



Appeal Decision

Site visit made on 5 November 2024

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 9 January 2025

Appeal Ref: APP/J4423/C/23/3328125

50 ELMFIELD AVENUE, SHEFFIELD, S5 7TF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr and Mrs S Morley against an enforcement notice issued by Sheffield City Council.
- The notice was issued on 18 July 2023.
- The breach of planning control as alleged in the notice is Without planning permission a material change of use of the dwelling house to a mixed use of dwelling house and child care facility.
- The requirements of the notice are to either (a) cease the childcare use; or (b) reduce the childcare use so that no more than four children are provided childcare at any time on the land.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (f) 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 is dismissed and the enforcement notice upheld.

Preliminary Matters

1. There was no childcare use of the property taking place at the time of my accompanied site visit, although I saw that the rear garden retained play equipment appropriate for such a use.
2. The notice refers to a childcare use at the property involving 34 children on the books and with up to 18 children on the premises at any one time. The notice requires a reduction to no more than four. If permission is required for the use then any such grant of permission could control by condition the number of children who might be present on site at any time.
3. Although under ground (b) the appellants contend that the childcare use alleged in the notice has not occurred, it is accepted that a childminding use has taken place. The appellants contend that the childminding use is ancillary to the use of the property as a dwelling and that planning permission is not required for the level of activity described. This is to incorporate arguments more relevant to an appeal on ground (c), which would be to say that the matters alleged in the notice do not amount to a breach of planning control (because not requiring planning permission).
4. I have not found it necessary to refer back to the parties on this point, because their respective cases are already clear, but I shall incorporate consideration of an appeal on ground (c) below.

5. Nor have I found it necessary to refer back to the parties as a result of changes to national planning policy issued on 12 December 2024. The main issues in this appeal do not turn on anything arising from those changes.

Main Issues

6. The main issues arising under the 'legal' grounds of appeal, (b) and (c) as set out above, are the nature of the use that has been taking place at the site and whether this requires planning permission. If it does require planning permission (and any necessary corrections can be made to the notice without causing injustice to either party) then the ground (a) appeal will arise for consideration. The Council's reason for issuing the notice referred to the impacts on the amenities of the residents of neighbouring houses arising from noise disturbance and traffic movements. Whether the development can result in acceptable living conditions for neighbouring occupiers is therefore the main issue in the appeal.
7. If permission is not forthcoming then the appeal on ground (f) raises the question whether the steps required by the notice go further than necessary to achieve the objectives of the notice, namely to secure an acceptable standard of amenity for the neighbours. The appeal on ground (g) seeks further time to comply with the notice's requirements.

Reasons

The appeal on grounds (b) and (c)

8. The reference to 34 children on the books and 18 on site at any time appears in the Council's reasons for issuing the notice. The allegation itself (found in paragraph 3) refers only to the mixed use of dwellinghouse and childcare facility.
9. The appellants suggest that the term 'childcare facility' is a vague and imprecise definition and not one used by OFSTED or within the planning regime. Nonetheless the appellants go on to refer to the legal definition of childcare found in the Childcare Act of 2006. Section 18 of that Act provides that 'childcare', for the purposes of certain parts of that Act, means any form of care for a child and care includes education and other supervised activities although subject to exceptions.
10. Although a broad definition, I have no hesitation in accepting that it applies to the childminding services previously provided by the appellants. I find it unnecessary to specify the precise type of childcare (i.e. whether that be childminding, or a day nursery, or any other type of childcare) in order to arrive at an intelligible description of the use for planning purposes.
11. Any enforcement notice must tell the recipient with reasonable specificity what s/he is alleged to have done wrong, and what must be done to remedy it. The appropriate test, as set out by Upjohn LJ in *Miller-Mead v MHLG* [1963] 2 WLR 225, is whether or not the notice is 'hopelessly ambiguous and uncertain'. That test is not met here.
12. I therefore find the reference to a 'childcare facility' to be apt, and I do not understand the appellants to deny that childminding, as a particular form of childcare, has taken place. The question arises whether that childcare activity has been sufficiently intensive as to amount to a material change of use, to

the mixed use alleged by the Council, or whether it has merely been ancillary to the continuing use of the property as a dwellinghouse.

13. I am reminded that in relation to 'legal' grounds of appeal the onus of proof lies on the appellants, to the standard of probabilities. What this means is that the appellants must demonstrate the Council's allegation, including the requirement for planning permission, to be wrong.
14. There is no express requirement in the 1990 Act for an observed use of land to be taking place precisely as described in an enforcement notice on the day of issuing it. An appeal on ground (b) could succeed if the matters alleged have not occurred at all, but it will not necessarily succeed if those matters happen not to be going on at the date the notice was issued. Here it appears that the reference to 34 and 18 children (not anyway found in the allegation itself) was information volunteered to the Council by a member of the childminding staff some months previously. The appellants say that the number of children present on site at any time had diminished by the time the notice was served. This appears to have been principally due to a reduction in staff numbers and therefore of the permissible number of children under OFSTED or other regulatory requirements.
15. At the time the notice was issued, there are said to have been 19 children on the roll, with no more than 12 on the site at any one time. This maximum number might be met between 1500 and 1700 in term time, although potentially all day during school holidays. Some of that time would be spent outdoors.
16. Even on the appellants' case of a maximum of 12 children on site for around two hours each day, rather than the 18 referred to by the Council, there is no information put before me by the appellants to demonstrate why this number would amount to use ancillary to an ongoing use of the property as simply a dwellinghouse, rather than as the materially different use alleged by the Council. These numbers of children would be likely to result in comings and goings to the property considerably in excess of the amount usually associated with a semi-detached dwellinghouse.
17. The children's play equipment in the garden remaining at the time of my site visit was of a scale and amount I would not usually expect to find in a purely domestic garden. It also appears from the information supplied by the Council that before the notice was issued, the ground floor of the building had been equipped and laid out in a manner appropriate to a childcare facility rather than a dwellinghouse, with extensive storage facilities and the majority of articles and furnishings designed for the use of children.
18. Therefore I am not satisfied that the Council's allegation of a mixed use involving a childcare facility has been disproven, or that planning permission was not required for such a use. Accordingly the appeal on grounds (b) and (c) will fail.

The appeal on ground (a): the deemed planning application

19. It appears there are no specific locational criteria found in the development plan to apply to the provision of childcare facilities. A number of policies do serve to seek to protect residential amenity standards and to avoid nuisances and noise pollution. The most relevant policies for consideration are H14, GE22

and GE24 of the Sheffield Unitary Development Plan of 1990 ('the UDP'). Although the UDP is of considerable vintage, its provisions as they relate to securing good standards of residential amenity appear consistent with national policy in this regard. Other relevant considerations include the Noise Policy Statement for England (2010) ('NPSE') as well as the National Planning Policy Framework and the National Planning Practice Guidance. The appellants' noise assessment also makes reference to British Standards and to IEMA guidelines.

20. The appellants have taken some steps to reduce the noise emanating from the property, having installed soundproofing at considerable expense and having commissioned a noise assessment for the purpose of appealing an earlier planning refusal (although I understand that in the event no appeal was made against that refusal). The Council's officer report on that earlier planning application does not record any comments from their Environmental Health department, and the Council has not commented on the assessment for the purposes of this appeal.
21. The recommendations arising from that assessment were to limit the number of playtimes and to limit the number of children outdoors at any time; to have a strict code of conduct and to implement and adhere to a noise management plan. Subject to achieving strict control over playtimes, the assessment concludes that noise emissions from the site should have no observable effects on neighbouring recipients.
22. Representations from neighbours suggest that this is not so, and the Council propose that if permission is to be granted then conditions requiring further soundproofing measures should be required. Whilst the appellants' noise assessment finds that acoustic fencing in the garden is unnecessary, it also suggests that the noise levels at nearby receptors would be reduced if it were to be provided.
23. The noise assessment includes the results of a monitoring survey taken over the weekend in early June 2023, using equipment mounted on a pole protruding from the attic window facing the rear side of the host building. A table of the ambient noise levels over the weekend (although referring to 2nd and 3rd June, when it appears the correct dates were 3rd and 4th) is provided. Readings of the entire monitoring period, from the Friday lunchtime until the Monday morning, are provided in an appendix showing that the noise levels on the Friday afternoon were somewhat higher than those generally found over the weekend.
24. Although the use was being carried on at the time of the noise assessment, no analysis of any readings taken during the periods of operation is supplied. Instead, the noise assessment takes as its baseline "an external play session at a day nursery with approximately 30 children" in 2009 at an unknown location and in unknown weather conditions. Corrections have then been applied to those findings to assume the noise emissions arising from nine children in the external play area here, and calculations have then been derived to anticipate the specific sound levels at nearby noise receptors.
25. It is not explained how the corrections have been applied or how that interpolation has been arrived at, and it is not explained either why LAeqT is the appropriate metric or why a play period of 90 minutes is the appropriate time interval to use, given what is said about the duration of playtimes at the appeal site of no more than 30 minutes per hour. One might reasonably

expect any noise from a shorter playtime to be more intensive, at least overall, than from a longer one.

26. The noise assessment report does not explain why it is appropriate to derive its calculations from a different and unrelated case in circumstances where the use was already ongoing at the subject property and presumably amenable to analysis. Given the uncertainties and lack of explanation on these points, I am not satisfied that the noise assessment adequately describes the noise emissions likely to be heard at adjoining properties.
27. If the findings of the noise assessment are accepted, however, then the predicted specific sound levels at the neighbouring first floor window is 48dBA and at the centre of their garden 50dBA (after applying acoustic shielding in the form of fencing whose height is unspecified). The assessment goes on to conclude that at most a 'moderate' level of impact would be achieved to the neighbouring property and consistent with the 'Lowest Observed Adverse Effect Level' in accordance with the NPSE.
28. Its recommendations then advise that adverse impacts can be avoided at the closest and most affected sensitive receptors. To achieve this it is proposed that no more than one 15-minute outdoor playtime session per hour takes place, and provides an IEMA assessment (Fig 3) applying such scheduling. It is not clear why the table uses a measurement interval of 1 hour (LAeq) for this purpose, if the garden is only to be used for 15 minutes, or why an average noise weighting (rather than L_{max}) is the appropriate metric in the case of highly unpredictable noise from children. Again the uncertainty of applying findings averaged from a 90-minute playtime session to shorter and likely more intensive stints of 15 minutes arises, and I am not satisfied that those sound levels, even if interpolated appropriately, would be comparable.
29. Noise at higher frequencies is more sensitively felt by the human ear than at lower ones, and the noise assessment does not address whether the likely high pitched sounds of children playing would be a particular source of annoyance. There is no particular assessment of the nature of the noise source, rather than its decibel output. The noise of children playing, or crying, is likely to be harder to ignore than, say, equally noisy but bland and relatively atonal traffic noise. In an appropriate context, such as in parks or school playgrounds, such noise can be uplifting and pleasant, but the psychological expectation here is rather different.
30. In the round and notwithstanding the findings of the appellants' noise assessment report, I consider that the living conditions of neighbouring occupiers would be adversely affected by the childcare of the number of children anticipated by that noise assessment report. That was however provided on the assumption of 18 children on site at any time, and any playtime outdoors involving nine of those children. Some representations suggest that those numbers have been exceeded.
31. The appellants now propose the pattern of use said to be operating at the time the notice was issued; namely up to 12 children at any one time with a maximum of 6 children of pre-school age present before 1500 in term time. There is no express assessment before me of any number of children playing outdoors other than the nine referred to in the noise assessment report. Those nine children were predicted to give rise to noise emissions of 66dB LAeqT in distinction to the 72dB LAeqT arising from 30 children. Without knowing how

the corrections were applied, I am unable to apply them further to any different number of children.

32. The recommendations arising from the noise assessment have the air of unreality, or at least of unenforceability, about them. They suggest that playtimes be limited to 15 minutes per hour; that a strict code of conduct be outlined and presented to the children's parents during a site induction; and that a noise management plan be implemented and adhered to thereafter. Planning conditions to control the number and times of outdoor playtimes could not be readily enforceable by the local planning authority, and would seriously restrict the benefit of any permission for the operation of a childcare facility by removing the operator's discretion as how best to run it for the benefit of the children involved. I am not satisfied that such restrictions could reasonably be in the best interests of the children concerned.
33. The noise assessment also provides a 'noise breakthrough assessment' which concerns the noise emissions felt through the partition wall with the adjoining neighbour. It states that the internal noise level of 18 children playing with in the Site has been calculated based on the external noise level of 30 children playing, and refers to Table 3. Table 3 however provides the corrected noise emissions from 9 children playing in the garden, not from 18 children inside the house. I am therefore most unclear about how the conclusions of the breakthrough assessment have been arrived at. Accordingly I treat its conclusion of 'no observed effect level' in accordance with the NPSE with some circumspection. The neighbour in question made representations on this appeal some 18 months after the date of the invoice for the present soundproofing measures, and describes the noise from inside the property as 'constant', suggesting that the present measures have not been wholly successful.
34. Neighbours also complain of noise and disturbance arising when children are dropped off or collected from the property. The monitoring point and assessed receptors considered in the noise assessment do not appear appropriate for this purpose, as they were located to the rear of the properties involved.

Conclusions on ground (a)

35. Paragraph 198 of the National Planning Policy Framework ('the Framework') requires that new development is appropriate for its location taking into account the likely effects on living conditions. Noise giving rise to significant adverse impacts on the quality of life should be avoided. Local UDP policy H14 requires that new developments or changes of use in housing areas should not result in noise nuisance or risk to health and safety for people living nearby. The appellants point out that no noise nuisance complaints have been made. The reasons for the policy include that new uses do not lead to an unsatisfactory environment for people living in Sheffield.
36. Although the appellants' noise assessment concludes that noise emissions from the site can be controlled to levels that would not result in 'significant adverse impacts', in the terms of the Framework, or 'nuisance or risk to health and safety', in the terms of the UDP, there are reasons to doubt this analysis as well as to doubt the efficacy or reasonableness of the mitigation or control measures that might be introduced. That doubt means that the appellants have not demonstrated that the development would not have the results that the Framework and the UDP seek to avoid.

37. Although the provision of a childcare facility in the area constitutes economic development meriting support, and there is no overall locational objection to it, in this case I find that the uncertainties about producing an acceptable noise environment mean that overall the development is contrary to the provisions of the development plan for the area. Accordingly, the appeal on ground (a) will fail and planning permission will be refused.

The appeal on ground (f)

38. The appellants' appeal on ground (f) appears predicated on the same arguments as those considered in the above grounds; namely that planning permission should be granted, that no planning permission is required, or that no injury to amenity has been caused to neighbouring living conditions. No alternative steps are proposed by the appellants to the present requirements of the notice, which are to cease the use altogether or to considerably limit the number of childcare places that may be offered.
39. Whilst it may be that harm to neighbouring amenities could be avoided by the provision of childcare to a greater number of children than the four allowed by the notice, it appears that childcare provision has ceased at the site because the requirements of the notice make it unviable. I have no information before me about what numbers of children might make it viable, or what the impacts of such numbers would be on neighbouring living conditions. Therefore I am unable to specify any other limit on the number of children with any degree of certainty as to its acceptability, either to the appellants or to the neighbours. The steps specified by the notice are therefore not excessive to achieve the purpose of the notice, and the appeal on ground (f) will fail.

The appeal on ground (g)

40. The appellants sought an extended period of six months in order to comply with the notice, in order to transfer to new premises. In the event the childcare use had already ceased at the time of my site visit and it appears that the appellants' reasons for seeking more time have been superseded. Therefore the appeal on ground (g) also fails.

Conclusion

41. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Formal Decision

42. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Laura Renaudon

INSPECTOR