
Appeal Decision

Site visit made on 22 March 2016

by Jane Miles BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 5th May 2016

Appeal Ref: APP/P1560/W/15/3140604
15 The Chase, Holland on Sea, Essex CO15 5PU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permissions under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which previous planning permissions were granted.
 - The appeal is made by The Chase Nursery against the decision of Tendring District Council.
 - The application ref: 15/00867/FUL, dated 29 May 2015, was refused by notice dated 27 August 2015.
 - The application relates to:
 - (1) Condition 3 of planning permission (A) ref: 13/01206/FUL dated 15 January 2014 for development described as **"Increase the number of children for full day care from 30 to 35. Extend opening hours from 9am-3.30pm to 8.30am-6.00pm. Extend from 44 weeks of opening to 45 weeks"**;
 - (2) Condition 2 of planning permission (B) ref: 14/00339/FUL dated 29 May 2014, for development described as **"Change of use of upstairs from residential to ancillary nursery accommodation and After School Club room"**.
 - The two conditions in dispute are identical, and each states: **"The maximum number of children hereby permitted to attend the day nursery shall not exceed 35 children on any day"**.
 - The reason given for the condition, in each case, is: **"To minimise noise nuisance and disturbance to adjoining and nearby properties in this residential area from comings and goings, and activities within the property and rear garden"**.
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Decision

1. The appeal is allowed and planning permissions are granted as follows.
 2. (A): **Planning permission is granted for "Increase the number of children for full day care from 30 to 35. Extend opening hours from 9am-3.30pm to 8.30am-6.00pm. Extend from 44 weeks of opening to 45 weeks" at 15 The Chase, Holland on Sea, Essex CO15 5PU, in accordance with the application ref: 15/00867/FUL dated 29 May 2015, without compliance with the conditions previously imposed on planning permission ref: 13/01206/FUL dated 15 January 2014, but subject to the following conditions:**
 - 1) The day nursery use hereby permitted shall not operate other than in accordance with plan drawing number 01 (submitted with application ref: 13/01206/FUL).
 - 2) The maximum number of children attending the premises known as The Chase Nursery (in the ground floor nursery and, by virtue of a separate
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- planning permission, in the upstairs After School Club) shall not exceed 35 children in total at any one time.
- 3) The day nursery use hereby permitted shall operate only between the hours of 08.30 and 18.00 on Mondays to Fridays: it shall not operate at weekends or any other times.
 - 4) The day nursery use hereby permitted shall operate for only 45 weeks of the year, with closures of one week at Easter, four weeks in the local school summer holidays and two weeks over the Christmas holiday period.
3. (B): Planning permission is granted for **“Change of use of upstairs from residential to ancillary nursery accommodation and After School Club room”** at 15 The Chase, Holland on Sea, Essex CO15 5PU, in accordance with the application ref: 15/00867/FUL dated 29 May 2015, without compliance with the conditions previously imposed on planning permission ref: 14/00339/FUL dated 29 May 2014 but subject to the following conditions:
- 1) The uses hereby permitted shall not operate other than in accordance with the proposed floor plan received by the local planning authority on 28 April 2014 (pursuant to application ref: 14/00339/FUL).
 - 2) The maximum number of children attending the premises known as The Chase Nursery (in the upstairs After School Club and, by virtue of a separate planning permission, in the ground floor nursery) shall not exceed 35 children in total at any one time.
 - 3) The uses hereby permitted shall operate only between the hours of 08.30 and 18.00 on Mondays to Fridays: they shall not operate at weekends or any other times.
 - 4) The uses hereby permitted shall operate for only 45 weeks of the year, with closures of one week at Easter, four weeks in the local school summer holidays and two weeks over the Christmas holiday period.

Background & Preliminary Matters

4. The ground floor of the detached building at No. 15 The Chase has been used **as a children’s nursery for many years, with the** previous owner living on the first floor. A Certificate of Lawfulness for the longstanding nursery use, for up to 30 children, was granted by the Council in 2012. Use of the property as a **children’s nursery by the current owners began in 2013**. This appeal application relates to two separate planning permissions for the premises (identified as permissions A and B in the banner heading to this decision). By virtue of other conditions, which link each permission to a specific plan, permission A relates to the ground floor of the premises and permission B **relates to the ‘upstairs’ or first floor**. The condition in dispute is the same in both permissions, as are the issues arising: I therefore refer to **‘the condition’** in the singular in the reasoning which follows.
5. The *National Planning Policy Framework* and *Planning Practice Guidance* (PPG) provide guidance on the use of planning conditions. The appellant maintains the condition in dispute does not meet the various tests in that guidance and should either be deleted in its entirety from both permissions or, alternatively, it should be re-worded. In the appeal application before me the suggested alternative is **up to 35 children ‘at any one time’ rather than ‘on any one day’**.

I note also that a second alternative, specifying 35 children in the day nursery and 10 in the After School Club in any one day, was put forward in a subsequent application (ref: 15/01885/FUL) which was refused by the Council in February 2016 after this appeal was made.

6. In this appeal the most relevant development plan policies are saved policies of the Tendring District Local Plan 2007 (LP) which are broadly consistent with the more recent **Framework**. The Council also cites draft policies of the emerging LP¹ (eLP) but this plan is at a stage where it can be given little weight (not least because a further version of it is being prepared with publication for consultation now envisaged during 2016). Thus although I have borne in mind the cited eLP policies insofar as they reflect the LP policies and the **Framework**, I have not explicitly referred to them.

Reasons

7. The nursery offers part or full time care with flexible start and finish times: pre-school children may attend for a morning or afternoon session of varying lengths or a full day, and school children attend an After School Club. The Council maintains that a variation **to 35 children 'at any one time'** would result in a significant increase in numbers attending the nursery. It suggests that different sets of 35 children could attend the morning, afternoon and after school sessions, potentially resulting in up to 105 children attending on any one day with associated increases in comings and goings by pedestrians and vehicles. The Highway Authority also raises concerns about the safety aspects of the likely levels of activity on the highway resulting from such increases.
8. Having regard to all of the above there are **two main issues** in this case. The first is whether, in principle, the condition in dispute accords with the tests for planning conditions: conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. The second issue is the effects of varying the condition on living conditions at neighbouring properties and on highway and pedestrian safety.

The tests for planning conditions

9. The appellant suggests it is not necessary to restrict the number of children by condition at all, in part because doing so duplicates other legislation relating to **children's day nurseries which is policed by Ofsted**. However no specific legislation is cited and, whilst the 2014 Ofsted report for The Chase nursery records that **it is a '35 place' nursery**, there is no detailed explanation of how that number is derived. In any event it seems more likely than not that any such legislation will be concerned primarily with the welfare and safety of the children, rather than with the amenity of neighbouring occupiers and/or highway safety per se. Given that residential amenity and highway safety are well-established material planning considerations, conditions seeking to protect the former and ensure the latter may satisfy the test of necessity if justified in the particular circumstances of the case in question.
10. In my experience, but depending on the particular site context, comings and **goings associated with children's nurseries can result in harmful noise and disturbance for neighbouring occupiers and/or highway safety problems**, and

¹ Currently the 2012 Tendring District Local Plan: Proposed Submission Draft as amended by the 2014 Tendring District Local Plan: Pre-Submission Focussed Changes

outdoor play may also affect residential amenity. The potential for adverse impacts is likely to increase as numbers increase. From the reason given for the disputed condition in this case, the officers' reports to Planning Committee and the Council's appeal statement it is evident that concerns about these matters underlie the rationale for the condition.

11. The particular site context in this case comprises a detached property in close proximity to other dwellings in quiet residential streets. No. 15 sits at a bend in the road and has insufficient on-site space for vehicles to go in and out at drop-off and collection times. Thus short-term parking outside neighbouring properties will sometimes occur. The main pedestrian entry point into the nursery area is down the side of the building, under a covered area alongside another dwelling (no. 11). Thus too many people arriving or leaving at once could potentially result in congestion and danger on the highway and/or excessive levels of noise and disturbance, primarily for occupiers of no. 11. Moreover all of the sizeable rear garden area is laid out and set up for use by the children. Thus prolonged use of this area by high numbers of children could potentially result in significantly higher (and harmful) levels of noise and disturbance than would normally be expected in a suburban residential context.
12. In principle therefore a condition to restrict numbers is reasonable and necessary to ensure the use will not have significant adverse impacts in terms of **either neighbouring occupiers' living conditions or highway safety**. Such an approach accords with saved LP Policies QL10 and QL11 and with the *Framework* which advocates securing a good standard of amenity for existing and future occupants of buildings and also safe and suitable access for all people. For similar reasons such a condition is also relevant to planning and to the development permitted.
13. The Certificate of Lawfulness is a logical starting point for specifying a maximum number, because 30 children equates to a level of use and activity that had previously been operating in this particular site context without causing undue harm in terms of residential amenity or highway safety. As I understand it, the increase to 35 resulted from the number specified by the applicant on a planning application form. The problem which has arisen appears to stem more from the restriction to 35 **'on any day'** than from 35 being set as a maximum number: I consider this matter in more detail in relation to the issues of living conditions and highway safety.
14. As the appellant notes, the tests of precision and enforceability are interlinked. In the latter respect I note the account of an exercise to count children during a visit by a Council enforcement officer. However it would be unusual if the nursery was not required to keep some form of register of children attending each session/day. It is unclear why that has not been considered as a means of checking compliance with the condition. It seems unlikely that would have **adverse implications in terms of data protection and/or the children's safety**.
15. In addition, in relation to planning permission A, I find no compelling grounds to conclude the condition is imprecise. However planning permission B relates **specifically to a change of use of 'upstairs'** (the first floor) and condition 1 further specifies (in effect) that the permitted use of **'upstairs'** may be carried out only in accordance with the floor plan accompanying the application. Neither condition 1 nor condition 2 clarifies whether the After School Club is to

be considered as part of the day nursery² for the purposes of restricting the number of children to a maximum of 35 on any day. Thus I find condition 2 of permission B to be insufficiently precise, which necessarily casts doubts on its enforceability.

16. In summary, I have found in principle that a condition along the lines of the disputed condition is reasonable, necessary, and relevant to planning and to the development permitted in these two permissions. It follows that I find no compelling case to delete the condition in its entirety from either permission. I am satisfied condition 3 of planning permission A meets the tests of enforceability and precision, but I find that condition 2 of permission B fails those tests. That does not necessarily mean condition 2 should be deleted in its entirety, but I shall bear its shortcomings in mind in due course.

Living conditions and highway safety

17. The first matter to consider in relation to both of these matters is the likelihood of comings and goings increasing if the condition was to be varied to 35 **children 'at any one time'**. **Neither the Council's scenario of up to 105 children** per day nor the **appellant's** suggestion that the same set of 35 children could go home for lunch and return for the afternoon³ seems likely to occur in practice. That is not least because it is more likely than not that there will always be a demand for both full day places and shorter sessions, to meet the needs of working people and to provide the sessions funded by Government.
18. Moreover it is highly relevant that the existing condition allows for 35 children to arrive all at once in the morning and for 35 children to be present throughout the day. It is more likely than not that the morning arrival and late afternoon departure periods will be the busiest in terms of comings and goings⁴. Varying the condition as requested would allow flexibility for different children to attend morning and afternoon sessions, potentially resulting in more comings and goings around the lunch time period rather than **at the 'peak'** morning arrival and afternoon departure periods (when other pedestrian and vehicular activity in the locality is also likely to be at its highest).
19. I have noted the anecdotal accounts of noise and disturbance associated with comings and goings at the nursery, such as noise from adults congregating outside the premises. Even so, in the light of the reasoning above I can find no compelling grounds to conclude that varying the condition would cause material harm to neighbouring occupiers' living conditions in this respect. That reasoning applies equally to noise and disturbance generated by children being outside in the rear garden area, because the existing permissions do not restrict the numbers permitted outside at any one time or the times when outdoor play may occur: all 35 children could be outside at the same time and that situation would not alter if the condition was to be varied.
20. Similarly, whilst there are some accounts of vehicle-related incidents, such as inconsiderate parking for example, there is little substantive evidence of actual highway safety problems occurring. That may result in part from a staggered pattern of arrivals and departures⁵ and also from some people arriving and

² A use in a different part of the building which is permitted by virtue of a quite separate planning permission

³ Which could result in at least as many comings and goings as **in the Council's scenario**

⁴ **And information in the appellant's statement about numbers arriving and leaving on a typical day is broadly consistent with this view**

⁵ **Described in general terms in the appellant's statement, and typical for this type of use**

leaving on foot⁶. I fully appreciate the highway and pedestrian safety problems that could arise due to the position of no. 15 at the bend in The Chase and the lack of on-site drop-off facilities, but the fact remains that the existing permissions already allow for up to 35 children to be delivered and collected. Given also that any increase in comings and goings as a result of varying the condition is unlikely to occur at peak times, I can find no compelling grounds to conclude the variation would compromise highway safety.

21. In summary therefore I find no sufficiently sound and compelling reasons to conclude that varying the condition to allow for 35 children to be present at any one time would cause material harm to the living conditions of neighbouring occupiers or to highway safety. Thus varying the condition would not conflict with saved LP Policies QL10, QL11 or TR1a, or with the **Framework**.

Other matters and overall conclusions

22. I have had regard to all other matters raised but have found nothing sufficient to alter or outweigh the findings already set out. I have found that a condition limiting numbers attending the nursery and After School Club would, in principle, accord with guidance on the use of conditions in the **Framework** and PPG. Having taken account of that guidance and all the representations before me I conclude that the condition in dispute should be varied, in planning permissions A and B, to allow for up to 35 children in total to attend the premises at any one time.
23. Only one application was made in relation to the two separate planning permissions but, from a procedural point of view, combining both of these into a single new planning permission would be problematic: I shall therefore retain the format of two separate planning permissions, with suitable linkages in the disputed condition for consistency and clarity. Following guidance in the PPG and for the avoidance of any doubt, I shall also repeat the other conditions previously imposed, with some minor variations in the interests of clarity and precision, **being satisfied that doing so would not prejudice anyone's interests.**

Jane Miles

INSPECTOR

⁶ Albeit no actual figures have been provided by the appellant, apart from the 10 children attending the After School Club who are collected from school by nursery staff and walked to the premises
