



Appeal Decision

by P H Willows BA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 May 2021

Appeal Ref: APP/R1038/X/20/3263839

Swimming Pool, Mansfield Road, Mile Hill, Hasland S41 0JN

- 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 Swim 121 (Mrs Lynn Booth) against the decision of North East Derbyshire District Council.
 - The application Ref 19/01159/LDC, dated 25 November 2019, was refused by notice dated 30 January 2020.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as:
To be allowed to continue to provide 121 swimming tuition on a Saturday 8:30 - 16:30, and Sunday 08:30 - 16:30.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. In order to minimise contact during the pandemic, and given the nature of this case, I did not visit the appeal site. The decision not to visit the site was made with the agreement of the parties.

Main Issue

3. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded.

Reasons

General approach to LDCs

4. Advice relating to LDCs is provided by the Government's *Planning Practice Guidance* (PPG). This establishes that the applicant is responsible for providing sufficient information to support an application. In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the

grant of a certificate on the balance of probability. A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. Planning merits are not relevant.

The requirements to establish lawfulness in this case

5. Swimming lessons have taken place at the appeal property for a number of years. Planning permission was initially granted in 2004. However, a further planning permission¹ was granted on 14 April 2009 permitting the same use but with a relaxation on the hours of operation. Condition 2 of the new planning permission now controls the hours of operation and is worded as follows:

Swimming tuition shall take place only between the hours of 9.30am to 7.30pm Monday to Friday and 8.30am to 1.00pm on Saturdays.

6. It appears to me that the 2009 planning permission is now the planning permission under which the use operates, and has been since it was granted (since the hours specified by the previous planning permission were already being breached). Although the appellant refers to a planning permission granted in December 2015² which had a condition specifying different operating hours, that permission, which was for a pool enclosure, was not implemented and so has no bearing on this appeal.
7. The appellant's case is that the extended hours during which swimming lessons are taking place have become lawful due to the passage of time. Section 191(3) of the Act establishes that any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—
 - (a) the time for taking enforcement action in respect of the failure has then expired; and
 - (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
8. There is no relevant enforcement/breach of condition notice, so the focus is on 191(3)(a). The relevant time limit is set out in section 171B(3). This states that, in the case of any other breach of planning control (which would include this case), no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Thus, to succeed in this appeal, the appellant would need to demonstrate, on the balance of probability, that the condition had been breached for a 10 year period by the point in time when the LDC application was made - 25 November 2019. The breach would need to be continuous – the 10 year period could not be reached by adding together individual breaches. Whether a series of incidents amount to a number of individual breaches of a condition or a single, continuous breach is a matter of fact and degree, highly dependent on the details of the case.

The appellant's evidence

9. The appellant has provided the following evidence:
 - An extract from the 2013 accounts payment list

¹ Ref: 09/00028/FL

² Ref: 15/00413/FL

- A statement from a consultant who visited the site on a Sunday afternoon to assess noise levels.
 - Signed statements from past and present employees with the company
 - A signed letter from a current customer.
10. The extract from the accounts indicates that the condition was being breached by conducting swimming lessons on Saturday afternoons and Sundays during October and November 2013. The report from the noise consultant shows that the condition was being breached on a single day in July 2019.
 11. The customer letter indicates that swimming lessons had taken place at 4pm on a Sunday 'since 2009'. The letter was written on 23 November 2019.
 12. A short signed statement dated 19 November 2019 is made by 3 current (at that time) employees of the company. It states that Swim 121 have provided private swimming tuition on a Saturday and Sunday from 8:30-16:30 since 2009. Two of the signatories started at the company before 2009 but the third started in 2013, and so is unlikely to have had personal knowledge of operating hours during the preceding period. A more detailed letter from one of the employees states that he has worked weekends 'since 2009'.
 13. A letter from a former employee states that she was contracted to work the weekend afternoon shifts finishing at 16.30 on both Saturdays and Sundays in 2009, although no end date is given.
 14. Another letter from a former employee states that she was employed by the appellant in 2005 and left in 2013. The writer says she was employed as a part time receptionist for 16 hours per week working from 8.30am to 4.30pm Saturday and Sunday.
 15. In addition to the above, letters from neighbours suggest that the condition has been breached for many years, although they do not give specific dates.

The Council's evidence

16. On 14 January 2009 the appellant wrote to the Council in support of the application to extend the operating hours of the business. In the letter she stated a requirement to trade 'Monday to Friday 9.30am to 7.30pm and Saturday morning 8.30am to 1.00pm'. She continued, 'This does not necessarily mean that lessons will be booked during these times, the pool may remain empty much of the time but the more flexible I can be the better chance I have at making a profit'. She added, 'I do not intend to open on Sundays or bank holidays'.
17. The Council also says that the fact that the enforcement officer closed the enforcement case in April 2009 is an indication that the condition was not being breached at that time.

Assessment

18. The appellant relies largely on statements/letters provided by employees and a customer. Although these are not in any statutory form (which would carry more weight) that does not mean that they should be discounted. However, in accordance with the advice in the PPG, it is important that the evidence as a whole is sufficiently precise and unambiguous. Yet none of the statements are specific regarding dates, but instead use generalities such as 'since 2009'. This

is important because the condition would need to have been breached no later than 25 November 2009 in order for lawfulness to be established.

19. Moreover, the statements are not entirely consistent, with one indicating hours of 8.30am to 4.30pm on Saturdays and Sundays since 2005 – four years earlier than suggested in the other letters. There are no detailed records of lessons that have taken place over the relevant period to clarify matters. The accounts records relate only to a short period of a single year and the noise report to a single day, so these are of limited assistance.
20. The claimed hours also need to be seen in the context of the appellant's letter of 14 January 2009. The letter creates the impression that even the more limited hours sought at that time (compared to the hours of operation now claimed) were largely required to provide flexibility. The letter was written in early 2009 but it is perhaps reasonable to assume that the appellant's position had not changed when the application was determined in April 2009 and that the condition was not being breached at that point (otherwise the permission would not have met her requirements even at the point it was granted). The clear statement that 'I do not intend to open on Sundays or bank holidays' suggests to me that, if Sunday opening did take place in 2009, it would have been towards the end of the year. This makes precision regarding when the breach took place more critical still.
21. Viewed as a whole, the appellant's evidence lacks precision and is not entirely unambiguous. Consequently, I am not persuaded that the appellant has demonstrated, on the balance of probability, that the condition was breached as claimed for a 10 year period prior to the LDC application. Accordingly, the use of the property for swimming lessons on Saturdays and Sundays from 8.30am until 4.30pm was not lawful when the application was made.

Other Matter

22. I have noted the claim that extended hours of operation would not be harmful, including the reference to a previous appeal decision at the property, but planning merits are not relevant to the narrow remit of determining lawfulness.

Conclusion

23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the provision of 121 swimming tuition on a Saturday 8:30 - 16:30, and Sunday 08:30 - 16:30 was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended and dismiss the appeal.

Peter Willows

INSPECTOR