennedy said that "it is submitted that the impact of this on the residents of the main house would be minimal" even though the occupant of the Bungalow might use the garden of the main house and when this happened other service users would not be able to use the garden. In addition the Bungalow had its own alarm system which if actuated would create flashing blue and red lights and give off a sound in the kitchen of the main house and staff from the main house would respond by running over to the Bungalow. The control panel with the sounder and flashing lights was an new addition to the kitchen in the main house as a result of the development of the Bungalow. In the opinion of the panel this would be bound to have a negative impact on residents over and above the mere increase in numbers.

119. Moreover Ms Sharron Webster said that in her opinion there would be no negative impact on existing service users of additional residents. She explained, "If we do what we are doing now, I don't think it will have any impact." This all shows a lack of understanding of the risks set out in the national policy and guidelines of increasing numbers from 6 in such a care home.

120. In addition, as well as the apparent failure to acknowledge the impact on existing residents, the panel concludes that there is a lack of evidence of an adequate assessment of the likely impact on existing residents and staff. Even if the Appellant had properly understood the risks, the panel agrees with the evidence of the CQC witnesses that there was a lack of evidence of meaningful consultations with the 6 existing service users in the main house as to the likely impact of their being 2 extra service users (and the new Bungalow) on site. There was also inadequate evidence of an impact assessment on residents and staff. Moreover, there was also inadequate evidence of any sort of plan to try and reduce or manage such impact.

121. The panel concludes that the minutes relied upon by the Appellant as supposed evidence of such discussions only took place after the Bungalow had been built and after the application had been made. Moreover the panel concludes that they do not establish that adequate information was provided so that any resident or relative could make an informed choice. We agree with the analysis of these minutes as outlined by the CQC witnesses that there was no meaningful discussion with existing residents or their advocates about the possible impact of increasing the number of service users.

122. In particular having considered all of the evidence the panel agrees with the analysis of Ms Suzanne Howard, CQC Registration Manager that the evidence relied upon by the Appellant indicated only minimal retrospective consultation for the purpose of merely validating a decision already made by the Appellant to increase numbers. We also agree that on the face of the minutes some service users were left with the impression that the proposed new service users would just be visiting rather than being new long term residents.

123. We also agree with her opinion that in particular "the option of nobody moves in was not explored." This conclusion was strengthened by the evidence from the Appellant's witness Ms Jane Kennedy who made it clear that the consultations with residents were about their preferences about the type of new residents rather than asking their opinions as to whether the numbers should be increased at all. She explained "we wouldn't include them in that because today they might say no whereas tomorrow they might say yes."

124. The panel also takes into account what Ms Jane Kennedy said about the consultation process in that "those who have been able to express a view have not raised any concerns about the prospect of additional service users moving in." She also said that she had discussed matters with residents but "its difficult to make them understand and make an informed decision. Some don't have capacity." She added that there was a limit to how much consultation there could be with service users because they lacked capacity and "don't choose to live there."

125. The panel note that in relation to service users who lack capacity Regulation 9(5) imposes a duty to act in accordance with the Mental Capacity Act 2005. This entails seeking the assistance of a service user's advocate and family to try and assess their best interests. There is inadequate evidence that this was done. In fact Ms. Jane Kennedy in oral evidence confirmed that none of the service users had independent advocates supporting them during the consultation process. Only staff were present with the residents.

126. The panel accepted the clear evidence of the CQC witnesses as to how meaningful discussions with service users who lack capacity can be undertaken. Ms Sarah Jordan gave examples of the various ways in which service users with very limited mental capacity or cognitive abilities could be consulted and their opinions taken into account. Also Ms Suzanne Howard gave examples from her experience of what other providers had done to ensure meaningful consultation with service users and their families and advocates.

127. The panel notes that Regulation 9 does not state that a specific impact assessment document was required. Mr. Butler is correct to state that There is no requirement in the regulations or guidance for an "impact assessment report". However, the panel are satisfied that what the regulation and guidance obviously does require is evidence that the impact of the proposal has been recognised and an assessment of the impact of the proposal has been conducted in a meaningful way. What is also required is evidence that plans had been put in place to mitigate and manage such risk.

128. For reasons given above the panel concludes that adequate evidence of these matters has not been provided and that the proposals breach Regulation 9.

129. The panel now deals with the issues relating to whether the Bungalow is suitable for a service user of the type catered for by the Appellant, i.e. individuals who have a learning disability with additional complex needs including autism, challenging behaviour, epilepsy and communication difficulties. The service user SB was put forward by Mr. Butler as an example of the type of service user for whom the Bungalow was designed and whom the Appellant's envisage accommodating.

130. This involves a consideration of **Regulation 15**. This reads as follows:

Premises and equipment

***15.**—(1) All premises and equipment used by the service provider must be—*

(a) clean,

(b) secure,

(c) suitable for the purpose for which they are being used,

(d) properly used

(e) properly maintained, and

(f) appropriately located for the purpose for which they are being used.

(2) The registered person must, in relation to such premises and equipment, maintain standards of hygiene appropriate for the purposes for which they are being used.

(3) For the purposes of paragraph (1)(b), (c), (e) and (f), "equipment" does not include equipment at the service user's accommodation if—

(a) such accommodation is not provided as part of the service user's care or treatment, and

(b) such equipment is not supplied by the service provider.

131. In the judgement of the panel (for reasons given below) the Appellant has failed to prove on the balance of probabilities that the Bungalow is suitable for the needs of someone like SB or that it is appropriately located for the purpose for which it is planned to be used.

132. The type of service user catered for by the Appellant, is an individual who has a learning disability with additional complex needs including autism, challenging behaviour, epilepsy and communication difficulties. According to the Independent Social Worker report dated 03/11/17, by Nicholas Robinson, SB's mobility was deteriorating and would continue to do so. The report also concluded that until a long term placement that would be a final move is

identified, his best interests are to stay at Advent House. This analysis is in accordance with the national policy and guidance set out above which indicates that a person like SB should only be moved once and that his next move should be his last. The national policy and guidance set out above indicates that any move should be on the basis of "do it once and do it right." The NICE Guidance recommends designing and delivering services which maximise people's choice and control, promotes person centred care and takes "a whole life" approach.

133. In the light of the policy and guidance, the panel interprets Regulation 15 to require premises and equipment to be suitable not only for a service user's present needs but for all reasonably foreseeable needs. In light of Nicholas Robinson's report (which was submitted and relied upon by the Appellant), SB's present and reasonably foreseeable needs (and those of a service user like him) include provision now for the foreseeable deterioration in his condition generally and his mobility in particular. Nicholas Robinson stated that SB's mobility was deteriorating and would continue to do so. The panel disagrees with Mr. Butler's submissions that "whether it [the Bungalow] remains suitable in the future is irrelevant". The panel takes the view that "current need" includes reasonably foreseeable future need.

134. Moreover the panel notes the evidence of Ms Sharron Webster that "it's always been a possibility that SB's mobility will decrease with his condition" but does not agree that it is in accordance with Regulation 15 for a service provider to take the view as expressed by her that "If there is a need for bigger equipment we might need to have a talk about that".

135. For reasons given below the panel concludes that it has not been established on the balance of probabilities that the Bungalow would meet the current and foreseeable future needs of someone like SB of the type envisaged by the Appellant.

136. In coming to this conclusion, the panel was impressed by the evidence of Ms Jennifer Herbert, CQC specialist advisor in occupational therapy. She had been instructed by the CQC to provide an independent assessment of the suitability of the Bungalow which she visited and inspected on 29/03/19 and again on the first day of the hearing. The panel gives substantial weight to what we consider to be her expert opinion (based on relevant policy and guidance) that;

    a. By reference to the guidance "Living in the Community. Housing Design for Adults with Autism" (JLH/01) if the room that is now the calm room was made into a kitchen it would possibly not have sufficient space for the type of service user she was assessing.

    b. By reference to the guidance in "Creating Autism Friendly Spaces" (JLH/03) the Bungalow would be too small and crowded for the type of service user she was assessing. She opined, "the space in the [Bungalow] is potentially going to fall short for people who have proxemic issues and wheelchair users."

c. By reference to the guidance "Planning Your House by the Challenging Behaviour Foundation" (JLH/02) the Bungalow was too small for the type of service user she was assessing.

d. She also said that "the inside space is limited and may not adequately meet the changing physical needs of an individual as outlined."

137. The panel gives substantial weight to the document JLH/02 which is relevant policy and guidance and which states that "A self-contained flat will usually be about 40 square meters and 50-55 square meters if built to wheelchair standards". The evidence from the Appellant indicated that the Bungalow was only between 38.9 and 39.27 square meters. The panel concludes that by reference to that benchmark the Bungalow is too small now for someone who is able bodied. It would be much too small for anyone with mobility issues.

138. In light of all the evidence the panel gives substantial weight to the opinion of this witness with her special insight into the national policy and guidance outlined above (and her experience as an Occupational Therapist) as well as her having seen the proposed Bungalow annexe in the grounds of the care home.

139. Moreover the panel has also given weight to the evidence of the other CQC witnesses who all concluded that the Bungalow was not fit for the purpose for which registration was proposed. In particular the panel accepts the evidence of Ms Sarah Jordan who inspected the site in detail and concluded that the lack of laundry facilities and a kitchen was not an appropriate response to SB's particular needs and in any event, future service users in general would need a kitchen and laundry facilities and there was not enough space for those to be provided. In addition the panel accepts that there would be practical difficulties in transporting food from the main house to the Bungalow with no on site kitchen, and that there is a lack of space for a service user with complex needs and the likely staff required for their support. Also the panel accepts the validity of her opinion that the accommodation was too small to deal with concerns about a service user's deteriorating health in the future.

140. In addition, the panel has also taken into account the evidence of our own observations during the site visit. Our unanimous view was that despite the obvious good will and efforts of the Appellant's employees at the Orchard, nonetheless it was obvious that the Bungalow was simply too small for its intended purpose. In particular by reference to the policy and guidance set out above, in our judgement the proposed accommodation in the Bungalow was not suitable to accommodate a service user with autism and learning disabilities and complex needs such as behaviours which challenge and a deteriorating health condition. In addition we came to the conclusion that the Bungalow was too small to accommodate the required staff and visits from family members.

141. The attempts to come up with solutions to the obvious problems with the Bungalow, such as proposals that the food and laundry could be transported to and from the main house and that the resident of the Bungalow could use the garden thus denying the other residents access to it at such times, merely highlights the many problems of the proposed Bungalow annexe. The panel

concludes that these problems simply cannot be solved and the risks they pose successfully managed simply by the staff carrying on as they have done in the past or simply trying harder.

142. In coming to these conclusions the panel has of course taken into account the evidence of the Appellant's witnesses. However we conclude that their opinion that the size of the Bungalow is adequate is unrealistic wishful thinking and fails to take into account the relevant guidance outlined above that the number of moves that a service user undergoes should be as few as possible and that a placement should be in a homely environment and as far as possible for life. Moreover the panel concludes that Ms Sharron Webster was simply unrealistic when she said in oral evidence that she could envisage no circumstances in which SB would deteriorate so much that he would ever have to move out of the Bungalow.

143. Moreover, the panel recognises that under the guidance set out above, such accommodation should be as like a normal home as possible. The panel concludes after seeing it that Bungalow is not like a normal home. It is not homely and is in the garden of a care home. In the judgement of the panel it breaches the policy behind the guidance contained in TC

144. The panel has also considered the report by Stephanie Porter dated 05/11/18 (JAK11) but for the reasons given below give it little weight. The author was the director of Estates & Capital Programmes and visited the Bungalow on 30/09/18, but it is unclear what if any relevant qualifications she has and it was unclear whether she took into account any of the guidance referred to above. Moreover, her report was only about SB and failed to consider the needs of a generic service user. In addition she did not make a witness statement in the proceedings before the Tribunal and was not called to give oral evidence and answer questions.

145. For the reasons given above therefore in the judgement of the panel, the design, size and location (in the garden of a care home) of the Bungalow means that the proposal is in breach of Regulation 15 as not providing suitable and suitably located care.

146. It was obvious to the panel that everyone involved in this case on both sides of the litigation were acting in good faith in what they considered to be in the best interests of vulnerable service users. However, in light of the evidence before us we are driven to the conclusion that the proposal is inappropriate by reference to the statute, as well as the national guidance and policy. We conclude that the proposed increase in numbers and the extent to which it departs from national policy and guidance creates unacceptable and serious risks to service users in the provision of care.

147. We acknowledge that (according to the last CQC report) the Appellant does provide good care at the Orchard. However this is on the basis when the number of service users is limited to 6. But put simply there is an unacceptable risk that the Appellant would fail to provide adequate care in the future if registration was granted as per the proposals. This is because of the nature of the proposed

extension to the numbers of service users, the nature of the Bungalow annex, the lack of evidenced risk assessment around the impact on the existing service users and staff of the proposal and the extent to which it departs from the aforesaid policy and guidance.

148. In light of all the evidence (including our findings that the proposed service would not meet the national policy and guidance) we conclude that the proposed care home would not meet the standards required under Regulations 9 & 15 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 in that the care provided would not be adequately person-centred and that the premises would not be suitable and or suitably located.

149. We have no doubt that the Appellant acted in good faith in making this application and would do its best to make it work. But it would be wrong for this Tribunal to allow this appeal (and effectively allow the registration) on the basis that the proposal would provide a short term sub optimal service that does not meet the standards set out in the policy and guidance.

150. The panel considered the evidence from the Appellant that the CQC has rated care homes operated by the Appellant elsewhere as 'Good' or 'Outstanding' even though they accommodate more than 6 people. However, the panel found this evidence of limited assistance as those decisions were obviously all fact specific. For reasons given above we have come to a different conclusion on the basis of the different evidence concerning the different proposals we were considering.

151. The panel also considered the Court of Protection materials but found these of limited assistance. The Order of the Court itself about SB's best interests is entirely predicated on the Bungalow being suitable for registration (which for reasons given above we conclude that it is not) and does not deal with the requirements of generic service users. In addition the letter from the Vale of York CCG also only deals with SB's specific needs and does not deal with the requirements of generic service users. Moreover the author of the letter was not called to give evidence and answer questions.

152. The panel has also taken into account the email correspondence between the CQC and the Appellant's solicitors between 20 June 2019 and 02 July 2019 in which the CQC stated that they would be willing to vary the condition and increase the number of service users from 6 to 8 if the Appellant would agree to provide a satisfactory impact assessment as required by Regulation 9 and only use the Bungalow for short term respite care. However the panel gives this evidence little weight. This is because the hearing before us is de novo and in any event the offer was comprehensively rejected by the Appellant's solicitors. Moreover, the proposal before us which is the subject matter of the appeal is not for the registration of respite care and the Appellant's solicitors refused to provide the necessary risk assessment.

Compelling Circumstances

153. The panel is not satisfied that there is adequate evidence to establish compelling or exceptional circumstances that require the CQC and/or the

Tribunal to depart from the Regulations and national policy and guidance set out above.

154. Ms Jane Kennedy, the Appellant's Operations Director gave some anecdotal evidence about local need in general and in particular that "SB has an immediate and local need for the Bungalow" and that the Vale of York Clinical Commissioning Group (CCG) had concluded that his needs could not be met at the Appellant's other site, Advent House. They had tried to find alternative accommodation but had found none therefore the Appellant had looked to develop the Bungalow.

155. However no one from the CCG came to give evidence before the panel to explain exactly what efforts they had made to find alternative accommodation for SB or how many service users like SB had a pressing need for accommodation in the Bungalow. The panel concludes that there is simply inadequate evidence of there being a pressing local need for the particular type of service provided for in the proposals which are the subject matter of this appeal, i.e. a care home larger than that recommended by the national policy and guidance and having a Bungalow annex that can only provide sub-optimal care to the cohort of service users that are cared for by the Appellant.

156. In particular, the panel was provided with inadequate evidence as to why there was a pressing need for the specific provision proposed in the Appellant's application and there was no adequate evidence of the lack availability of alternative provision that was more in keeping with the national policy and guidance.

157. There is therefore inadequate evidence to establish that the local need cannot be met by the provision of supported living or small scale care homes as envisaged in the national policy or guidance.

158. Even the evidence specifically concerning SB does not provide compelling reasons why it would be appropriate to transfer him from one sub-optimal setting to another one in circumstances where such a move would negatively impact on the care of other existing service users. As outlined in Nicholas Robinson's report, until a long term placement that would be a final move for SB is identified, his best interests are to stay at Advent House. For reasons given above the panel concludes that the Bungalow would not provide the "final move" that is in his best interests.

Conditions

159. After considering the matter fully the panel is satisfied that there are no practical conditions which could be imposed upon the registration so as to make it appropriate to allow the appeal or grant the application.

160. Mr. Butler in his closing submissions argued that the panel should "honour" the undertakings made by the CQC in the email exchange referred to above. He argued that we should allow the appeal but with conditions which mirror those offers.

161. However, we take the view that we should only impose conditions which would meet the concerns set out above and which are proportionate, reasonable, open to scrutiny and achievable.

162. In relation to the proposed condition that the Bungalow is only used for short term respite care, the panel take into account that the Appellant said in the email exchange that it does not provide such a service.

163. Moreover, a condition that the Appellant produce an impact assessment does not deal with the concerns the panel has that (as is made clear in the email exchange itself) the Appellant refused to provide adequate evidence in any reasonable format of such impact. In particular the Appellant failed to provide adequate evidence of consultations with existing residents as to their person centred requirements in the context of a proposed potentially radical change to their service provision.

164. In the opinion of the panel the Appellant's failure to provide this requested evidence and their failure to recognise why they should have done so in the first place, evidences a worrying lack of insight into their responsibilities to existing residents which (for the reasons given above) drive the panel to conclude that the proposal should not be registered and the appeal should not be allowed.

Conclusion

165. Having balanced the impact of the decision upon the Appellant and existing and potential service users against the impact upon the public interest in the promotion of the health, safety and welfare of people who use health and social care services, including the CQC's ability to fulfil its registration function and role in the national agenda to transform care, we find that the decision was (and remains) lawful, fair, reasonable and proportionate.

Decision

The appeal is dismissed.

The decision to refuse to vary registration is confirmed.

Tribunal Judge Timothy Thorne
First-tier Tribunal (Health Education and Social Care)

Date Issued: 27 August 2019