The Planning Inspectorate

Appeal Decision

Site visit made on 12 October 2022

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 9 May 2023

Appeal Ref: APP/P4225/C/22/3297999
Land known as 415 Birch Road, Wardle OL12 9LH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended).
- The appeal is made by Mr Edward Smethurst, Prosperity Law, against an enforcement notice issued by Rochdale Metropolitan Borough Council.
- The notice was issued on 22 March 2022.
- The breach of planning control as alleged in the notice is, On 30th October 2019 planning permission reference 19/00536/FUL was granted for 'Proposed conversion of existing dwelling to Children's day care centre including the alteration of fenestration, the creation of outside play areas, installation of fencing and four parking spaces.' Condition 5 of this planning permission states: 'The nursery shall not be brought into use until four off street parking spaces, as shown on drawing no. 4 Revision E (Proposed Site Plan) have been provided and made available for the parking of cars. The parking spaces shall be retained thereafter.' Reason: In the interests of highway safety and to ensure that the site is provided with sufficient off street parking provision and to accord with policy DM1 of the adopted Rochdale Core Strategy and the National Planning Policy Framework.' It appears to the Council that the condition has not been complied with and the nursery is operating in breach of the condition because the premises are in use as a nursery and the approved car parking as required by planning condition has not been provided.
- The requirements of the notice are to: Either:
  (A) (i) Cease the use of the premises as a children's day care centre; and (ii) Remove the infill walls and glazing from the infill extension to the north elevation of the building and return the ground floor fenestration detailing in the north elevation to that shown in the attached annotated image 001; and (iii) Remove the closeboard timber fence and gate from the north, east and south boundaries of the site; and (iv) Remove all materials and items resulting from compliance with requirements (i), (ii) & (iii) from the Land.
  OR
  (B) (i) Provide the four off street car parking spaces in strict accordance with the plans approved under planning permission reference 19/00536/FUL (drawing no. 4 Revision E (Proposed Site Plan), appended to this Notice); and retain the car parking spaces thereafter; and (ii) Remove all materials and items resulting from compliance with requirements (i) from the Land.
- The periods for compliance with the requirements are: For A steps (i) – (iv) within six months OR For B steps (i) and (ii) within two months.
- The appeal is proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended.

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

Application for Costs

1. An application for costs was made by Mr Edward Smethurst, Prosperity Law, against Rochdale Metropolitan Borough Council. This application is the subject of a separate Decision.

Procedural Matters

2. Following the submission of the appeal, the appellant confirmed that they wished to add ground (a) [1], namely that planning permission ought to be granted for the matters stated in the notice. The Inspectorate's validation letter dated 3 May 2022 confirmed that, in completing the appeal form, the appellant had not stated or gave any indication that they wished to appeal ground (a). Additionally, the request to add ground (a) was received after the effective date on the Enforcement Notice (the notice). Therefore, ground (a) could not be added and I have determined the appeals on grounds (c) and (f) as stated in the appeal form.

3. Representations have been received from interested parties alleging effects to highway safety and harm to their living conditions arising from the development's lack of compliance with condition 5. In response to these claims and the Council's reasons for issuing the notice, the appellant challenges the validity of the allegations and highlights the lack of need for the required parking spaces. Nevertheless, in the absence of an appeal on ground (a), I am not able to consider the planning merits of the development.

4. The appellant has raised a number of matters in their statement which they assert demonstrate unreasonable behaviour on the Council's part. These are not within the remit of my considerations in determining the appeals under section 174(2) (c) and (f) of the 1990 Act as amended. However, I have had regard to them in my determination of the application for costs.

5. The site visit had been arranged to be accompanied by both main parties. However, at the event, the Council did not attend. Nevertheless, I was able to carry out the site visit on an access required basis. I am satisfied that no parties' interests were prejudiced by me taking this approach.

Background

6. Application Ref: 19/00536/FUL for 'conversion of existing dwelling to Children's day care centre including the alteration of fenestration, the creation of outside play areas, installation of fencing and four parking spaces' was granted planning permission, subject to conditions, on 30 October 2019. The provision of car parking spaces at the site was considered as part of the assessment and determination of the application, with consultation comments on the proposal provided by the Council's Highways and Engineering team.

7. On this basis, condition 5 relating to the provision of parking spaces, was included as part of the grant of planning permission. An application to remove condition 5, Application Ref: 21/00046/VRCON, was refused by the Council on 5 March 2021 on the grounds of highway safety and residential amenity. A further application to vary condition 5 with a revised parking layout, including a shared parking and play area, Application Ref: 21/00610/VRCON, was refused by the Council on 21 July 2021 for the same reasons.

[1] Email to the Planning Inspectorate from the appellant dated 4 May 2022.

8. At the time of my site visit, the land which forms the car parking area shown on drawing no. 4 Revision E, Proposed Site Plan (Dwg 4 Rev E), was covered in artificial grass. A moveable, low, timber, picket fence delineated the rectangular space comprising the playground/car parking area. The car parking area was bordered at the side by a close-boarded timber fence and at the front by a combination of a close-boarded timber gate, low brick wall with a post and rail timber fence and shrubbery. From the information submitted by both parties, I am satisfied that this reflects the situation on the date that the notice was issued.

Appeal on ground (c)

9. The appeal on ground (c) is that those matters (if they occurred) do not constitute a breach of planning control. On this ground of appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

10. The Council issued the notice because it appeared to them that there had been a breach of planning control within paragraph (b) of section 171A(1) of the 1990 Act as amended, namely, failing to comply with any condition or limitation subject to which planning permission has been granted.

11. Condition 5 states: 'The nursery shall not be brought into use until four off street parking spaces, as shown on drawing no. 4 Revision E (Proposed Site Plan) have been provided and made available for the parking of cars. The parking spaces shall be retained thereafter.' The reason for the condition is: 'In the interests of highway safety and to ensure that the site is provided with sufficient off street parking provision and to accord with policy DM1 of the adopted Rochdale Core Strategy and the National Planning Policy Framework.'

12. The thrust of the appellant's case is that, prior to the property's use, at the date of the issue of the notice and thereafter, the requirements of condition 5 as drafted have been complied with. In this regard they state that the four off street parking spaces (the parking spaces) as shown on Dwg 4 Rev E, have been 'provided' and that, with the movement of any play equipment and the dividing low picket fence, they are 'available' and capable of use for the parking of cars as and when required.

13. This is challenged by the Council, which state that the premises are in use as a nursery and that the parking spaces required by condition 5 have not been provided. Reference is made by the Council to photographs taken during site visits to the property on 16 October 2020 and 14 March 2022, which show that the area where the parking spaces should be laid out, is part of the outdoor play area and not used for car parking.

14. There is no dispute between the parties that, at the date of the issue of the notice, the use of the site as a nursery had commenced, and there is nothing before me which would lead me to a different view. It is also clear that condition 5 required its compliance prior to the nursery being brought into use. The crux of the appeal is whether, as required by condition 5, the parking spaces as shown on Dwg 4 Rev E, were provided and made available for the parking of cars prior to the property being brought into use, and have been retained thereafter.

15. In considering this issue I have had regard to ordinary definitions of the words 'provide' and 'available'[2]. 'Provide is to 'make available for use; supply', and 'available' is 'able to be used or obtained; at someone's disposal'.

16. The appellant declares that they complied with the condition as drafted prior to the property's use. However, this assertion is undermined by the appellant stating that the relocation of a lamppost, lowering of the kerb and fitting of large gates to make the parking spaces available were carried out during the investigation by the Council's Enforcement Officers, which took place after the use of the nursery had commenced. There is nothing before me which illustrates that, prior to these works being carried out, the site was capable of making the parking spaces as shown on Dwg 4 Rev E 'available for use'. Additionally, given the presence of the low brick wall with timber fence and shrubbery at the front of the site, I cannot be certain that, at the date of the issue of the notice, the site was able to 'make available for use' the parking spaces as shown on Dwg 4 Rev E and therefore be in compliance with condition 5.

17. It may be the case that, as asserted by the appellant, the play equipment and portable low timber picket fence can be easily moved 'in a matter of minutes' to allow cars to park in the parking spaces. However, the presence of artificial grass, a fixed timber fence and closed/locked timber gate, do not indicate that the parking spaces are 'available for use' or 'able to be used' by members of staff, customers or visitors to the nursery. Furthermore, no substantive information has been provided which demonstrates that if a member of staff, customer or visitor wanted to use the parking spaces, there is a system or process in place whereby the parking spaces could be 'made available' to them when attending the nursery. To my mind, if it is not clear or apparent to staff, customers or visitors that the parking spaces are 'available' for use then, by definition, they have not been 'provided'.

18. Moreover, even if I accepted that the appellant 'provided' the parking spaces in line with Dwg 4 Rev E prior to the property being brought into use and that they are currently available to use, which from the evidence before me I do not, this is only at particular points in time. Given the reason for imposing condition 5, it is reasonable to conclude that the parking spaces are required to be 'available for use' at all times during the operation of the nursery. On this basis, I am also not satisfied that the parking spaces have been 'retained thereafter'.

19. That the Council is alleged to have stated that, in order to comply with condition 5, the parking spaces must be made available but there is no obligation to use them unless this becomes necessary, is not relevant to an assessment of whether condition 5 has been complied with. In any event, I have found that the parking spaces have not been 'provided'. Similarly, that there is an area of land adjacent to the nursery which has been tarmacked by the appellant and is available for customers and visitors to the nursery to park on, is not pertinent to the appeal on ground (c).

20. Given the different daily routines and operations of a nursery and a primary school, I do not consider their respective associated parking requirements to be comparable. In any event, it is not for me to consider the necessity or otherwise of condition 5 as part of this ground of appeal.

[2] Oxford Languages Definition.

21. The implications of the requirements of condition 5 in relation to the size and form of the children's play area, again, concern the planning merits of the development and are not within the scope of this appeal.

22. I conclude that the matters stated in the notice do constitute a breach of planning control, in that as required by condition 5, the parking spaces as shown on Dwg 4 Rev E, were not provided and made available for the parking of cars prior to the property being brought into use and have not been retained thereafter. Accordingly, the appeal on ground (c) fails.

Appeal on ground (f)

23. The appeal on ground (f) is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.

24. When an appeal is made on ground (f), the starting point is to identify the purposes of the notice. Section 173(4) of the 1990 Act as amended sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or (b) remedying any injury to amenity which has been caused by the breach.

25. In this case the requirements of the notice are to either: (A) (i) Cease the use of the premises as a children's day care centre; and (ii) Remove the infill walls and glazing from the infill extension to the north elevation of the building and return the ground floor fenestration detailing in the north elevation to that shown in the attached annotated image 001; and (iii) Remove the closeboard timber fence and gate from the north, east and south boundaries of the site; and (iv) Remove all materials and items resulting from compliance with requirements (i), (ii) & (iii) from the Land; Or (B) (i) Provide the four off street car parking spaces in strict accordance with the plans approved under planning permission reference 19/00536/FUL (drawing no. 4 Revision E (Proposed Site Plan), appended to this Notice); and retain the car parking spaces thereafter; and (ii) Remove all materials and items resulting from compliance with requirements (i) from the Land.

26. The purpose of the notice must therefore be to remedy the breach of planning control. Having regard to section 173(4)(a) of the 1990 Act as amended, this can be achieved in two ways, both of which are allowed for in the notice under Option A and Option B.

27. I note the appellant's comments that Option A is an 'over zealous approach' to achieve the purposes of the notice. However, Option B is the minimum requirement, and the alternative of Option A is provided in case the appellant does not want to continue the use with the parking spaces intact. I am also aware of the appeal decision cited by the Council in its statement which accepts

and endorses this approach[3]. On this basis, I do not consider the requirements of the notice to exceed what is necessary.

28. In relation to Option B, the appellant highlights that the Council's use of the words 'in strict accordance' as opposed to 'in accordance' is a misinterpretation of the condition's requirements and outside of its remit, as well as a more onerous requirement than is already there. Whilst I note the Council's assertion that this is merely emphasis, I am of the opinion that it is not in line with the requirements of condition 5 as worded in the consented planning permission. To this extent, I consider that, given the purpose of the notice, the inclusion of the word 'strict' in Option B(i) exceeds what is necessary to remedy the breach of planning control.

29. Consequently, I conclude that step (i) of Option B as required by the notice to be taken exceeds what is necessary to remedy the breach of planning control. The appeal on ground (f) succeeds to that extent and I will vary the notice accordingly. Having regard to section 176(1) of the 1990 Act as amended, I am satisfied that no injustice would be caused by varying the notice in this respect.

Formal Decision

30. It is directed that the enforcement notice is varied by:

    - In paragraph 5, Option B, sub-paragraph (i) of the notice, the deletion of the word 'strict'.

31. Subject to the variation, the appeal is dismissed and the enforcement notice is upheld.

Conclusion

32. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation.

F Cullen

INSPECTOR

[3] Council's Appeal Statement, Appendix 4: Appeal Decision Ref: APP/J2373/C/14/2225020.