



Appeal Decision

Inquiry Held on 13 and 14 February 2024

Site visit made on 13 February 2024

by D Moore BSc (HONS), MCD, PGDip, MRTPI, IHBC

an Inspector appointed by the Secretary of State

Decision date: 23/02/2024

Appeal Ref: APP/Z3635/X/23/3331411

Roslin, Rookery Road, Staines-Upon-Thames, Surrey TW18 1BT

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development.
 - The appeal is made by Roslin Educational Limited against the decision of Spelthorne Borough Council.
 - The application Ref 23/00507/CLD, dated 20 April 2023, was refused by notice dated 8 August 2023.
 - The application was made under section 191(1)(c) of the 1990 Act as amended.
 - The use for which a certificate of lawful use or development is sought is "failure to comply with condition 2 of 09/00277/COU in respect to pupil numbers".
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development (LDC) describing the matter constituting a failure to comply with a condition which is considered to be lawful.

Costs

2. An application for costs was made by Spelthorne Borough Council against Roslin Educational Limited. This application is the subject of a separate decision.

Preliminary Matters

3. Oral evidence on matters of fact was given under affirmation.
4. In this type of appeal, the onus of proof is firmly upon the appellant. The relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under s195. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
5. I note further evidence has been submitted as part of the appeal that was not provided with the application. It is open to me to consider any such evidence because s195 of the 1990 Act refers to the 'refusal' being well-founded, which means the local planning authority's decision, not the reasons for that decision. I have, therefore, taken account of the further evidence.

Background and Main Issue

6. On 15 June 2009, planning permission was granted for “change of use from residential at first floor level to nursery day care facility” (Ref 09/00277/COU). This was subject to a condition which states - “the maximum number of children at the nursery at any one time shall not exceed 30 children, as approved in planning permission SP/92/00562”.
7. If a condition has been breached continuously for any ten-year period, without significant interruption, the breach will be lawful thereafter, unless that lawful right has been lost through some event sufficient to terminate it. However, the condition would not be expunged. That would not correspond to the continuing breach and would unjustifiably remove any limit on the number of children.
8. Therefore, if the appellant can show that there has continued to be more than 30 children at the nursery at any one time for a ten-year period, they are entitled to an LDC legitimising the breach of condition to the extent of allowing up to a certain number of children at any one time. In effect, the condition restricting the number of children continues in force, but with a revised ceiling of the total number of children allowed.
9. I must decide whether the failure to comply with the condition subject to which planning permission was granted is lawful. The main issue is whether the Council’s refusal to grant an LDC was well-founded.

Reasons

10. The appellant has submitted evidence for the ten-year period immediately prior to the submission of the LDC application on 20 April 2023. This comprises a spreadsheet showing daily attendance at the nursery for each of the five weekdays that it operates, excluding public holidays and the closure for the Christmas period. Mr Celino explained that the nursery uses a computer system to keep records of the sessions provided. Data was extracted from this system and analysed to determine the occupancy for each day of operation over the ten-year period between 19 April 2013 and 20 April 2023.
11. The nursery operates morning and afternoon sessions, which the parents can book in advance. Parents register their children with the nursery and then choose on which days and times to send them. The nursery offers flexible session options and parents have the choice of full-day sessions, or the morning session 8am to 1pm or the afternoon 1pm to 6pm. The data is thus shown per session¹. The appellant has also provided an analysis showing averages by week, month and year² and a spreadsheet showing the number of days in breach of the condition³.
12. Mr Celino accepted that the data does not show actual occupancy but relates to the bookings made by parents. If a child has been booked to attend a particular day or session but does not attend due to illness for example, this would not be recorded in the dataset but would be held on a paper record. Similarly, there may be instances where a child is not booked for a session, but the parents’ plans change and the child attends at short notice. It was not

¹ GCDA 1 Daily Attendance.

² GCDA 2 Occupancy by week/month/year.

³ GCDA 3 Breach by week/month/year.

considered practical to provide the paper records to the Inquiry due to the volume involved and the related difficulty in analysing data.

13. Consequently, there are some acknowledged inaccuracies in the data presented. Despite this, I am satisfied that the data can be relied upon for the purposes of this appeal. The percentage variation is likely to be very small over the relevant period and such small numbers would not have a significant effect on the matters at issue.
14. The Council argued that there are many occasions where the number of children attending the nursery fell below 30. Over the ten-year period, there is a pattern of attendance dropping to 30 or below on Fridays and Mondays, either in the morning or afternoon or over both sessions, particularly in August and September. There are also the implications of the COVID-19 pandemic, which affected operations at the nursery, including a period of closure for just over ten weeks from 23 March 2020 to 2 June 2020.
15. Taking this period of closure first, it was agreed that it is not possible to breach the condition when the nursery is not operating at weekends or public holidays. The closure of the nursery was due to the national lockdown imposed by the UK Government. It follows that this period of non-operation cannot be considered an interruption to continuous use, having regard to the principles established in *Thurrock*⁴.
16. In *Thurrock*, it was held that a use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. An enforcement notice can be lawfully issued even if, at the moment of issue, the activity objected to is not going on, for example, at a weekend or a factory summer holiday. If a use that is taking place in breach of planning control is ceased, the immunity 'clock' would need to start again. There will be "borderline cases" when it is not clear whether the land is being used for the objectionable activity. These will be a matter of judgement for others. *Thurrock* was applied in *Swale*⁵. The critical question is whether the use was continuous, not whether the building was available or intended for a particular use.
17. The period in which the nursery was operating normally amounts to 498 weeks. It was agreed that there have been 865 sessions, either morning or afternoon, where the attendance numbers were 30 or below and 222 whole days when attendance levels were below 30. However, it is important to consider the pattern of compliance, its incidence, and the level in comparison with periods of non-compliance. Crucially, the sessions of compliance were distributed throughout the relevant period. As explained, the sessions where the number of children was 30 or below were typically on Fridays and Mondays across the late summer months and at the start of the new academic year. This occurs due to lack of demand during these periods, which arises from the nursery use. The appellant pointed out that there was not a single week when the condition was not breached on at least three out of five days.
18. It is apparent from *Thurrock*, *Swale* and *North Devon*⁶ that the test of whether the local planning authority would have been able to take enforcement action

⁴ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226.

⁵ *Swale BC v FSS & Lee* [2005] EWCA Civ 1568.

⁶ *North Devon DC v FSS & Stokes* [2004] EWHC 578 (Admin).

during the immunity period is central to a decision on whether a lawful right has accrued. The key principle is that time does not run for the purposes of s171B during periods when the local planning authority would be unable to take enforcement action because the breach of planning control has ceased. It is for that reason that a breach of planning control must continue throughout the immunity period. If a breach of condition ceases the clock stops. If the condition is breached again a fresh breach of planning control occurs and the clock starts again. It is not permissible to add the period of one breach to that of a subsequent breach, if as a matter of fact and degree they are separate breaches (*Nicholson*⁷).

19. I am not persuaded that the daily or half-daily periods in which the nursery was operating in compliance with the condition would mean the Council could not have taken enforcement action during the immunity period. The dips in occupancy are similar to the normal fluctuations that are incidental to the operation of the nursery, in the manner described in *Westminster*⁸. In that case, an LDC was sought for the use of a defined area of pavement in front of a restaurant for the placing of tables and chairs in connection with the restaurant. The use only occurred when the restaurant was open, and even then the amount of furniture fluctuated. The Inspector found that the use had been continuous notwithstanding these temporary interruptions, and the Court upheld this decision.
20. The Council maintained that the wording of the condition "at any one time" means that if occupancy fell to below 30 at any point during the relevant period, whether morning or afternoon, then this would amount to a fresh breach. The example was used that if the Council had attended on one or more of the 865 sessions where occupancy was in compliance with the condition, it would have been unable to take enforcement action.
21. A fact and degree assessment has to be made on whether any interruptions would result in a fresh breach. Had the Council investigated the breach, it would have been apparent that there was a regular pattern in which the condition was being breached for the majority of the time on a weekly basis. In contrast, the periods of compliance were intermittent and relatively limited.
22. If an enforcement notice had been issued in respect of the failure to comply with the condition, and this had been subject to an appeal on ground (b) that the matters alleged had not occurred as a matter of fact, then I very much doubt that any such argument would withstand scrutiny. It would not be justifiable to claim that the breach of condition had not occurred because the nursery was operating in compliance with the condition, due to a lack of demand on certain days or part days of the week, at particular times of the year.
23. The Council relied on *Nicholson*, which was concerned with a refusal of an LDC relating to non-compliance with an agricultural occupancy condition. The dwelling was initially occupied in compliance with the condition. Then it was unoccupied for seven years before being occupied in breach of the condition for the next seven years. For the following four years leading up to the date of the application the house was unoccupied while extensive works were carried out.

⁷ *Nicholson v SSE & Maldon DC* [1998] JPL 553.

⁸ *Westminster CC v SSCLG* [2013] EWHC 23 (Admin).

24. Mr Robin Purchas QC (sitting as a Deputy High Court Judge) rejected the claimant's argument that it sufficed for her merely to show that the breach had occurred more than ten years before the date of the application. It is highly pertinent that because the breach of condition had ceased after seven years, the ten-year time limit had never been satisfied. That, in itself, was fatal to the claim because the breach had not continued for at least ten years.
25. In contrast, this is a case where the breach has occurred throughout the immunity period, subject to short periods of a day or half-day when there was compliance with the condition. During the relevant period, I consider the Council would have been able to take enforcement action. This is because the breach was continuing throughout, during periods of normal operation. In my opinion, the short periods where occupancy was at 30 or below did not amount to discontinuance of the offending activity bringing the breach to an end. Overall, I find the periods of non-compliance did not amount to separate breaches as a matter of fact and degree.
26. I shall now consider the period when the nursery was open but operating under restrictions due to the pandemic. From 3 June to 31 July 2020, the nursery was required to operate in classroom 'bubbles' to minimise contact. During this period of around nine weeks, attendance was consistently at 30 children or fewer. The effects of the pandemic were unusual, and businesses were impacted in various ways. The nursery was not able to operate at capacity due to the restrictions which it was obliged to follow, despite it being open for business and technically the condition could have been breached.
27. However, this represents a fraction of the relevant period at nine weeks out of a total of 498. *Basingstoke*⁹ reinforced the need to focus on whether there has been a continuous breach of condition, rather than significant breaks in occupation. That was a case where a substantial period of non-occupation for refurbishment did not bring the breach of condition to an end.
28. The nursery was operating in compliance with the condition for a relatively short period, due to matters outside of its control. It continued to offer a service to parents and there is nothing to suggest that the breach of condition would not resume once restrictions were lifted, which is what happened. In the circumstances, I do not agree the bubble period can be considered a significant interruption.
29. The Council relied on *Miles*¹⁰ in support of its case, but I consider the facts of this matter to be distinguishable. In *Miles*, the breach in question was alleged to be use for motorcycle racing. That use was suspended for a period of some 12 to 18 months, because of the foot and mouth outbreak. This was found to be an interruption of such significance that it stopped the clock for the purposes of immunity from enforcement action. The length of time when the offending activity was not taking place amounted to a relatively large part of the relevant period, which is not the case here.
30. Following the bubble period, the nursery continued to be subject to Government restrictions at various times throughout 2020 and 2021. Between August 2020 and November 2020, the afternoon sessions were usually compliant with the condition. Over the same period, the occupancy exceeded

⁹ *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 (Admin).

¹⁰ *Miles v The National Assembly for Wales and Caerphilly BC* [2007] EWHC 10 (Admin).

30 children on three mornings each week. This general pattern continued into December although afternoon occupancy was steadily increasing. From December 2020 through to March 2021, it was the norm for attendance to be lower on Mondays and Fridays.

31. The Council's position was that each and every time attendance fell below 31, it amounted to a significant interruption. However, I do not accept this. As explained, during the periods of lowest occupancy the condition was still breached on three mornings each week. It could not be argued successfully that the breach had not occurred due to compliance on certain days or half-days. The pattern is one of a continuous breach, and the short periods of compliance cannot be considered significant, having regard to *Thurrock* and *Basingstoke*.
32. I note the comments from a neighbour who queries the appellant's version of events on the basis of their own observations. However, the claims that the nursery was operating in accordance with the condition relate to the period during the pandemic, which I have considered above.
33. I find that the appellant has shown on the balance of probabilities that condition 2 has been breached continuously for the relevant ten-year period, without significant interruption. Therefore, it falls to consider whether there is sufficient evidence to justify the appellant's suggested ceiling of 45 as the total number of children allowed.
34. The figure was arrived at through analysis of the data using averages and percentiles. Mr Davis explained that the average daily maximum attendance for each year is 44.55 children. According to Mr Celino, the overall average attendance is 39.8 children. In terms of percentiles, the maximum weekly occupancy was between 41 and 45 more often than at any other level, and between 46 and 50 second most often. It was argued that in 75 percent of weeks, the maximum weekly occupancy was at 41 to 50, and 45 is the midpoint.
35. The Council maintained that the methodology was flawed due to the reliance on the average daily maximum, which fails to acknowledge the attendance per half-day session. It is also suggested that the appellant has not shown the lawfulness of 45 children attending at any one time.
36. There is no established basis for arriving at the revised ceiling. It must be a matter of judgement based on the facts. The appellant has provided a suggested ceiling, which was arrived at through logical analysis of the data. The revised ceiling is intended to operate as an upper limit, and it is appropriate to look at the overall pattern. The figure of 45 sits at the higher end of the data distribution, but this is appropriate when considering a maximum number of children. I find, therefore, that the suggested revised ceiling of 45 has been justified.
37. I consider that the evidence provided by the appellant is sufficiently precise and unambiguous to show, on the balance of probabilities, that there has continued to be more than 30 children at the nursery at any one time for a ten-year period in breach of condition 2. Consequently, the appellant is entitled to an LDC legitimising the breach of condition to the extent of allowing up to 45 children at any one time.

Conclusion

38. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of "failure to comply with condition 2 of 09/00277/COU in respect to pupil numbers" was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

D Moore

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Harry Spurr - Barrister instructed by Mr Neil Davis of Davis Planning Ltd

He called:

Ms Fatma Walji (Witness of Fact)

Mr Gianpiero Celino (Witness of Fact)

Mr Neil Davis (Planning Expert)

FOR THE LOCAL PLANNING AUTHORITY:

Ms Izindi Visagie - Solicitor instructed by Spelthorne Borough Council

She called:

Ms Ingrid Smith (Planning Expert)

DOCUMENTS SUBMITTED AT THE INQUIRY

Miles v NAW & Caerphilly CBC [2007] EWHC 10 (Admin), 2007 WL 2919

GCDA 1 Daily Attendance data

GCDA 2 Occupancy by week/month/year

GCDA 3 Breach by week/month/year

Spreadsheet Roslin Day Nursery Data

Lawful Development Certificate

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 20 April 2023 the matter described in the First Schedule hereto, constituting a failure to comply with a condition or limitation subject to which planning permission has been granted, 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(3) of the Town and Country Planning Act 1990 (as amended), for the following reason:

On 15 June 2009, planning permission was granted for "change of use from residential at first floor level to nursery day care facility" (Ref 09/00277/COU). This was subject to a condition which states - "the maximum number of children at the nursery at any one time shall not exceed 30 children, as approved in planning permission SP/92/00562".

The condition has not been complied with since 20 April 2013, being an uninterrupted period of ten years prior to the date of the application, because the appellant has shown, on the balance of probabilities, that the nursery was occupied by more than 30 children at any one time throughout that period. On the facts, a revised ceiling of 45 is appropriate. Condition 2 remains in force but with that revised ceiling in place. The operation of the nursery by any person continuing the same breach of condition 2, subject to the revised ceiling, is thereby immune from enforcement action under s171(3) of the Town and Country Planning Act 1990.

Signed

D Moore

Inspector

Date

Reference: APP/Z3635/X/23/3331411

First Schedule

Failure to comply with condition 2 of planning permission reference 09/00277/COU in respect to pupil numbers, such failure being occupation by up to 45 children at any one time.

Second Schedule

Land at Roslin, Rookery Road, Staines-Upon-Thames, Surrey TW18 1BT

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 matter, constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, 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 or 187A of the 1990 Act, on that date.

This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any matter 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:

by D Moore BSc (HONS), MCD, PGDip, MRTPI, IHBC

Land at Roslin, Rookery Road, Staines-Upon-Thames, Surrey TW18 1BT

Reference: APP/Z3635/X/23/3331411

Scale: NTS

