The Planning Inspectorate

Appeal Decision

Site visit made on 10 June 2020

by Simon Hand MA

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

Decision date: 15 June 2020

Appeal Ref: APP/V1260/X/20/3244317
Kings Castle Montessori, 31 Saxonbury Road, Bournemouth, BH6 5NB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Saxonbury Road Ltd against the decision of Bournemouth Christchurch and Poole Council.
- The application Ref 7-2019-4276-AH, dated 2 April 2019, was refused by notice dated 29 November 2019.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is proposed use as a children's nursery without restrictions.

Decision

1. The appeal is dismissed.

Reasons

2. This appeal turns on the construction and effect of various planning permissions and whether by accidental omission the Council have inadvertently left the nursery school with no enforceable planning conditions. The argument is that various planning permissions granted by the Council have superseded the original planning permission for the development. Some of those planning permissions were never implemented and those that were had no conditions on them, thus leaving the nursery without restrictions.

3. In the past, it was often considered that a permission granted under s73 was a new planning permission which superseded any previous planning permissions and should therefore be subject to any conditions that would continue to be relevant. More recently the Supreme Court[1] in the Lambeth case has made it clear that an application under s73 to remove a condition from an existing planning permission was limited to that matter. Assuming the later permission is compatible with the continued effect of the earlier permission then the original conditions could remain binding. The original conditions would only be affected if they were discharged or removed. As long as there is nothing in the new permission to affect the continued operation of the old conditions then they remain in effect.

[1] Lambeth LBC v SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2017] EWHC 2412 (Admin), [2018] EWCA Civ 844, [2019] UKSC 33

4. Both parties rely on Lambeth and there is no dispute as to what it means. The dispute is whether or not certain planning permissions were ever implemented or not and the ongoing effect of that lack of implementation.

5. In 2004 planning permission (7/2004/4726/N) was granted for the erection of a 2 storey nursery and caretakers flat. Although the appellant's schedule of permissions says this was never implemented, I think this is a typing error. Both parties clearly seem to accept this was the original permission. It was subject to a number of conditions restricting the operation of the use.

6. Two amending s73 applications were granted in 2006 to vary the fenestration details on the eastern elevation and to allow the staff flat to be let out privately. Neither referenced the original 2004 planning permission nor repeated any conditions from it. The appellant argues the second application (7/2005/4276/Q) was a brand new, unconditional, planning permission. But I do not agree, it is described as "*variation of condition No.1 of application 7/2004/4276/N to allow the use of first floor flat as private accommodation*". In view of Lambeth, it seems clear that both the 2006 applications sat alongside the 2004 permission and any conditions on that permission which were not directly affected by the new 2006 permissions and could still operate would still be in effect.

7. Both parties agree the next application made in 2010 was for full planning permission and was a standalone permission. This permission (7/2010/4276/V) was for a change of use of the flat to a nursery and extension to the ground floor to accommodate 14 extra children and was subject to a full set of conditions controlling the use of the newly extended premises. The appellant claims this planning permission was never implemented and the Council disagree.

8. Following the issue of the 2010 permission, four applications were made to vary one or more of the conditions attached to it. 4276/W and 4276/Y were refused, but 4276/X and 4276/Z were approved. 4276/X was to vary condition 2 to allow further hours of outdoor play and 4276/Z was to vary conditions 1 and 6 to enable the cycle store to be repositioned. Both X and Z were granted subject to a handful of conditions relating solely to the issue of hours of play, in the case of X and cycle storage in the case of Z. Both were unequivocally s73 applications to vary the conditions, that is how they were described on the application forms and in the permissions.

9. The appellant argues that 4276/Z thus became the operative planning permission governing the use of the site, with only conditions relating to the cycle store. The 'Sheffield stands' approved as part of 4276/Z were implemented, and photographs show them in place. The appellant argues the 2010 permission (4276/V) thus lapsed and was superseded by the now implemented 2012 permission (4276/Z).

10. This argument seems to misunderstand the fact that both X and Z were attempts to vary the conditions on V. If V had never been implemented, as the appellant argues, then X and Z would have no effect. Neither of them and in particular 4276/Z, were new standalone planning permissions. Applying Lambeth, both X and Z simply affected the relevant conditions attached to V and no more. The rest of the conditions on 4276/V which had not been discharged were still in effect. There would seem no reason why the relocated cycle stands should impact on the continued operation of the rest of the

conditions on V. If 4276/V had never been implemented, as the appellant suggests, then X and Z are of no importance and the nursery continued to function courtesy of the original permission 4276/N and the amending permissions P and Q. But I see no reason to assume that 4276/V was not implemented. The cycle store was relocated as per the revised plans in Z and I assume the larger number of children were accommodated – at least there is no suggestion that they were not.

11. There is a subsidiary point that the appellant argues condition 6 of 4276/V was a condition precedent and the failure to discharge it renders 4276/V unimplemented. I do not agree with this. Firstly, it is not a condition precedent that goes to the heart of the permission, it only affects the location of a cycle store, so the lack of implementation does not undermine the lawful existence of 4276/V. Secondly, it seems its implementation is irrelevant, as it was varied by 4276/Z and the varied condition implemented.

12. The appellant attempts to differentiate this case from the appeal considered in Lambeth, because in this case the operative permission (4276/V) was, allegedly, never implemented. Lambeth concerns only planning permissions that have been implemented and so their conditions continue to bite. This analysis of Lambeth is correct but is of no help. In my view 4276/V was implemented. However, if not, then neither of the amending permissions X and Z are relevant as they simply seek to vary an unimplemented permission. The appellant's argument only works if I agree that both 4276/V was not implemented and then that 4276/Z was a new standalone permission. Neither contention is, in my view, correct.

13. Further applications and permissions are also described. In 2013 a temporary permission (4276/AA) was granted to allow further outdoor play. This application sought relief from conditions on 4276/N, 4276/V and 4276/X. By this time it seems the appellant and the Council were both completely confused as either N or V must be the main permissions but not both. But in any case, it was clear what was wanted and the temporary permission was granted, was implemented and then expired.

14. Another 2013 permission (4276/AB) allowed alterations and a single storey office extension to the nursery, but this was a standalone permission that did not affect the running of the nursery, as accepted by the appellant and so sits alongside 4276/V – although the appellant argues it sits alongside 4276/Z, which cannot be the case for the reasons I explain above. This permission (4276/AB) was itself amended by 4276/AC, but that does not affect the main arguments.

15. A final permission was granted in 2014 (4276/AD) to again allow extended outdoor play hours, similar to the temporary permission 4276/AA, and to effect this also sought relief from conditions attached to 4276/N, 4276/V and 4276/X. The appellant argues this permission is invalid as none of those applications were extant. In my view at least one of them was, but it does not matter as 4276/AD only sought to vary a planning permission. If that planning permission wasn't extant then AD would have no effect, if it was then AD would be enforceable. But that is not relevant for this appeal and neither is the question of whether it was implemented or not.

Conclusions

16. It is my view that permission 4276/V, as amended by 4276/X, 4276/Z and 4276/AD forms the operative planning permission for the nursery school, along with the various conditions attached to it and as varied by the subsequent permissions X, Z and AD.

17. If 4276/V was never implemented then 4276/X and 4276/Z are irrelevant as they sought to vary an unimplemented and now time expired planning permission. In which case the operative permission remains 4276/N, and its conditions remain enforceable, as varied by 4276/Q, 4276/P and 4276/AD.

18. Thus it would not be lawful to use the children's nursery without restrictions and I shall dismiss the appeal.

Simon Hand

Inspector