



Appeal Decision

by Jessica Graham BA (Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 20 March 2023

Appeal Ref: APP/K3605/X/22/3298972

63 Queens Road, Hersham, WALTON-ON-THAMES, Surrey, KT12 5NF

- 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 Mr D Hartnett against the decision of Elmbridge Borough Council.
- The application ref 2022/0301, dated 2 February 2022, was refused by notice dated 4 May 2022.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The proposed development for which a certificate of lawful use or development is sought is change of use from day nursery (Class E) to Office (Class E).

Summary of Decision: the appeal is dismissed

Procedural matters

1. Local residents have expressed concern about the potential consequences of issuing the requested LDC. It is therefore worth clarifying here that planning matters (such as the need for additional parking spaces, or compliance with national and local planning policies) can have no bearing on my determination of this appeal: rather, my assessment is confined to the narrow issue of deciding whether or not the proposed use would be lawful if begun on the date of the LDC application.¹
2. In the course of the appeal, the Appellant submitted copies of Ofsted reports which had not been provided to the Council at the application stage. The Council has had the opportunity to comment on these documents, and I have taken them into account in my determination of the appeal.
3. In light of the matters at issue, it was not necessary to conduct a site visit.

Background

4. The building on the appeal site is the former Trinity United Reform Church, which has more recently been used as a day nursery. The Ofsted reports provided by the Appellant establish that the Fairmile Montessori School was operating from the appeal site on 25 January 2007, providing day care for children aged two to five, and that this use continued through to 13 September 2017. There is no dispute that the use of the appeal site as a day nursery ended in 2017, and it has remained vacant ever since.

Analysis

5. The starting point is to determine the lawful use of the appeal site as at 2 February 2022, the date of the LDC application.

¹ Per S.192(2) of the Town and Country Planning Act 1990 (as amended).

6. It is common ground that the original lawful use of the appeal site was as a church. It was subsequently used as a day nursery but – and this is important – at a time when day nurseries and churches were part of one and the same Use Class². The legislation provides that changes between uses that are within the same Use Class should not be taken to involve development of land: this means that no grant of planning permission is required for any such change.
7. Use of the premises as a day nursery ceased in 2017, well before the 2020 amendments to the UCO which placed churches and day nurseries in separate Use Classes³. So throughout the period during which the appeal site was used as a day nursery, that use was authorised by the relevant legislation: there was no development, and so no need to obtain planning permission. Put another way, there was no point during the period of use as a day nursery at which that use constituted a breach of planning control, against which the Council could have taken enforcement action.
8. Following the 2020 amendments to the UCO, which took effect from 1 September 2020, use as a day nursery was placed in a different Use Class to use as a church. After that date, use of the appeal site as a day nursery could, had it amounted to a material change of use, have required an express grant of planning permission. However, the evidence is clear that no such use was made of the appeal site any later than 2017.
9. As at 2 February 2022, then, the lawful existing use of the appeal site was use as a church. No grant of planning permission for any alternative use had been implemented, and no material change of use had taken place which had subsequently acquired immunity from enforcement.⁴
10. As discussed above, by 2 February 2022 the UCO no longer operated to provide that changes between use as a church and use as a day nursery “should not be taken to involve development”. The fact that churches and day nurseries were once included in the same UCO Use Class does not mean that a change from one to the other cannot be a material change of use, such as would amount to development requiring planning permission. The question of whether or not there is a material change of use will be a matter of fact and degree.
11. The use of the appeal site as a day nursery would have a number of significant differences from its existing lawful use as a church. The pattern of attendance for a day nursery would generally be weekdays rather than weekends and evenings, and this would be reflected in different quantities and concentrations of vehicle and pedestrian movements. Compared to use as a church, the levels of noise and disturbance generated by a day nursery would likely be greater during traditional working hours, as opposed to outside traditional working hours. In my judgment, these differences in character indicate that as at 2 February 2022, the use of the appeal site as a day nursery would have amounted to a material change of use from its existing lawful use as a church. This means that the use of the appeal site as a day nursery on that date would not have been lawful without a grant of planning permission. No such planning permission was sought or issued.

² As set out in The Town and Country Planning (Use Classes) Order 1987 (“the UCO”).

³ The Town and Country Planning (Use Classes)(Amendment)(England) Regulations 2020

⁴ By operation of S.171B(3) of the 1990 Act, no enforcement action may be taken against this type of material change of use after the end of the period of ten years beginning with the date of the breach.

12. The appeal site, then, could not lawfully have been used as a day nursery at the date of the LDC application. It follows that it does not fall within the provisions of the UCO which hold that a change of use from "day nursery" to "office" (being uses that are now both within the same Use Class) should not be taken to constitute development.
13. For the avoidance of doubt, it is worth noting that just because two uses are in separate Use Classes, it does not automatically follow that a change from one to the other will constitute a material change of use. Again, that will be a question of fact and degree. However, the proposed "office" use of the appeal site is likely to be significantly different in character to its lawful use as a church. Premises operating as offices would generally be occupied and in use during working days, rather than at weekends and on evenings. This would generate different patterns and concentrations of vehicle and pedestrian movements, including visitors and deliveries, which would in turn give rise to different patterns and levels of noise and disturbance. The proposed change to office use would, then, amount to a material change of use, such as would constitute development requiring planning permission.
14. Drawing all of this together, I find that the lawful use of the appeal site, as at the date of the LDC application, was as a church. The appeal site could not lawfully have been used, on that date, as a day nursery. It could not therefore benefit from the UCO provisions which now operate to permit a change from day nursery to office use, without the need to apply for planning permission.

Conclusion

15. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a LDC in respect of change of use from day nursery (Class E) to Office (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.

Formal decision

16. The appeal is dismissed.

Jessica Graham

INSPECTOR