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## Appeal Decisions

Site visit made on 6 October 2020

**by S Hanson BA (Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 30 November 2020**

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### **Appeal A Ref: APP/X0360/C/20/3247007**

#### **Edgefield, Western Avenue, Woodley, Reading RG5 3BH**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Pankaj Popat against an enforcement notice issued by Wokingham Borough Council.
- The enforcement notice was issued on 21 January 2020.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of land and buildings from dwelling house and associated residential land and buildings, including an enclosed swimming pool, to a mixed use of dwelling house and associated residential land and buildings, including an enclosed swimming pool for a use for the provision of swimming classes.
- The requirements of the notice are: 1. Cease the use of the residential swimming pool for the provision of swimming classes. 2. Cease the use of the swimming pool for the purposes other than for a use incidental to the enjoyment of the dwelling house as such.
- The period for compliance with the requirements is 2 (two) months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

**Summary of decision: appeal allowed, notice quashed and planning permission granted subject to conditions.**

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### **Appeal B Ref: APP/X0360/W/20/3247237**

#### **Edgefield, Western Avenue, Woodley, Reading RG5 3BH**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Blue Dips Limited against the decision of Wokingham Borough Council.
- The application Ref 192825, dated 22 October 2019, was refused by notice dated 29 November 2019.
- The development proposed is Use of existing C3 residential swimming pool for baby and toddler classes and residential use (Sui Generis).

**Summary of decision: appeal allowed, and planning permission granted subject to conditions.**

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### **Preliminary Matters**

1. The applicant as noted on the planning application form is Blue Dips Limited and on the planning appeal form as Mr Pankaj Popat. The appellant has confirmed that Blue Dips Limited is a company registered in Mr Pankaj Popat's name.

### **Matters concerning the enforcement notice**

2. The notice alleges that the swimming pool has been used for the provision of swimming classes. That in itself is not a breach of planning. As it appears to me, the material change of use (MCU) is the use of the swimming pool for classes for paying members of the public. Wide powers to correct a notice are available to me under section 176(1) of the Act. However, they only apply if I am satisfied that the correction will not cause injustice to the appellant or the Council. The appellant's statement, under his ground (c) appeal, suggests a re-wording of the allegation. In this case, I am satisfied the correction will aid to clarify the notice and will not cause injustice to either party.
3. The plan which accompanies the notice is of poor quality and the appellant considers that it is not clear on the face of the notice which building is being targeted. Nevertheless, the notice makes clear that it attacks land at Edgefield, Western Avenue, Woodley, Reading RG5 3BH which is outlined in red on the plan. The appellant has clearly received a copy of the notice and made an appeal. I am therefore satisfied that the notice leaves no doubt as to the land subject of the alleged breach of planning control.

### **Application for costs**

4. An application for costs was made by Mr Pankaj Popat against Wokingham Borough Council and by Wokingham Borough Council against Mr Pankaj Popat. These applications will be the subject of a separate Decision.

### **Appeal A – grounds (b) and (c)**

5. In pursuing the appeal on ground (b), the onus firmly rests with the appellant to show, on the balance of probabilities, the matters stated in the notice have not in fact occurred. Likewise, for the appeal on ground (c) to succeed, the onus is on the appellant to demonstrate, on the balance of probabilities, that the matters which give rise to the alleged breach of planning control do not constitute a breach of planning control.
6. It is argued that the scope of the land identified by the notice exceeds the planning unit. The appellant provides that it is solely the pool building, which is in a separate mixed use, being used for swimming classes for paying members of the public and by the occupants of the residential dwelling.
7. In this case the appellant does not dispute there has been a breach of planning control with the provision of the swimming classes for paying members of the public. What is disputed is that the use of the pool for swimming classes for the benefit of the occupiers of the main dwellinghouse is not a material change of use of the pool building and that the house is not used for purposes connected with the commercial activity. The appellant in his statement suggests that the notice is imprecise and that it should redefine the allegation and be more specific to reflect this position.
8. The Council recognises that there are two distinct uses taking place within the property but says there is not sufficient physical or functional separation between the two uses taking place to enable a smaller planning unit to be identified. As such, the Council identified one planning unit with two uses. Established case law<sup>1</sup> recognises the concept of a mixed use as one of two or

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<sup>1</sup> Burdle and Williams v SSE and New Forest DC [1972]

more primary uses existing within the same planning unit or unit of occupation. One is not ancillary to the other, although there may be ancillary uses associated with each primary use.

9. It is acknowledged that there is no legal obligation for the requirements of the notice to cover the entirety of the relevant planning unit. However, Regulation 4 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 requires that the notice specifies the precise boundaries of the land to which the notice relates.
10. From the evidence before me, I concur with the Council that there is no physical or functional separation of the buildings to indicate two distinctly separate uses of the appeal site. The swimming pool building is concomitant with the dwellinghouse, situated within the rear garden with one common entrance. Furthermore, the use of the site for swimming classes for paying members of the public is not limited to the pool building. The drive to the front of the house is used for parking and customers access the pool building via the side of the house and through the rear garden, both of which form part of the residential use of the dwellinghouse.
11. With regard to whether the matters give rise to a breach of planning control, s55(1) of the 1990 Act defines the meaning of development, which includes "the making of any material change in the use of any buildings or other land". Therefore, if there would be a material change in the use of the appeal property, then express planning permission is required.
12. In order to assess the materiality of any change of use, it is necessary to be clear that what is to be compared, in deciding whether there has been a material change of use, is the present use and the previous use. The issue is whether the extent and nature of the change amounts to a change in the *character* of the previous use of the site. Additionally, it is necessary to consider both what happens on the land and its impact off the land when deciding whether the character of the use has changed. Thus, off-site effects are a material factor.
13. For a proportion of the weekday, during term time, the site takes on commercial activities over and above those that would be akin to the residential use of the property. The use generates extra vehicle and pedestrian movement both within and away from the property. The increase in the scale of the use and the way the property is used, give rise to such materially different planning circumstances at the site. This, as a matter of fact and degree, results in a change in the definable character of the use that amounts to a material change of use of the planning unit.
14. Based on the circumstances in this case and on the balance of probabilities, the use of the site for swimming classes for paying members of the public is not *de minimis* but represents a material change to how the property is used and gives rise to additional pedestrian and vehicular patterns of movement in and around the appeal site.
15. Consequently, I find, on the balance of probabilities, that a material change of use of the land from a single residential dwelling to a mixed use for residential and private swimming classes for paying members of the public has occurred.

16. Overall, I conclude that the matters stated in the notice which give rise to the alleged breach of planning control have occurred and did, at the time the notice was issued, constitute a breach of planning control.
17. The appeals on ground (b) and ground (c) thus fail.

## **Appeal A - ground (a) and deemed planning application, and Appeal B**

### **Main Issues**

18. These are i. the effect of the development on the living conditions of occupiers of neighbouring properties regarding additional noise and activity and ii. the impact on highway safety due to on-street parking.

### **Reasons**

#### *Living conditions*

19. The appeal site lies on the eastern side of Western Avenue. The large two-storey detached house is set back from the residential road with a generous area to the front for parking and turning. To the rear of the house is a long mature garden lined with high hedges. A detached building is sited at the end of the garden. This building houses a swimming pool with changing facilities, a separate room, an area for gym equipment and a plant room.
20. Since April 2017, the swimming pool building has been used on a commercial basis offering swimming classes for babies and toddlers. It is proposed to continue this use with up to 8 classes per day accommodating a maximum of 6 babies/toddlers per session. It is acknowledged that not all classes would be fully attended and at times some classes may not take place at all.
21. Undoubtedly, the swimming classes would generate an increase in traffic and associated noise and disturbance within this residential area. The additional activity created by the use of the residential swimming pool by parents/guardians bringing their children to use the facility is likely to be additional to what would normally be the case if the property were occupied as a single household. Noise would generate from additional car movements, the closing of car doors, and chatter as people move between the front of the property to the rear of the site. However, this noise is likely to be intermittent as classes begin and end.
22. It is proposed that use of the building for these swimming classes would not be permitted outside the hours of 10.00am to 2.00pm when surrounding residents might be more sensitive to any noise from additional comings and goings. Whilst some limited additional noise is likely to result from comings and goings, the evidence does not lead me to consider that it would be particularly perceptible or disturbing to the extent that the use of the pool would have a detrimental effect upon the living conditions of the occupiers of nearby properties. Furthermore, the building appears well-insulated and noise from inside the building would be contained and unlikely to be audible outside.
23. Consequently, I do not consider that the use of the facility on this level would have an unduly harmful effect on the living conditions of neighbouring residents with particular regard to noise and activity. To that extent the

development accords with the amenity aims of Policy CC06 of the Wokingham Borough Development Plan Adopted Managing Development Delivery Local Plan February 2014 (MDD Local Plan) and Policy CP3 of the Wokingham Borough Core Strategy Development Plan Document January 2010 (the Core Strategy) regarding noise upon the quality of living standards.

### *Highway Safety*

24. Western Avenue is a two-way single carriageway road and subject to a 30 miles per hour speed limit. From what I saw at the time of my visit, traffic was light with speeds reflective of the restriction. There are generally no car parking restrictions on Western Avenue, or the nearby residential streets, which means that vehicles can park unrestrained on the carriageway. Generally, residential properties within the area have generous frontages which provide householders with room to park off the road. The area to the front of the appeal site is hard surfaced with two access point to the highway and sufficient space to park and manoeuvre 4 vehicles.
25. The Council consider the mixed use of the site would result in a parking demand not sufficiently met by on-site parking provision. This would result in larger than average numbers of cars parking on Western Avenue and Ryecroft Close, some of which have been noted as parking partially on the footpath. Both the Council and some interested parties declare that on-street parking impedes the safe passage of vehicles, including buses along this route, cyclists and pedestrians. However, this statement is not quantified nor substantiated with any objective evidence except for some photographs which show a small number of vehicles parked along the road.
26. It is acknowledged that the use of the swimming pool for classes for visiting members of the public would generate extra vehicle movements in the area and cars parking within the vicinity of the appeal site. If the swimming classes were running at full capacity, this could equate to at least 6 vehicles parking at and near the site between just before 10.00am to just after 2.00pm. When lessons change over each half hour, there could be at least 12 cars for a limited period. This is in addition to the member of staff.
27. During my site visit, there did not appear to be a level of on-street parking which could indicate a high degree of evidence of a clear parking problem. I acknowledge that this was just a moment in time on a weekday when the swimming classes were not in operation due to the pandemic and that on-road parking may be more apparent at other times. Nevertheless, as detailed above, the surrounding roads have no parking restrictions in place and houses in the locality provide parking within their curtilages. This leads me to believe there is capacity for on-street parking in the vicinity of the appeal site which would not compromise highway safety.
28. Furthermore, I have not been presented with any substantive evidence from the parties, local residents or the Police, that there is a material shortage of parking that is resulting in high levels of parking stress due to excessive on-street parking or inconsiderate parking that is causing highway safety issues. Additionally, it has not been demonstrated that the proposal would result in an increase in the likelihood of highway danger or considerable inconvenience due to cars parking along on the roadside. Furthermore, I have not been directed to, or provided with, any parking standards that apply to the use or a similar

use to gauge the required provision for off-street parking and hence any shortfall.

29. For these reasons, and in the absence of clear evidence to the contrary, I do not consider that the proposal would have a harmful or unacceptable impact on highway safety in this location. The site is located on a bus route and is within safe and reasonable walking and cycling distances of residential areas, providing a choice of transport. In this respect, the development complies with the aims of Policy CP6 of the Core Strategy regarding managing travel demand and avoid causing highway and congestion problems.

### *Conditions*

30. A condition is suggested requiring compliance with the submitted plans. However, such a condition is not necessary as the development has already been carried out.
31. Conditions requiring the details of the parking spaces and bicycle storage are necessary in planning terms. It is also necessary to provide access for less able bodied people to enable all-inclusive use of the facility. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively-worded condition to secure the approval and implementation of the outstanding matters before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met.
32. I have found that the use of the swimming pool would not be detrimental to living conditions or highway safety and therefore consider that the Council's suggestion of a temporary permission to assess the effect of the use upon 'the amenity of surrounding residential properties' is unnecessary.
33. I nevertheless agree that a condition requiring no swimming classes to take place outside of the times and days listed and to contain no more than six pupils and one instructor is necessary to protect the living conditions of neighbouring residents. In addition, I am satisfied that the Council's suggested inclusion of requirements for lessons to be not less than 30 minutes is necessary to limit the turnover in people at the beginning and ending of lessons.

### **Conclusion**

34. For the reasons given above, I conclude that Appeal A succeeds on ground (a) and planning permission will be granted. The appeal on grounds (f) and (g) do not therefore need to be considered.

### **Formal Decisions**

#### **Appeal A**

35. It is directed that, for clarity, the enforcement notice be corrected by deleting the allegation under section 3 'The Breach of Planning Control' and substituting it with *'without planning permission, the material change of use of the land and buildings from residential to a mixed use comprising residential use and the provision of commercial swimming classes for members of the public'*.
36. And it is directed that the requirements be varied by substituting section 5 'what you are required to do', with *'Cease the use of the residential swimming*



*pool for the provision of commercial swimming classes for members of the public'.*

37. Subject to this correction and variation the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of the land and buildings at Edgefield, Western Avenue, Woodley, Reading RG5 3BH, as shown on the plan attached to the notice, for a mixed use comprising residential use and the provision of commercial swimming classes for members of the public, subject to the conditions in Schedule 1.

## **Appeal B**

38. The appeal is allowed and planning permission is granted for the development already carried out, namely the use of the land and buildings at Edgefield, Western Avenue, Woodley, Reading RG5 3BH, as shown on the plan attached to the notice, for a mixed use comprising residential use and the provision of commercial swimming classes for members of the public, subject to the conditions in Schedule 1.

### **Schedule 1 - Conditions**

- 1) The use hereby permitted shall cease within two months of the date of failure to meet any one of the requirements set out in i) to v) below:
  - i) Within one month of the date of this decision, a scheme for the provision of off-street parking spaces to be provided for the commercial use hereby permitted shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
  - ii) Within one month of the date of this permission, a scheme for the secure and covered bicycle storage for those partaking in commercial swimming classes shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
  - iii) Within one month of the date of this permission, a scheme for provision for disabled persons to gain access to the swimming pool shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
  - iv) If within 6 months of the date of this decision the local planning authority refuse to approve these schemes or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
  - v) If an appeal is made in pursuance of iv) above, that appeal shall have been finally determined and the submitted schemes shall have been approved by the Secretary of State.

- vi) The approved schemes shall have been carried out and completed in accordance with the approved timetable. Upon implementation of the approved schemes specified in this condition, those schemes shall thereafter remain in use.
- 2) The use hereby permitted shall only be available for customers between the hours of 1000 and 1400 Monday to Friday and not at all on weekends, Bank or National Holidays or during any school holidays. The use hereby permitted is subject to a maximum of one staff member at any one time, six children in any one class and eight x 30 minutes classes in any one day.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in the conditions, the operation of the time limits specified in the conditions will be suspended until that legal challenge has been finally determined.

*S Hanson*

INSPECTOR