



Appeal Decision

Site visit made on 9 June 2022

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11th AUGUST 2022

Appeal Ref: APP/G5180/X/20/3261484

Land At 77 Cumberland Road, Shortlands, Bromley BR2 0PL

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal in part to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Ms Jan Calladine-Smith against the decision of Council of the London Borough of Bromley.
 - The application ref DC/19/02719/ELUD, dated 19 June 2019, was refused by the Council by notice dated 27 August 2020.
 - The application was made under section 191(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 described in the application from as: Residential and childminding on ground and first floor.
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Preliminary Matters

1. I had intended to undertake my appeal site visit as an accompanied visit, where I would have been accompanied by a representative from each party. Unfortunately, the letters notifying the parties of 9 June site visit arrangements were not sent out. I attended the site on 9 June, not knowing this. The appellant was present at the site, but was not, of course, aware that a site visit was to take place that day. Despite this, she agreed to let me into the property in order for me to undertake a site visit. This visit was, however, undertaken on the basis of this being access only, rather than an accompanied visit.
2. The main parties were subsequently advised of the above and were given the opportunity to make any comments on the site visit and how it was undertaken. There was no objection from any party.
3. Whilst I note the description of the development stated in part 5 of the LDC form, as stated in the heading above, I also note that in part 4 of the form the use is described as a mixed use. Having inspected the appeal site, I am satisfied that it is a single planning unit and that it is in a mixed use, with one element of the mixed use for childminding and the other element as a dwellinghouse. I have, therefore, determined the appeal on the bases of an LDC sought for a mixed use of the appeal site as a dwellinghouse and for childminding.

Main Issue

4. Section 191(4) of The Town and Country Planning Act 1990 as amended (the 1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter

described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is, therefore, based on the facts of the case and judicial authority. I have seen the representations made by interested parties, some of which refer to the planning of the use of the property. For the avoidance of doubt, this the planning merits of the development (a use of the site in this case) are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a LDC was well founded.

5. There is no dispute that childminding has taken place at the appeal site since 2009. The Council acknowledge that a material change of use of the land occurred at some time prior to the submission of the LDC application¹. In dispute and, therefore, the main consideration in this case, is whether, on the balance of probabilities, the mixed use of the appeal site as a dwellinghouse and for childminding has been continuous for a period of ten years or more. The burden of proof is on the appellant. If the Council has no evidence itself, nor any from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal and refuse to grant the LDC, provided the appellant's evidence alone is sufficiently precise and unambiguous.

Reasons

6. The appellant has provided a number of documents to support her case, including a sworn statement in which she states that she has been a childminder since 2008, but was registered with Ofsted as a childminder and home child carer in February 2009. The evidence suggests that children have been cared for at the appeal site from this time. The appellant has provided copies of formal documentation, including letters from Ofsted showing the appellant's inclusion on the childcare register at the appeal site. Whilst none of this is disputed by the Council, it suggests that the evidence of the extent of the childminding use of the appeal site over the relevant 10 year period is not sufficient to demonstrate that the mixed use has been continuous over this period.
7. The appellant has attempted to demonstrate in her evidence the extent of the use over the relevant period by giving the number of children cared for and care providers employed at the site over 10 years. This evidence includes a table provided by the appellant with her LDC application recording children on her records (roll) and staff numbers over the relevant period². This table is referred to in the appellant's sworn statement and, as such, carries weight in this case in view of the sanctions that could be imposed should the statement contain false or misleading evidence³. In support of this evidence the appellant has provided letters from some of the parents of children who have been cared for at the appeal site over the relevant 10 year period⁴. A table has also been provided indicating children's attendance at the site, by family name, over the 10 year period, signed by parents of those children⁵.

¹ Paragraph 7.25 of the Council's appeal statement.

² Table submitted with the LDC application.

³ Perjury Act 1911.

⁴ Appendix 2 of the appellant's appeal statement.

⁵ Appendix 3 of the appellant's appeal statement.

8. Whilst I note that neither the letters nor the appendix 3 signed table account for all children included in the appellant's table submitted with the LDC application, the appellant suggests that she has not been able to contact all parents who have used her services. This is understandable. Indeed, I note that not all parents who provided a letter have been included on the signed table, and that some parents included on the table have not provided a letter. I also note that these separate pieces of evidence were prepared some 4 months apart, during which a new school year would have started where some families may have left the appellant's services and other joined. These factors may account for some of the discrepancies on the Council's table at appendix 1 of its statement. I also note that some of the letters refer to the childminding staff, supporting the appellant's suggestion that carers were employed at the appeal site.
9. I find the parents' letters and the signed table to be reliable, independent support for the appellant's account of the number of children at the site over the relevant 10 year period. Accordingly, I regard these pieces of evidence as corroborative, rather than inconsistent.
10. Notwithstanding the above, the Council has referred to the Ofsted inspection reports⁶ which are dated 2009, 2010 and 2016. It points to the number of children quoted in each as being well below those suggested by the appellant. The appellant has given reasons for the discrepancies, including that these reports 'capture a moment in time' and that the report does not include children over the age of 8. Indeed, it is acknowledged that older children are cared for at the site.
11. Having regard to the above, I do not find the appellant's evidence contradictory, and the Council's evidence is not sufficient to make the appellant's version of events less than probable. All things considered, it is more likely than not that the appellant's account of the number of staff employed and children cared for at the appeal site during the relevant 10 year period is accurate.
12. I now turn to consider whether the extent of the use indicated in the evidence is sufficient to demonstrate that the mixed use of the appeal site as a dwellinghouse and for childminding has been continuous for the relevant 10 year period in this case. In doing so I note that the table provided with the LDC application suggests that in 2009 there were 13 children cared for at the appeal site, with 11 children at the site at any one time, along with one full time and one part time member of staff. The number of children cared for at the site steadily increased over the 10 year period and peaks to 25 in 2018 (17 at any one time) and then 22 in 2019 (again, 17 at any one time), which is when the LDC application was made. The staff numbers also increased during the period, with 1 full time and 3 part time staff employed in 2019.
13. The Council suggest that childminding of up to 6 children at any one time at home is not usually regarded as resulting in a material change of use of a residential property. To my mind, whether or not a material change of use has occurred is a matter of fact and degree. The particulars of any case must, therefore, be considered in determining this.

⁶ Appendix 2 of the documents submitted with the LDC application.

14. The Council acknowledge that at least 10 children have been cared for at the site since 2009, but suggest that the days of attendance and period of attendance during the day has not been indicated. In this regard, I note that many of the parents who have provided a letter have indicated that they use or have used the child care service 5 days a week. Nevertheless, I acknowledge that not all children cared for at the site attended Monday to Friday. I can also see from the evidence, in particular the parents' letters, that siblings have been cared for at the appeal site. Child care has also been provided over the relevant 10 year period for pre-school children, in addition to school age children requiring school pick up and drop off.
15. The arrival and departure of staff at the site, as well as parents dropping off and picking up children would have generated trips to the site that would not ordinarily take place in a residential setting. Whilst children of school age may not be at the site for the whole day, the school run service provided by the appellant and her staff twice a day would have generated additional activity at the site. As for activity within the appeal site, at the site visit I saw that most of the ground floor of the appeal property was being used for the care of children, including the rear garden area. Areas were set aside for children to sleep and for feeding, as well as for both indoor and outdoor play.
16. Having regard to the activity within the appeal site that is likely to be associated with the childminding use, as set out above, it is more likely than not that a material change of use to the mixed use subject of this appeal would have occurred in 2009 as a result of 11 children being cared for at the site at that time⁷. In finding as I have, I acknowledge that some siblings may be cared for at the site and, therefore, dropped off and picked up together. I also acknowledge that not all 11 children may have been cared for at the site every day, for the whole day.
17. In addition to the above, as the numbers of both staff and children at the site through the remainder of the ten year period increase from those stated in 2009, I also find it more likely than not that the mixed use of the appeal site has been continuous for this ten year period.
18. I have found the appellant's evidence to be sufficiently precise and unambiguous. I have found no evidence sufficient to contradict or otherwise make the appellant's version of events less than probable. As such, and having regard to my findings above, there is no good reason to dismiss the appeal and refuse to grant the LDC. Accordingly, I conclude that the appellant has demonstrated that, on the balance of probability, the use of the appeal site for a mixed use as a dwellinghouse and for childminding has been continuous for a period of ten years or more and was lawful on the date the application was made.
19. In concluding as I have, I note the Council's suggestion that the LDC be granted on the basis of 'proof of maximum number of children attending the childminding business on anyone day'. The Council says that it wishes to 'avoid an unfettered use of the childminding business'.
20. The LDC is sought for a mixed use of the appeal site. This includes a use as a dwellinghouse which reflects the appellant's residence at the appeal site, with her family. Indeed, at the site visit I observed a family home, parts of which

⁷ The appellant's table submitted with the LDC application.

were also used for childminding. I am satisfied that the description of the use of the appeal site as a mixed use adequately reflects the two component uses of the site I observed at my visit, as well as the use that has occurred at the site during the relevant 10 year period.

21. I acknowledge that if the extent of the childminding use of the site were to increase, at some point this could result in an end to the mixed use where, for example, the dwellinghouse use would cease or a residential use might become ancillary to the childminding use. In these circumstances a material change in the use of the appeal site would occur. The LDC I intend to grant in this case would not relate to such a use.
22. I cannot determine within the parameters of this appeal what extent of the childminding use might bring about such a material change of use of the site. Should the childminding use intensify, it would be for the decision maker to determine, as a matter of fact and degree, whether a material change of use had occurred, having regard to all relevant factors, not just the number of children cared for at the site at that time. I do not, therefore, consider it appropriate in this case to refer to a maximum number of children at the site at any one time in the LDC I intend to grant.

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 use of the appeal site for a mixed use as a dwellinghouse and for childminding was not well-founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me in section 195(2) of the 1990 Act.

Decision

24. The appeal is allowed and attached to this decision is a certificate of lawful development describing the existing matters which are found to be lawful.

J Moss

INSPECTOR



Lawful Development Certificate

APPEAL REFERENCE: APP/G5180/X/20/3261484

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 19 June 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

It has been demonstrated that, on the balance of probability, the use of the appeal site for a mixed use as a dwellinghouse and for childminding has been continuous for a period in excess of 10 years and was lawful on the date the application for the lawful development certificate was made.

Signed

J Moss

Date: **11TH AUGUST 2022**

First Schedule

A mixed use as a dwellinghouse and for childminding.

Second Schedule

Land at 77 Cumberland Road, Shortlands, Bromley BR2 0PL.

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: **11TH AUGUST 2022**

by J Moss BSc (Hons) DipTP MRTPI

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Reference: APP/G5180/X/20/3261484

Scale: Not to scale.

