



Appeal Decision

Site visit made on 22 September 2022

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16TH NOVEMBER 2022

Appeal Ref: APP/G5180/C/21/3284493

Land at 210 Southover, Bromley BR1 4SE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Ms Ena Cassandra Purser against an enforcement notice issued by the Council of the London Borough of Bromley.
 - The notice was issued on 6 September 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from a residential use to a mixed use of residential and the operation of a childcare nursery.
 - The requirement of the notice is to: Cease the unauthorised use of any part of the Land for use as a childcare nursery as described above.
 - The period for compliance with the requirement is three months after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
-

Summary Decision: The appeal succeeds and the enforcement notice is quashed.

Ground (b) and Ground (c)

1. Having regard to the allegation as made in the enforcement notice and the appellant's response to this in her appeal, it is more logical to deal with the ground (b) and ground (c) appeal together in this case.
2. The appeal on ground (b) is that the matters alleged in the enforcement notice, which appear to the Council to constitute the breach of planning control, have not occurred. To succeed on ground (c), the appellant must demonstrate that, on the balance of probability, the matters alleged in the notice do not constitute a breach of planning control. In both cases the burden of proof is on the appellant.
3. The allegation is of a material change of use of the property from a residential use to a mixed use of residential and the operation of a childcare nursery. A mixed use is one where two or more primary uses occur within a single planning unit, but where it is not possible to say that one is incidental or ancillary to the other or where, as a matter of fact and degree, the uses are not physically and/or functionally separated.
4. There is clearly a residential use of the appeal site. As for the other component of the mixed use, there is no dispute that the property is used for the purposes of providing childcare. Although apparently now confined to the garden and

the outbuilding, I see from the evidence that children have also been cared for in the main dwelling. I also note from evidence that the garden is used by the occupiers of the dwelling, as well as providing outdoor play space for the children cared for at the site. Children are primarily cared for in the outbuilding and I note the Council's suggestion that the building is only being used for the care of children. However, there is evidence of the use of the outbuilding as, for example, a gym and home office, both of which I saw at the site visit. I have no reason to conclude that such uses would not be incidental to the residential use of the site.

5. Having regard to the above, I conclude as a matter of fact and degree that there is a mixed use of the appeal site for a residential use and a use for the care of children. In concluding as such, I do not consider myself to be in disagreement with either party. After all, the allegation is of a mixed use of the whole of the appeal site (i.e. the planning unit), rather than the sub division of the planning unit and use of part of it for the purposes of childcare. However, I acknowledge that the use alleged in the notice includes as a 'childcare nursery', rather than a use for the purposes of childcare. Indeed, the appellant objects to this in the description used in the notice. She says that she is a childminder and she draws a distinction between that and a nursery.
6. In her personal statement the appellant sets out what she considers to be the difference between child minding and a nursery. This includes the type of premises used, whether children are cared for in separate age groups and in separate rooms, the number of employees providing care, and the number of children cared for. She also points to the means of OFSTED registration. For childminders only the individual would be registered and that individual can only care for up to 6 children, whereas a nursery would be registered differently, and there would be no limit on the number of employees or children cared for.
7. Whilst I have had regard to the above, it is clear that a premises used for either the purposes of childminding or as a nursery would involve the care of children. Save for the means of OFSTED registration, it would appear that the principal differences between the two would be the nature, scale and intensity of the use. I acknowledge the parties views on the words used to describe the childcare use of the appeal site. However, it is the nature, scale and intensity of the childcare use that are important to the consideration of whether or not there has been a **material** change in the use of the appeal site for which planning permission is required.
8. In this regard, as I note above, the appellant cares for no more than 6 children at the site. Although I have seen reference in evidence to an assistant, there is no suggestion that any other registered child minders have looked after children at the site, such that the number of children cared for has been greater than 6. Indeed, it is suggested that between 3 and 6 children are cared for at the site, which is not disputed by the Council.
9. I acknowledge that 6 children being cared for at the site might generate some noise, particularly when the children play in the garden. There would also be comings and goings when, for example, children are taken from the site for play groups, when children are picked up and dropped off, or when children are taken to or picked up from school. However, the dwelling at the appeal site is a family sized home occupied by a household with children. Having considered

the likely comings and goings of this household, the additional noise and disturbance resulting from the use of the site for the care of children is unlikely to be material. I conclude as such having regard to the limited number of children cared for at the site and that care is only provided during daytime hours (the appellant says that this is between 8am to 6pm).

10. I have had regard to the reference in the third party representations to the traffic generated by the childcare use. However, the appellant says that parents pick up from the site over the hour between 5pm and 6pm; morning drop offs are likely to be similarly staggered. The appellant also says that she picks some children up from their homes. In addition to this, the interested party also states that Hillcrest Road is a cul-de-sac of over 100 homes. In this regard I can see that all traffic to and from these homes would pass the appeal site (the appeal site sits on the corner of Southover and Hillcrest Road). Having regard to the likely levels of traffic movements throughout the day passing the appeal site, I can only conclude that the additional traffic associated with the use of the site for the care of 6 children is unlikely to be material.
11. The site benefits from a side entrance along Hillcrest Road, which is not unusual for a corner property. Whilst this may be the only entrance used in association with the childcare use, the appellant also refers to the use of this entrance by her and members of her family. The presence and use of the side entrance is not, therefore, an indication that the change of use in this case is a material change.
12. Bringing this all together, I have concluded that as a matter of fact and degree there has been a change of use of the site from a residential use to a mixed use comprising a residential use and a use for the care of children. Having regard to all of the above and the particular circumstances of this case, I conclude that 'the operation of a childcare nursery' does not correctly describe the childcare element of the mixed use. As such, the matter alleged in the enforcement notice, which appears to the Council to constitute the breach of planning control, has not occurred. The appeal on ground (b) should, therefore, succeed to that extent.
13. The childcare element of the mixed use is best described as a use for the purposes of childcare. I shall, therefore, correct the enforcement notice¹ to make reference to such a use. Having regard to the case made by each party in this appeal, as well as the grounds of appeal made, I am satisfied that no injustice would be caused with such a correction.
14. As for the ground (c) appeal, I find the change of use of the appeal site from a residential use to a mixed use for residential and a use for the purposes of childcare is not a material change. It is more likely than not that the childcare element of the mixed use in this case is ancillary or incidental to the residential use. Accordingly, the matter alleged in the enforcement notice, once corrected as intended, does not on the balance of probability constitute a breach of planning control. For this reason, the appeal on ground (c) should succeed.

¹ The powers transferred to Inspectors under section 176(1)(a) of the 1990 Act include to correct any defect, error or misdescription in the enforcement notice or, under section 176(1)(b), to vary the terms of the enforcement notice.

Conclusion

15. From the evidence before me, I conclude that the alleged breach of planning control set out in the enforcement notice is incorrect. The appeal succeeds on ground (b) to that extent.
16. On the balance of probabilities, the appeal on ground (c) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control.
17. The enforcement notice will be corrected and quashed. In these circumstances, the appeal on ground (a) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decision

18. It is directed that the enforcement notice is corrected by the substitution of the words 'the operation of a childcare nursery' with the words 'a use for the purposes of childcare' in part 3.
19. Subject to the correction, the appeal is allowed and the enforcement notice is quashed.

J Moss

INSPECTOR