



Appeal Decision

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

an Inspector appointed by the Secretary of State

Decision date: 28 June 2022

Appeal Ref: APP/V4630/X/22/3291197

Simon's Restaurant, 520 Chester Road, Aldridge, Walsall WS9 0PU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Little Ripley Day Nurseries against the decision of Walsall Metropolitan Borough Council.
 - The application ref 21/1470, dated 6 October 2021, was refused by notice dated 10 December 2021.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended (the Act).
 - The use for which a certificate of lawful use or development is sought is the use of the site as a day nursery (Class E).
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Little Ripley Day Nurseries against Walsall Metropolitan Borough Council. This is the subject of a separate decision.

Preliminary Matters

3. It has not been necessary to carry out a site visit as, in this particular case, where all the information needed is included with the application and appeal documents, a decision can be reached on the papers¹. Both parties were informed and offered the chance to respond. No comments were received.
4. Section 192(2) of the 1990 Act indicates that if, on an application under that section, the Council is provided with information satisfying it that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The onus is firmly on the applicant to demonstrate on the balance of probabilities that the proposed development would have been lawful on the date of the application.
5. For the avoidance of doubt, the planning merits of the matters applied for do not fall to be considered. The decision will be based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case.

¹ The Procedural Guide - Certificate of lawful use or development appeals – England, dated November 2020, states at paragraph A.9.4. "Where the appeal concerns a case, which will be decided purely on the basis of technical and/or legal interpretation of the facts, the Inspector may decide the case without a site visit." In addition, Footnote 12 within Appendix F states that a small number of appeals do not require a site visit and can be dealt with on the basis of the appeal documents.

6. The council, within its reasons for not issuing the LDC, referred to 'proposed alterations' to the property. However, the application for the certificate purely sought whether the proposed change of use to a day nursery would be lawful. This is highlighted by the appellant in their submissions as being unrelated to the LDC application and I have no reason to disagree.
7. Therefore, I consider the main issue to be as follows and my decision will be based on this reason alone.

Main Issue

8. This is whether the decision not to issue an LDC was well-founded. The decision turns on whether the use of the land for the purposes of day care would be lawful by reason of condition 9 of planning permission BC43883P (the 1995 permission). This states that "Notwithstanding the provisions of the Town & Country Use Classes Order 1987, the premises shall only be used as a licensed restaurant and tearoom for the sale of food on the premises and for staff accommodation and not for any other purpose, including any other uses within Class A1, A2 and A3 of the above order".

Reasons

9. The 1995 permission was granted subject to conditions and dated 12 September 1995. The particulars of the proposed development on the application form are described as 'Redevelopment of Bourne Farm to comprise hotel and restaurants access and parking and tearoom'. The council's decision notice for the 1995 permission describes the proposal as 'Redevelopment of Bourne Farm to comprise restaurant, tearoom, managers/staff accommodation and associated access and parking'. The appeal site was last used as a restaurant, known as 'Simon's Cantonese and Seafood Restaurant'. The restaurant closed on 13 July 2019.
10. The appellant considers that the most recent use of the appeal site was operating in breach of condition 9, and the time to take enforcement action expired pursuant to Section 171B (3) of the Act². It is claimed that the condition restricts the use of the site to a restaurant **and** (my emphasis) tearoom along with staff accommodation. A breach is said to have occurred because the appeal site had been operating as a restaurant only, not as a restaurant and tearoom, over a minimum period of 10 years prior to its closure.
11. Accordingly, they consider that condition 9 of the 1995 permission is no longer applicable. In this respect, the appellant considers that a change of use to a day nursery would be lawful. This is because, on the date of the application, a restaurant³ and day nursery⁴ would fall within Class E of Part A, Article 3 of Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO) whereby, pursuant to section 55(2)(f) of the 1990 Act, a change of use of a building or other land does not involve development for the purposes of the Act if the new use and the former use are both within the same specified class.

² No enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

³ (a) for the display or retail sale of goods, other than hot food, principally to visiting members of the public

⁴ (f) for a crèche, day nursery or day centre, not including a residential use, principally to visiting members of the public

12. The council's reason for imposing condition 9 was to "safeguard the amenity of the occupants of adjoining premises and to ensure the satisfactory provision of off-street parking".
13. It is established through case law that a condition should be construed objectively and not by what the parties may or may not have intended at the time. To interpret the words in a condition one should ask what a reasonable reader would understand the words to mean when reading the condition whilst having regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.
14. Taken at face value the wording of the condition seems to me clear and unambiguous. The obvious, and only natural interpretation of the condition is that the council was approving what had been applied for, that is the use of the land for the provision of food and drink to paying customers and staff accommodation. Having regard to the inclusion of the specific word 'and', the condition does not require the operation of both the restaurant and the tearoom. The fact that the occupant of the land chose not to implement the tearoom use may have been due to external factors. They are both permitted uses, within the same use class⁵ that was in place at the time, which could be operated independently from each other. Furthermore, there is no distinction, in planning terms, between the two uses and there is no evidence to show that the intention of the condition was to prevent partial implementation of the restaurant without the tearoom or vice versa.
15. The purpose of the condition was essentially to limit the development to that which had been sought and prevent a change in use to something that may not safeguard the amenity of the occupants of adjoining premises and provide satisfactory off-street parking. The words 'not for any other purpose' in the condition make this clear. The condition has no other sensible discernible purpose than to prevent some other use which might be permissible without planning permission rather than require all of the uses applied for to be implemented.
16. Accordingly, I consider that the use of the appeal site has not been operating in breach of condition. The condition remains enforceable and precludes the proposed change of use. Express planning permission is required for the development and that can only be granted on application made to the council in the first instance.

Conclusion

17. For the reasons given above I conclude that the council's refusal to grant an LDC in respect of the use of the site as a day nursery (Class E) 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.

S A Hanson

INSPECTOR

⁵ Use Class A3 - For the sale of food and drink for consumption on the premises - restaurants, snack bars and cafes