
Appeal Decision

Site visit made on 28 February 2014

by K D Barton BA(Hons) DipArch DipArb RIBA FCI Arb

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

Decision date: 4 March 2014

Appeal Ref: APP/D1780/A/13/2201355
229 Botley Road, Southampton SO19 0NL

- The appeal is made under Section 78 of the *Town and Country Planning Act 1990* against a refusal to grant planning permission including, under Section 73 of the *Town and Country Planning Act 1990*, for the development of land without complying with a condition subject to which a previous planning permission was granted.
 - The appeal is made by Woodbury Day Nursery Limited against the decision of Southampton City Council.
 - The application Ref 13/00424/FUL, dated 15 March 2013, was refused by notice dated 13 May 2013.
 - The development proposed is ground and first floor extensions and the application also sought planning permission for use as a children's nursery without complying with a condition attached to planning permission Ref 08/007378/VC, dated 19 August 2008.
 - The condition in dispute is No5 of 08/00737/VC which states that: No more than 65 children shall be accommodated on the premises at any one time and the number of children using the outdoor play area at any one time shall be limited to 30 unless the Local Planning Authority agree otherwise.
 - The reason given for the condition is: To safeguard the residential amenities of adjoining properties and to prevent an over intensive use of the site.
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Preliminary Matter

1. The Council's decision notice refers to both drawings Nos WDN/PP/03A and 04 that show conflicting information. Drawing 04 is the most up-to-date and reflects the existing situation on site and has been considered in lieu of drawing 03A in determining this appeal.

Decision

2. The appeal is allowed and planning permission is granted for ground and first floor extensions and for use as a children's nursery at 229 Botley Road, Southampton SO19 0NL in accordance with the application Ref 13/00424/FUL, dated 15 March 2013 without complying with condition No 5 set out in planning permission Ref 08/007378/VC, dated 19 August 2008 by Southampton City Council, but otherwise subject to the following conditions:
 - 1) The development hereby permitted shall begin not later than three years from the date of this decision.
 - 2) The development hereby permitted shall be carried out in accordance with the following approved plans: WDN/PP/01, 02, 04, 21, 22, 23,41, 42, and 43.
 - 3) Notwithstanding the information on drawing WDN/PP/04, details of a front boundary treatment providing a means of enclosure with a

maximum height of not more than 600mm shall be submitted to, and approved in writing by, the local planning authority. The approved details shall be implemented before any increase in the numbers of children to more than 65 and thereafter retained at that height.

- 4) No development shall take place until the extension of the dropped kerb and the repositioning of the street light indicated on drawing WDN/PP/04 have been implemented.
- 5) The use hereby permitted shall only operate between the hours of 07:30 and 18:00 Monday to Friday and at no times on Saturdays, Sundays or Bank Holidays.
- 6) No more than 75 children shall be accommodated on the premises at any one time and the number of children using the outdoor play area at any one time shall be limited to 30.
- 7) The parking spaces set out on site shall be kept clear and retained for parking.
- 8) The existing boundary treatments, other than for the front boundary subject of condition 3 above, shall be retained.

Application for costs

3. An application for costs was made by Woodbury Day Nursery Limited against the decision of Southampton City Council. This application is the subject of a separate Decision.

Effect on the Character of the Surrounding Area

4. The existing children's nursery occupies a two-storey building with a single storey rear extension on the northern side of Botley Road. The surrounding area on the northern side of the road has a predominantly residential character, although there is a builder's yard to the rear of the nursery site accessed by a drive that adjoins the eastern appeal site boundary. The opposite side of Botley Road has a more rural character.
5. The Officer's delegated report indicates that "the proposed physical works to extend the premises will not harm the character and appearance of the host property or the residential amenities". Indeed, the extensions would not be readily visible from any public vantage point. In addition, the application drawings indicate that the proposed materials would match those used on the existing building safeguarding the appearance of the area in accordance with the aims of Policy SDP7 of the *City of Southampton Local Plan Review 2006* (LP).

Effect on the Living Conditions of the Occupiers of adjoining properties in terms of additional noise and disturbance

6. Change of use of the premises to a nursery for 40 children was granted in 2000 (Ref 00/00671/FUL) and the numbers were increased to 65 in 2008. A further increase to 75 is now sought, almost twice the original number, which would intensify the use of the site. The Council's reason for refusal maintains that this would lead to "noise and general disturbance from increased pedestrian and vehicle movements in and around the site and from increased use of the children's external play area".

7. In terms of pedestrian and vehicular movements, the case officer observed 19 trips to the site between 08:20 and 09:05 on 1 August 2012. Of the 15 cars, 14 were able to park on the site and of the 3 pedestrians, 2 were members of staff arriving together and the third was a parent with a child. The fifteenth trip was a delivery vehicle. The applicant states that there are currently 74 drop offs between 07:25 and 10:00 with a similar number of collections between 14:50 and 17:55 hours. Whilst this level of activity is above that which might be expected for residential use, even when the previous use of the building as two flats is considered, the busy nature of Botley Road means that the level of additional activity from an increase of 10 in the number of children catered for would be insignificant.
8. Turning to the use of the external play area, the Council's statement records that there were 4 objections to the proposal on the basis of noise. However, whilst Environmental Health generally deals with statutory nuisance rather than disturbance, the Officer's report states that there have been no complaints to Environmental Health in respect of noise whilst the appellant's Planning Statement notes there was a single complaint to Environmental Health in 2010 but the complainant did not want to pursue the matter. In any event, there would be no change to the existing restriction of no more than 30 children outside at any one time, and so there would be no change in the level of noise and disturbance experienced by neighbours due to the additional 10 children within the building.
9. The Council now questions the enforceability of a condition restricting the number of children playing outside at any one time. Whilst it might be difficult to enforce such a condition that does not mean it could not be done. Indeed, the Council imposed such a restriction on the original change of use (00/00671/FUL) and maintained it, albeit varied, in 2008 (08/00737/VC). Moreover, it imposed such a condition on another nursery run by the same company elsewhere in the City in 2012 (12/01431/FUL). The Council now refers to an appeal in Poole (APP/Q1255/A/12/2170524) where the Inspector considered that it would be inappropriate to deal with such a restrictive condition as there was insufficient detail to determine whether it would be effective or enforced. That differs from this case as the condition has been imposed on the nursery for a number of years during which time there has been only one objection to noise, which was not pursued, indicating that the condition has been effective.
10. Reference has also been made to an OFSTED requirement for freedom of movement for children. Currently, pre school children (3 years old plus) have 'free flow' where the door to the outside play area is 'open' whilst access to the outside for younger age groups is controlled subject to the limit on the total number outside at any one time. The appellant indicates that of the 10 additional children it is likely that 3 would be 0-2 years old and 3 would be 2-3 year old. Only 4 additional children would therefore be in the 3 years plus group with free access to the outside play area. The Officer's report states that there are normally approximately 20 children outside at any one time. In addition, the nursery has recently acquired a 'turtle bus' which allows 6 children to go to the park reducing the demand for the 30 external play spaces on site.
11. The proposal would, therefore, have no significant impact on the level of noise and disturbance experienced by the occupiers of nearby residential properties

and so would not conflict with the aims of LP Policy L4 that seeks to safeguard the amenities of neighbouring residential properties.

Other Matters

12. Botley Road is relatively busy but there are no on-street parking restrictions in the vicinity of the appeal site. The Officer's delegated report indicates that the existing situation was observed and no on-street parking issues that would prejudice highway safety were recorded. Seven on-site parking spaces are available and this would not alter with the proposal, although the application drawings indicate that a street light would be relocated and the existing dropped kerb extended to improve visibility. These improvements should be implemented before any increase in numbers is allowed. Notwithstanding what is shown on the application drawings, visibility could be further improved by a condition as suggested by the highway authority restricting the height of the means of enclosure on the front boundary to no more than 600mm, which would enable parents driving towards the site to see more easily whether there was an on-site parking space free. Notwithstanding the concerns of neighbours, parking and safety matters would not justify dismissing this appeal.
13. The appellant's Planning Statement indicates that the nursery needs to expand to be viable but no evidence has been submitted to support this statement. This matter has not therefore influenced the decision in this appeal. However, the proposal would allow disadvantaged 2 year olds, for who there is funding but for which there is a shortage of places in the area, to be accommodated. The proposal would also allow for two new trainees to be taken on.
14. The Officer's report states that any shortfall in nursery places could be achieved by the expansion or formation of other nurseries in the area but little evidence is provided to underpin this assertion. The proposal is supported by the Council's Children's Services and Learning and LP Policy L4 indicates that where there is a recognised need for childcare facilities this should be balanced against amenity considerations. Whilst the Council is concerned about the gradual intensification of the nursery use, which it considers would lead to incremental changes and increase the pressure to relax some of the restrictive conditions, each case should be considered on its merits.
15. In this case, notwithstanding that the use of the site would intensify, there would be no significant impact on the living conditions of the neighbouring residents due to additional noise and disturbance and no adverse impact in terms of highway safety and parking. I therefore intend to allow the appeal.

Conditions

16. Although not suggested by the Council, a condition should be attached, in the interests of clarity and good planning, confirming the numbers of the approved drawings. The appeal has been determined on the basis of 75 children being catered for on the premises of which no more than 30 at any one time should be using the outdoor play area. These numbers should be ensured by condition to safeguard the living conditions of nearby residents. The Council suggests, with no specific justification, that the overall number should be restricted to 70. This would change the application and be unreasonable. In addition, the hours of operation of the nursery have previously been restricted to 07:30 to 18:00 Monday to Friday and at no time on Saturdays, Sundays and

Bank Holidays. The Council now suggest that this should be relaxed to 07:00, again with no justification. The appellant has not sought such an extension to the operating hours and as it would extend the period during which there would be comings and goings that might have an impact on neighbours I do not consider that the operating hours should differ from those currently allowed.

17. The existing planning permission requires a parking area to be provided and thereafter kept clear and retained for parking. The parking area now exists but a condition requiring it to be kept clear and retained for parking should be attached in the interest of highway safety. Similarly, the existing planning permission required details of boundary treatments to be approved and then retained. The retention of existing boundary treatments should also be required in relation to this scheme as they have contributed to the lack of complaints about noise and disturbance. As there would be no change to the number of children playing outside at any one time, and no complaints have been pursued in relation to the use, there would be no justification for requiring acoustic fencing along the relevant boundary, despite the appellant's willingness to accept such a condition.

K D Barton

INSPECTOR

Costs Decision

Site visit made on 28 February 2014

by K D Barton BA(Hons) DipArch DipArb RIBA FCI Arb

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

Decision date: 4 March 2014

Costs application in relation to Appeal Ref: APP/D1780/A/13/2201355 229 Botley Road, Southampton, SO19 0NL

- The application is made under the *Town and Country Planning Act 1990*, Sections 78, 322 and Schedule 6, and the *Local Government Act 1972*, Section 250(5).
 - The application is made by Woodbury Day Nursery Limited for a full award of costs against Southampton City Council.
 - The appeal was against the refusal of planning permission for ground and first floor extensions and for the use of the building as a children's nursery without complying with condition 5 attached to planning permission 00/00671/FUL, as varied by condition 5 attached to planning permission 08/00737/VC.
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Preliminary Matter

1. The conclusion to the applicant's claim for an award of costs states that the application is for a partial award under paragraph A18 of *Circular 03/2009: Costs Awards in Appeals and Other Planning Proceedings*. However, paragraph A18 relates to a full award of costs. As it is not clear whether a full or partial award is sought I have considered both.

Decision

2. The application for an award of costs is allowed in the terms set out below.

Reasons

3. Paragraph A12 of the *Circular* sets out conditions to be met for an award of costs to be made. These include: making a timely application for an award of costs; the party against whom the award is sought acting unreasonably; and, that unreasonable behaviour causing the party applying for costs to incur unnecessary or wasted expense in the appeal process. It is not disputed that this application was made in a timely manner.
4. The applicant maintains that the Council has been unreasonable on two counts. Paragraph A22 of the *Circular* states that unreasonable is used in its ordinary meaning. Examples of unreasonable behaviour in paragraph B4 of the *Circular* include: introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not have arisen; and, prolonging the proceedings by introducing a new ground of appeal, or issue, or reason for refusal. It is claimed that the introduction of Policy L4 of the *City of Southampton Local Plan Review (March 2006)* (LP) and the withdrawal of the reason referring to LP Policy L7 are akin to the examples in the *Circular*.

5. The Council's Statement identifies an error in the Officer's report and the decision notice, which both refer to LP Policy L7. This is clearly concerned with The University of Southampton and should have read L4 which relates to Nursery provision. This error would be obvious to anyone looking at the policy, although the appellant's Planning Statement incorporating the Design and Access Statement also refers to LP Policy L7 in paragraph 11.2. The Council has not changed or withdrawn any reason for refusal, or introduced any new evidence, merely corrected the reference. This could not be regarded as unreasonable in the ordinary meaning of the word. An award of costs on this ground would not, therefore, be justified.
6. Secondly it is claimed that the Council has been unreasonable by way of inconsistency. Its sole reason for refusal relates to harm due to increased noise and general disturbance in terms of increased pedestrian and vehicular movements and increased use of an external play area. The Council, in relation to this case, queries the enforceability of a condition restricting the number of children playing outside at any one time. However, it imposed such a restriction on the original change of use (00/00671/FUL) and maintained it, albeit varied, in 2008 (08/00737/VC). Moreover, it imposed such a condition on another nursery run by the same company elsewhere in the City in 2012 (12/01431/FUL).
7. There is little evidence to justify the Council's change of position in this case, although it refers to an appeal in Poole (APP/Q1255/A/112/2170524) where the Inspector considered it would be inappropriate to deal with such a restrictive condition as there was insufficient detail to determine whether it would be effective or enforced. That differs from this case as the condition has been imposed on the nursery for a number of years during which time there has been only one objection to noise, which was not pursued, indicating that the condition has been effective. Whilst it might be difficult to enforce that does not mean it could not be done.
8. Reference has been made to an OFSTED requirement for freedom of movement for children. Currently, pre school children (3 years old plus) have 'free flow' where the door to the outside play area is 'open' whilst access to the outside for younger age groups is controlled subject to the limit on the total number outside at any one time. This situation would not change and so would not justify a change of stance by the Council.
9. The Council's inconsistency, without proper justification, constitutes unreasonable behaviour and has caused the appellant to incur unnecessary expense. However, the costs application does not refer to the increased pedestrian and vehicular movements and so an appeal would still have been necessary, even if a condition relating to the number of children playing outdoors at any one time had been proposed. Only a partial award of costs, limited to those costs incurred in dealing with the failure to consider a condition restricting the number of children playing outside at any one time, is therefore justified.

Costs Order

10. In exercise of the powers under Section 250(5) of the *Local Government Act 1972* and Schedule 6 of the *Town and Country Planning Act 1990* as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Southampton City Council shall pay to Woodbury Day Nursery Limited, the

costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in dealing with the failure to consider a condition restricting the number of children playing outside at any one time.

11. The applicant is now invited to submit to Southampton City Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

K D Barton

INSPECTOR