



Appeal Decision

Site visit made on 28 July 2022

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 10 August 2022

Appeal Ref: APP/M4320/C/22/3293859

77 Scarisbrick New Road, Southport PR8 6LJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Thomas Howie against an enforcement notice issued by Sefton Metropolitan Borough Council.
- The enforcement notice was issued on 25 January 2022.
- The breach of planning control as alleged in the notice is the construction of an outdoor swimming pool and retractable enclosure which is being used to provide swimming lessons which constitutes a material change of use and is not incidental to the enjoyment of the dwellinghouse.
- The requirements of the notice are:
 - a) Remove the retractable enclosure from the property or reduce its height to no higher than 2.5 metres in order to comply with permitted development rights; and
 - b) Cease using the swimming pool for providing swimming lessons. Only use the swimming pool for purposes which are incidental to the enjoyment of the dwellinghouse.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b) and (g) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a correction and a variation in the terms set out below in the Formal Decision.

Preliminary Matters

1. The enforcement notice concerns a residential property, No 77 Scarisbrick New Road. It is alleged that a swimming pool in the rear garden is used for providing swimming lessons, which the Council argues constitutes a change of use. In cases where there is a dispute as to whether a material change of use has occurred, it is first necessary to establish the correct planning unit, and the present and previous primary (or main) uses of that unit. The planning unit is usually the unit of occupation, unless a smaller area can be identified which is separate and occupied for different and unrelated purposes. In this case, the planning unit comprises the dwelling house and its garden, which is correctly identified in the plan attached to the notice.
2. The next step is to establish the present and previous primary uses. It is clear that the previous use was as a dwelling house, which is a residential use. Further, there is no dispute that the swimming pool in the rear garden is used for providing swimming lessons for paying customers, as well as being used by the family living in the house. There is no physical or functional separation between the swimming pool and the house.

3. As such, the property would be in a mixed use of residential and the provision of swimming lessons. The concept of a mixed use being two or more primary uses existing within the same planning unit or unit of occupation. It is important that the allegation refers to all the components of the mixed use even if only one is required to cease. This is because, where there is a mixed use, it is not open to the Council to decouple elements of it; the use is a single mixed use with all its component activities. Even if the additional components are lawful, the enforcement notice should be corrected, if possible, to describe the mixed use properly.
4. Therefore, it is necessary for me to correct the allegation to - "without planning permission, the material change of use from residential to a mixed use of residential and for the provision of swimming lessons; including the construction of an outdoor swimming pool with a retractable enclosure to facilitate that change of use". I note that the Council is not seeking the removal of the pool, or the enclosure providing it is reduced in height. This acknowledges that a pool may be constructed and used for purposes incidental to the enjoyment of the dwelling house as such. Hence, the requirements would remain as set out in the notice.
5. The Council and the Appellant have agreed that I can use my powers of correction under Section 176(1)(a) of the 1990 Act. I am satisfied I can make such a change to the allegation without injustice since the effect of the notice would remain unchanged. The terms of the deemed planning application would change but the planning issues would not be materially altered.
6. In addition, the ground (b) appeal – that the matters alleged have not occurred as a matter of fact – relies on the argument that the alleged change of use does not amount to a breach of planning control. This is a ground (c) appeal and should be considered as such, which the main parties have agreed.

The ground (c) appeal

7. In order to succeed on a ground (c) appeal, the appellant must show on the balance of probabilities that the matters alleged in the notice, as corrected, do not constitute a breach of planning control. Therefore, I must decide whether a change of use to a mixed use of residential and for the provision of swimming lessons constitutes a breach of planning control.
8. Section 55(1) of the 1990 Act provides a broad definition of 'development', which comprises the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land. Development requires planning permission under Section 57(1), and the carrying out of development without permission constitutes a breach of planning control under Section 171A(1).
9. The property is a substantial detached house with a relatively large garden, which is located within a residential area. A swimming pool with a glazed enclosure has been constructed in the rear garden, along the boundary with No 2A Balfour Road. The Appellant advises that the swimming pool is primarily for the benefit of the family living in the dwelling house. It is acknowledged that lessons are offered as a basis for sharing the benefit of the pool with the wider community, whilst also providing a way for the family to afford the maintenance of the pool.

10. The extended use of the pool for providing swimming lessons, combined with the commerciality of the lessons, results in a significant difference in the character of the residential property. There are also off-site effects, which third parties describe as comings and goings in relation to the swimming lessons and associated noise and disturbance, which have planning consequences. I accept that home businesses can operate from residential premises without amounting to a material change of use, but this is dependent on the type of activity and the site-specific circumstances. In this case, the number of customers using the facility, the size of the pool and the hours of use have resulted in a change in character when compared with the previous residential use.
11. I find, therefore, that the activities taking place on site give rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in such a change in the definable character of the property that it amounts to a material change of use to the matters alleged. There is no planning permission for that use, and for the reasons given above, the use cannot be considered incidental to the enjoyment of the dwellinghouse. As such the exemption under Section 55(2)(d) of the 1990 Act does not apply and the appeal on ground (c) must fail.

The ground (a) appeal and the deemed planning application

Main Issue

12. The terms of the deemed planning application are derived from the corrected allegation. Therefore, planning permission is sought for the material change of use from residential to a mixed use of residential and for the provision of swimming lessons; including the construction of an outdoor swimming pool with a retractable enclosure to facilitate that change of use. I note the Appellant is not seeking to retain the enclosure in its current form, but I am required to deal with the matters alleged in the first instance.
13. The main issue is the effect of the development on the living conditions of neighbouring occupiers with regard to noise and light pollution.

Reasons

14. The appeal property is a large premises which can accommodate the swimming pool and enclosure while ensuring a good-sized usable garden remains. However, No 77 is close to the junction of Scarisbrick New Road with Balfour Road. The relationship of the appeal property to No 2A Balfour Road is such that the swimming pool is sited along the boundary that forms the rear wall to the neighbour's garden. While No 2A is a large, detached house, the rear garden is relatively modest in depth. Consequently, the swimming pool is situated close to the neighbour's house. In fact, it is closer to the neighbour's house than the host dwelling. The pool also adjoins the side boundary of No 3 Balfour Road, although I saw that it is screened to a certain extent by a rear extension and outbuilding at that property.
15. Although the swimming pool has a moveable enclosure, there is no apparent sound insulation. Lessons are held on a regular basis and I understand they typically take place during the afternoons on weekdays and in the mornings at the weekend. Numbers of customers vary, but the lessons can operate on a 1:1 basis or a 1:3 basis with parents waiting at the poolside. In the winter months the pool is lit to an appropriate level to enable safe use.

16. The Council is concerned about light pollution and noise and disturbance from the use of the pool for swimming lessons. Due to the position of the pool in relation to No 2A, I share the Council's concerns about noise and disturbance. Even on a 1:1 basis, there would likely be parents waiting at poolside. This is in addition to customers arriving and waiting for lessons. This would introduce a level of activity into the rear garden, greater than would normally be expected in a residential area. This would have a harmful impact on the living conditions of No 2A Balfour Road due to the proximity. I appreciate that the pool can be used for the personal enjoyment of the occupants of the appeal premises but this is unlikely to lead to activity on a scale similar to that occurring as a result of lessons.
17. I accept that the pool could be illuminated if it were used for incidental purposes and this aspect may well be comparable to the illumination during lessons. However, the potential for noise and disturbance arising from the commercial use in a residential area, with this particular development layout, remains unacceptable in my judgement.
18. I am aware of the numerous letters of support for the development, in particular, the clear benefits of providing swimming lessons on a 1:1 basis for children, especially those with disabilities or special educational needs which I consider further below. There are also letters from neighbours that state there is no noise and disturbance resulting from the unauthorised use. However, there is also evidence to the contrary from those people living closest to the development.
19. I also note that the premises used to function as a day nursery, but that use ceased and this consideration carries limited weight. I am aware of other commercial venues in the vicinity but I must consider this case on its merits. Other commercial uses in different locations, with different development layouts, may be acceptable. I understand the Appellant's desire to continue to run a business from their home but this does not outweigh my concerns about the impact on neighbours' living conditions.
20. The Appellant draws my attention to planning permission for a public swimming pool to the rear of No 34 Grosvenor Road (Ref DC/2019/02039). It seems that there are elements of this development that are comparable, however, it is difficult for me to make a complete assessment as I am unaware of the site-specific circumstances. In this case, the pool is housed within a fully glazed enclosure with no sound proofing that is very close to a neighbouring house.
21. I have considered whether I could impose planning conditions to make the development acceptable. However, the extent of restrictions to the operation to reduce its impact to an acceptable level would have the effect of negating the planning permission, which would be unreasonable.
22. I appreciate that the Appellant offers an alternative scheme that would include a different type of enclosure. However, this would not overcome my concerns about the use itself.

Conclusion

23. I have considered the benefits of the development for children with special educational needs. Disability is a 'relevant protected characteristics' for the purposes of the Equality Act 2010 and the Public Sector Equality Duty. Hence, I

must have due regard to the need, among other things, to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not. The retention of the development would enable the children with special requirements to continue to access swimming lessons. However, there are other options for securing swimming lessons, albeit these are more limited due to the impact of the COVID-19 pandemic. On the other hand, the harm resulting from the development is considerable. The negative impact on the recipients of swimming lessons of dismissing this appeal would not outweigh the conflict with residential amenity.

24. I find that the development would have an adverse impact on the living conditions of neighbouring occupiers with regard to noise and disturbance. It would be contrary to Policies EQ4 and HC3 of the Local Plan (2017), which seek to protect residential amenity, and the National Planning Policy Framework insofar as it seeks to protect the amenity of existing and future occupiers. The development would not accord with the development plan as a whole and there are no material considerations that indicate a decision should be made otherwise. The ground (a) appeal fails, therefore.

The ground (g) appeal

25. The ground (g) appeal is that the compliance period falls short of what should reasonably be allowed. The Appellant is seeking a longer period to source and install a suitable enclosure. I accept that it will probably take longer than one month to install a suitable replacement. Consequently, I shall vary the compliance period to three months. This will also allow more time for customers to make other arrangements.

26. The ground (g) appeal succeeds to this extent.

Conclusion

27. For the reasons given above, I conclude that the appeal should succeed on ground (g) only. I shall uphold the enforcement notice with a correction and a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision

28. It is directed that the enforcement notice is corrected by:

The deletion of the allegation in paragraph 3 of the notice and its replacement with "without planning permission, the material change of use from residential to a mixed use of residential and for the provision of swimming lessons; including the construction of an outdoor swimming pool with a retractable enclosure to facilitate that change of use", and varied by:

The replacement of "one month" with "three months" as the period for compliance in paragraph 5 of the notice. Subject to the correction and variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Debbie Moore

Inspector