



Appeal Decision

Site visit made on 27 February 2024

by N Teasdale BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 April 2024

Appeal Ref: APP/A5270/W/23/3324756

72 Currey Road, Greenford UB6 0BG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Dipo Sotinwa against the decision of London Borough of Ealing.
 - The application Ref is 212835VAR, dated 6 April 2021, was refused by notice dated 28 March 2023.
 - The application sought planning permission for change of use to day nursery without complying with conditions attached to planning permission Ref P/2000/1600 Appeal Ref APP/A5270/A/01/1058039, dated 10 May 2001.
 - The conditions in dispute are Nos 4 and 7 which state that: 4: notwithstanding those details shown on the approved drawings, before the use hereby permitted is commenced, parking space for 3 vehicles shall be provided within the site in accordance with details which have been previously submitted to and approved in writing by the Local Planning Authority. The approved spaces shall be marked out and kept available for parking vehicles associated with the permitted use at all times and shall be used for no other purpose. 7: Outdoor play associated with the use hereby permitted shall be restricted to the area shown on the approved drawings. Such activity shall be limited to between 1100 and 1200 and 1300 and 1400 on any day. No more than 8 children shall be allowed to play outdoors at any one time.
 - The reasons given for the conditions are: 4: in the interests of highway safety. 7: in the interests of the living conditions of the neighbours.
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Decision

1. The appeal is allowed and planning permission is granted for change of use to day nursery at 72 Currey Road, Greenford UB6 0BG in accordance with the terms of the application, Ref 212835VAR, made on the 6 April 2021, without complying with conditions 1, 3, 4, 5, 7, 8 and 9 set out in planning permission Ref P/2000/1600 Appeal Ref APP/A5270/A/01/1058039 granted on 10 May 2001, but otherwise subject to the conditions set out on the attached schedule.

Procedural Matters

2. As part of my site visit, I was able to see that the proposed development has already taken place on site. The appeal before me has therefore been assessed on a retrospective basis.
3. The appellant has submitted a Noise Impact Assessment (NIA), Parking Technical Note (PTN) and layout drawings as part of this appeal. Given that the details do not materially alter the scheme as submitted and are not considered prejudicial to any party, then I have taken such information into account in reaching a decision.

Background

4. Planning permission was granted for change of use to day nursery. Conditions controlling the parking and outdoor play provision area including number of children and duration of play were imposed in the interests of highway safety and the living conditions of the neighbours. Condition 4 therefore states, notwithstanding those details shown on the approved drawings, before the use hereby permitted is commenced, parking space for 3 vehicles shall be provided within the site in accordance with details which have been previously submitted to and approved in writing by the Local Planning Authority. The approved spaces shall be marked out and kept available for parking of vehicles associated with the permitted use at all times and shall be used for no other purpose. Condition 7 states, outdoor play associated with the use hereby permitted shall be restricted to the area shown on the approved drawings. Such activity shall be limited to between 1100 and 1200 and 1300 and 1400 on any day. No more than 8 children shall be allowed to play outdoors at any one time. The proposed development seeks to vary these conditions to permit the use of the car park area to the rear into an outdoor play area.

Main Issues

5. The main issues are:
 - The effect that varying condition 4 would have on highway safety including car parking in the area; and
 - The effect that varying condition 7 would have on the living conditions of neighbouring properties with particular regard to noise and disturbance.

Reasons

Highway safety

6. As already set out, a condition imposed on the previous consent required parking space for 3 vehicles to be provided within the site. The plans provided show that prior to works taking place onsite, provision of 3 car parking spaces were provided to the rear of the property with access taken from Rothesay Avenue to the east. The development seeks to vary this condition to permit the use of the car park area to the rear into an outdoor play area. At the time of my site visit, I was able to see that two of the car parking spaces previously provided as shown on the plans have been removed with the area immediately to the rear of the property being used as an outdoor play area associated with the nursery. One parking space was however available directly in front of the rear outbuilding and was separated from the rear play area by a low fence. Access to this area is via a gated entrance leading from Rothesay Avenue and despite the dispute regarding the number of parking spaces to be lost as a result of the development, the appellant has confirmed this to be two which corresponds with the plans provided and my own observations onsite. One space therefore remains available.
7. The site has a PTAL rating of 2 and there are bus routes in the vicinity which could be used to access the nursery as well as opportunities for walking or cycling. Whilst there is a lack of information regarding cycle provision at the site, condition 3 attached to the original permission required details to be submitted to and approved in writing by the Local Planning Authority and based on the site history section contained in the officer's report for the current

scheme, such details have been approved and thus a condition requiring retention would still be required. Notwithstanding the above, a number of users would still likely access the nursery by vehicle. The appeal is supported by a PTN which has been based on the loss of 3 car parking spaces given the dispute between parties and thus is based on a worst-case scenario given that the development only results in the loss of 2 spaces. Parking surveys were undertaken covering an area of 500 metres walk distance from the site (approximately 6-minute walk) with an hourly survey being carried out between 7am and 7pm. The results show that average parking stress across all roads within the survey period was 71.2% (the highest was 74%) which is claimed to be significantly below the 85% threshold considered to represent high parking stress. It demonstrates that several of the roads in closest proximity to the site have the highest availability of parking even at the hour of highest parking stress. There are high levels of spare capacity on the network, with a minimum of 200 car parking spaces available at any point within the survey period.

8. At my site visit whilst only a snapshot in time, I observed that there were a large number of available and unrestricted parking spaces in close proximity of the site. Given that the development results in the loss of only 2 parking spaces along with the findings of the PTN, it is considered that even if a significant number of users drove to and from the nursery, the local highway network has more than sufficient capacity to accommodate additional vehicle parking. The minor nature of the changes made which does not increase the capacity at the nursery does not lead to a material level of increased traffic nor does it significantly alter the residential character/amenity of the area over and above that of the existing operations even if parking nearby is used for long stays. I am aware of the Councils' concerns regarding disabled parking provision. However, there is still 1 available parking space provided onsite which can be used for such purposes and thus the changes made do not lead to parking difficulty for such users.
9. I have had due regard to the images showing play equipment in the area used for the remaining parking space. However, such equipment can be moved to allow a vehicle to access this area and there were no obstructions to this area at the time of my site visit where a vehicle could easily access this space if needed. Moreover, the retention of this parking space can be conditioned to ensure the space is kept available at all times.
10. The previous permission was allowed on appeal on the basis that 3 parking spaces (and disabled parking space) were provided to reduce parking pressure and improve access. This would not however alter my findings in relation to the above as the local highway network still has more than sufficient capacity to accommodate additional vehicle parking and people with disabilities can still access parking onsite.
11. I am aware of third-party concerns regarding unsuitable parking which is claimed to take place in the vicinity of the site. I cannot control situations where individuals may choose to park/manoeuvre unsuitably. However, given that there is sufficient parking available in the area then such situations are unlikely to be as a result of insufficient/lack of parking options and sufficient availability should deter such events from happening.

12. For the above reasons, I conclude that the development does not have an unacceptable impact on highway safety including car parking in the area. It therefore accords with Policy T6 of the London Plan, 2021 and Policy 6.13 of the Development Management Development Plan Document, 2013 (DPD) which together, amongst other matters, explains that when calculating general parking provision within the relevant standards, the starting point for discussions should be the highest existing or planned PTAL at the site, although consideration should be given to local circumstances and the quality of public transport provision, as well as conditions for walking and cycling. Where no standard is provided, the level of parking should be determined on a case-by-case basis taking account of Policy T6 car parking, current and future PTAL and wider measures of public transport, walking and cycling connectivity.

Living conditions

13. The premises subject to this appeal sits in a predominantly residential area and is located on the corner of Currey Road (which the premises fronts onto) and Rothesay Avenue (which runs to the east of the site). The two nearest neighbouring properties are number 42 Rothesay Avenue (No 42) located to the southwest of the appeal site and number 74 Currey Road (No 74) located to the northwest. The side elevation of No 42 faces onto the appeal site which contains two windows located at first floor level. There are also windows located within the front elevation of the property at both ground and first floor level. In terms of No 74, this property has a similar arrangement to the appeal site where it fronts onto Curry Road with the rear of the property facing southwards including its garden area which runs along the boundary of the rear play area. It has windows at both ground and first floor level to the rear of the property.
14. As already set out, a NIA has been submitted whereby a survey was undertaken at two fixed monitoring points, representative of the nearest noise sensitive receptor's along with measurements of the different operational scenarios (one without the external rear playground in operation and one with). It sets out that the noise criteria will be set level with the typical background operational levels. On this basis, the criteria to be met is a maximum rating noise level of 45dB LAeq,T measured in line with the local authority's' requirements, not to cause rise to an increase in noise. A number of factors have been taken into account to predict the noise level at the nearest noise sensitive receptors. This includes, distance, lines of sight, perspex solid canopy which helps to attenuate sound from reaching first floor level at sensitive receptors, classroom which acts as a partial barrier, and boundary treatments. It is noted that there are gaps to the fence separating the appeal site from No 74 which would need to be replaced with an acoustic barrier, of the same height as the existing fence, estimated at 2.5 metres above ground. Overall, such factors would ensure that the rear outdoor play area in use would meet the noise criteria. On this basis and without any substantive evidence to the contrary, an adequate level of protection against noise for occupants of the nearest noise sensitive receptor is afforded. In terms of other nearby residential uses, it can be confidently assumed that as an adequate level of protection against noise for occupants of the nearest noise sensitive receptor is afforded then it will be met at other properties of equal distance and/or those further away.

15. I appreciate that neighbours are likely to open windows during the summer months and I have had regard to British Standards 'sound insulation and noise reduction for buildings – code of practice' which gives recommendations for acceptable internal noise levels in residential properties. The NIA explains that assuming worst case conditions, of the closest window being for a bedroom, the code of practice recommends 35dB(A) as being acceptable internal living conditions during daytime. According to the code of practice, the façade of a residential dwelling; with a window partially open for ventilation offers 10-15 dB attenuation. Therefore, taking into account this reduction, for a partially open window the internal noise level would be 33dB(A) which is lower than the acceptable internal noise level.
16. Additionally, the site is operational during Monday-Friday 08:00-18:00 hours only which is not changing as part of this appeal and does not therefore operate at unsocial hours. The assessment also undertaken is based on the children having a constant presence in the rear playground. This is very unlikely and is therefore a worst-case scenario as children would return inside for certain tasks during the day. The assessment sets out that the rear external play area typically has up to 12 children playing externally at any one time and no child is allowed externally without supervision. This would also help to reduce levels of noise and I have attached a condition restricting the number of children and staff outdoors taking into account the content and findings of the NIA. Reference has been made to the established play area to the front although the NIA sets out the noise levels for the front playground only and also the rear and front playground. The cumulative impact has therefore been factored into the overall assessment.
17. I am aware of the Councils' concerns regarding the details of the acoustic barrier which is required in order to meet the required noise criteria. The assessment sets out that this would need to be an acoustic fence of minimum mass, 12.5kg/m²), of minimum equal height to existing, estimated at 2.5m above ground. I am therefore satisfied that sufficient detail has been provided in this regard to demonstrate that this would sufficiently contribute to meeting the required noise criteria. That said, I find it necessary to attach a condition relating to the exact details of the fence in the interests of residential and visual amenity. The NIA did recommend the relocation/removal of certain play equipment although I have no substantive evidence to suggest that this altered the overall measurements. I accept that noisier equipment is likely to be used from time to time given the nature of the nursery setting and difficulty in controlling such situations. However, this is unlikely to occur for extended periods of time and is not considered to be of a level as to unduly harm the living conditions of neighbouring properties particularly when taking into account all of the above factors.
18. For the above reasons, I conclude that the development subject to the attached conditions would not unacceptably harm the living conditions of neighbouring properties with particular regard to noise and disturbance. It would therefore accord with Policies 7A and 7B of the DPD which together, amongst other matters, explains that new development must achieve a high standard of amenity for users and for adjacent uses.

Other Matters

19. The Council consider that the proposal would not constitute a minor material amendment given the nature of the works and claimed impacts. Whilst I have had due regard to the Council's 'Protocol for Minor Material Amendments following a grant of Planning Permission', Planning Practice Guidance (PPG) explains that an application made under Section 73 of the Town and Country Planning Act 1990 can be used to make material amendment by varying or removing conditions associated with a planning permission. There is no statutory limit on the degree of change permissible to conditions under s73, but the change must only relate to conditions and not to the operative part of the permission. On this basis, the current appeal seeks to vary conditions to permit the use of the car park area to the rear into an outdoor play area which does not involve a fundamental variation to the change of use to a day nursery on the site that is otherwise permitted by the operative part of the planning permission.
20. Third-party comments made in relation to child safety/risk assessments undertaken for the area in question as well as sewage overflow problems would not alter my findings in relation to the above main issues and in any event, I have very little details regarding this to be able to comment further. I also have no compelling case to suggest that the proposals would place strain on existing community facilities particularly as capacity remains unchanged and a condition restricting overall numbers is still relevant which I have applied.

Conditions

21. The guidance in the PPG makes clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. The officer's report sets out the planning history associated with the site and it is clear that details pursuant to conditions 3, 4, 5, 8 and 9 attached to the original permission have been submitted to and approved by the Council. I have therefore attached conditions requiring accordance with such details and their retention.
22. The standard time limit condition is no longer necessary given the retrospective nature of the appeal. A condition relating to the approved plans is necessary in the interests of certainty. The hours of operation is necessary to prevent nuisance being caused to neighbours by noise and in the interests of highway safety/parking. A condition requiring the parking space for 1 vehicle to be kept available for parking is necessary in the interests of highway safety. The need to limit the numbers of staff and children at the premises is necessary in the interests of the living conditions of the neighbours and highway safety. A restriction on the numbers of children and staff to play outdoors at any one time is necessary in the interests of the living conditions of neighbours. I accept that the wording of this condition provides further flexibility away from the original condition. However, it takes into account the overall content and findings of the NIA submitted. I have also imposed a condition relating to a scheme for the acoustic barrier which is necessary in the interests of residential and visual amenity.
23. There is a strict timetable for compliance with condition 10 because permission is being granted retrospectively, and it is not possible to use a negatively worded condition to secure the approval and implementation of the matters

before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met.

Conclusion

24. For the reasons given above and having had regard to the development plan as a whole, the appeal is allowed.

N Teasdale

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The use hereby permitted shall not operate outside the hours of 08:00 and 18:00 on any day.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: Location Plan 1:1250; Pre-Existing & Existing/Proposed Ground Floor Drawing No. A-01; Pre-Existing & Existing/Proposed Roof Plan Drawing No. A-02; Pre-Existing & Existing/Proposed Section AA Drawing No. A-03.
- 3) Details of parking of cycles pursuant to condition 3 of planning permission reference Ref P/2000/1600 Appeal Ref APP/A5270/A/01/1058039 shall be provided in accordance with the approved details and retained as such.
- 4) The parking space for 1 vehicle as shown on the approved plans shall be kept available for parking of vehicles associated with the use at all times and shall be used for no other purpose.
- 5) Details of the alterations of walls and gates adjacent to the vehicular access from the site to Rothesay Avenue pursuant to condition 5 of planning permission reference Ref P/2000/1600 Appeal Ref APP/A5270/A/01/1058039 shall be altered in accordance with the approved details and retained as such.
- 6) The day nursery shall be used to accommodate no more than 32 children and 7 staff.
- 7) Outdoor play associated with the use shall be restricted to the areas shown on the approved drawings. No more than 12 children and 3 staff shall be allowed to play outdoors to the front or rear at any one time.
- 8) Details of the means of enclosure around the outdoor play area pursuant to condition 8 of planning permission reference Ref P/2000/1600 Appeal Ref APP/A5270/A/01/1058039 shall be provided in accordance with the approved details and retained as such.
- 9) Details of the means of the facilities for disabled access and manoeuvring within the building pursuant to condition 9 of planning permission reference Ref P/2000/1600 Appeal Ref APP/A5270/A/01/1058039 shall be provided in accordance with the approved details and retained as such.
- 10) Unless within 3 months of the date of this decision a scheme for the acoustic barrier, is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within 3 months of the local planning authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented. Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be retained as such.

End of schedule