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## Appeal Decision

Site visit made on 18 February 2025

**by R Merrett Bsc(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 27 February 2025

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**Appeal Ref: APP/C2741/C/24/3347443**

**Land known as 312 Tadcaster Road, York YO24 1HF**

- 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 appeal is made by The Old Station Nursery Ltd against an enforcement notice issued by City of York Council.
- The enforcement notice was issued on 23 May 2024.
- The breach of planning control alleged in the notice is failure to comply with condition Nos 3,4,6,7,8 and 9 of a planning permission Ref 14/00285/FUL granted on 18 March 2014.
- The development to which the permission relates is Change of Use from office to children's day nursery (use class D1) and erection of covered decking to the rear.
- The conditions in question are:
  - No 3 which states that No more than 30 children shall be permitted within the gardens at any one time;
  - No 4 which states that Details of an acoustic noise barrier to protect adjoining properties to the Southern and Western boundaries of the rear garden shall be submitted to and approved in writing by the local planning authority. These details shall include the construction method, height, thickness, acoustic properties and the exact position of the barrier. The barrier shall have a sound reduction index of at least 10dB. The barrier shall be erected in accordance with the approval before the use hereby permitted first comes into use and maintained thereafter;
  - No 6 which states that Prior to the development commencing details of the cycle parking areas, including means of enclosure, shall be submitted to and approved in writing by the Local Planning Authority. The building shall not be occupied until the cycle parking areas and means of enclosure have been provided within the site in accordance with such approved details, and these areas shall not be used for any purpose other than the parking of cycles;
  - No 7 which states that Prior to the development commencing a drawing containing details of car parking and turning areas shall be submitted to and approved in writing by the Local Planning Authority. The building shall not be occupied until the car parking and turning areas have been provided within the site in accordance with such approved details, and these areas shall be used solely for their intended purpose;
  - No 8 which states that Prior to first occupation, a Full Travel Plan should be submitted and approved in writing by the LPA. The travel plan should be developed and implemented in line with local and national guidelines. The site shall thereafter be occupied in accordance with the aims, measures and outcomes of said Travel Plan. In formulating the Travel Plan consideration should be given to the following options, and used in connection with information contained within the itravelyork website and in consultation with the iTravel York Programme Manager:
    - Staff
    - A policy of no parking on site or on neighbouring streets
    - Provide an information pack on sustainable travel options to and from the site prior to commencement of employment
    - Free bus pass (3 months) for all new staff
    - Company interest free loan for cycle purchase
    - Monthly promotion of walking, cycling for the health benefits
    - Staff incentives for cycling or using the bus
    - Identify opportunities for staff to car share
    - Minibus service - to collect and drop off staff from pre-agreed points

#### Customers

- Information pack for parents in connection with sustainable travel options
- Promotion of walking and cycling with monthly cycle or walk to Nursery days
- Car sharing database for customers
- Timetable for drop off and collection times

Within 12 months of occupation of the site a first year travel survey shall have been submitted to and approved in writing by the LPA. Results of yearly travel surveys shall then be submitted annually to the authority's travel plan officer for approval;

No 9 which states All deliveries associated with the use shall be confined to between the hours of 10:00 and 15:00 Monday to Friday.

- The notice alleges that the conditions have not been complied with in that the operator has not responded to the Council requests to demonstrate that the nursery is operating in accordance with Condition 3; No details pursuant to Condition 4 have been submitted to or approved by the Council and the Land is now operating as a nursery; The approved cycle storage has not been provided as required by Condition 6 and the building is now occupied; The approved car parking and turning areas have not been provided as required by Condition 7 and the building is now occupied; No Travel Plan as required by Condition 8 has been submitted to or approved by the Council and the Land is operating as a nursery; the operator of the nursery has not responded to the Council's requests to demonstrate that the nursery is operating in accordance with Condition 9.
- The requirements of the notice are 5.1 Comply with condition 3 of the Planning Permission by ensuring that no more than 30 children are permitted within the gardens at any one time; 5.2 In respect of the failure to comply with the terms of condition 4 of the Planning Permission, submit details of an acoustic noise barrier to protect adjoining properties to the southern and western boundaries of the rear garden for approval in writing by the Council. These details shall include the construction method, height, thickness, acoustic properties and the exact position of the barrier. The barrier shall have a sound reduction index of at least 10dB; 5.3 In respect of the failure to comply with the terms of condition 4 of the Planning Permission, install an acoustic barrier in accordance with the details as may be approved by the Council pursuant to step 5.2 above; 5.4 In respect of the failure to comply with the terms of condition 6 of the Planning Permission, provide the cycle storage detailed on the approved drawings reference Y3550-AP/BSP-13-15 Rev A and Y3550-AP/BSP-13-08 Rev F that were submitted to accompany approval of details application reference AOD/14/00105; 5.5 In respect of the failure to comply with the terms of condition 7 of the Planning Permission, provide the car park area and turning area in accordance with the approved plan reference Y-3550-AP/BSP-13-14 Rev B that was submitted to accompany approval of details application reference AOD/14/00105; 5.6 In respect of the failure to comply with the terms of condition 8 of the Planning Permission, submit a Full Travel Plan for approval in writing by the Council in accordance with the details set out in this condition. Thereafter occupy the Land in accordance with the aims, measures and outcomes of the Full Travel Plan as may be approved, in accordance with condition 8 of the Planning Permission; 5.7 Comply with condition 9 of the Planning Permission by ensuring that all deliveries associated with the use of the Land are confined to between the hours of 10:00 and 15:00 Monday to Friday.
- The period for compliance with the requirements is six weeks.
- 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.

**Summary of Decision: The appeal succeeds in part and the notice is corrected to delete the relevant allegations and requirements, but otherwise the appeal is dismissed and the enforcement notice is upheld, with corrections and a variation, in the terms set out below in the Formal Decision.**

### Preliminary Matters

1. Part of the appellant's ground (b) appeal was in relation to Condition 7, namely that there had not been a breach of that condition. However, during the course of the appeal proceedings, the appellant changed their argument regarding this condition. They no longer seek to argue the condition has not been breached, rather that planning permission should be granted to carry out the development not in accordance with that condition. This is an argument under ground (a), and I am satisfied that the matter may be dealt with as such below, without causing injustice to the parties.

2. It is undisputed that since the notice was issued, details of an appropriate acoustic barrier and suitable travel plan have been submitted to and approved by the Council. In addition, at the time of my visit, I noted that the approved acoustic barrier was in the process of being installed. Accordingly, there has now been partial compliance with the requirements of Condition 4 and Condition 8. However, for the avoidance of doubt that does not discharge the requirement to continue to comply in full with those conditions, and there is no application before me not to do so.

### **The appeal on ground (b)**

3. The appeal on ground (b) is that there has not been a breach of planning control as a matter of fact. The appellant's appeal in this regard is confined to Conditions 3 and 9, in relation to which it is argued the requirements of neither condition have been breached.
4. With regard to the legal grounds of appeal, which include ground (b), in general terms the onus is on the appellant to make out their case to the standard of the balance of probabilities.
5. Condition 3 limits to 30, the number of children in the gardens at any one time and Condition 9 limits the timing of deliveries to the site during the week. The Council argues that the appellant has failed to provide information about their procedures, aimed at ensuring compliance with the controls stipulated in the conditions. However, neither condition includes any requirement to agree and maintain procedures for monitoring child numbers outside, or the timing of vehicle deliveries, and to disclose records of such.
6. With regard to Condition 3 the neighbouring residents suggest that child numbers are in breach of the condition, seemingly because of the level of noise heard. In relation to Condition 9 they also refer to delivery hours restrictions being breached on numerous occasions. However, neither the Council, nor third parties have offered any evidence, other than estimation and assertions regarding the breaches. Reports from the neighbouring residents regarding the timing of resurfacing works in the car park, and tree maintenance work, on the appeal site would not constitute the breach of a condition concerning delivery vehicles.
7. Whilst I acknowledge the burden of proof rests with the appellant to make out their case, it would be an exceptionally onerous and difficult task to prove the negative in this case, that no breach of conditions had occurred. It is also important to set this requirement in the context that there is an onus on Councils to carry out adequate investigation prior to the service of an enforcement notice. It seems to me that evidence from any investigation, which may, for example, have taken the form of diary entries or timed photographs of delivery vehicles, indicative of a breach of condition, is lacking.
8. On the balance of probability, I accept the appellant's case that there has been no breach of the aforementioned conditions. The ground (b) appeal therefore succeeds to this limited extent and the notice will be corrected accordingly. For the avoidance of doubt this does not absolve the appellant from a continuing requirement to comply with these conditions.

### **The appeal on ground (a)**

9. The ground of appeal is that planning permission should be granted for the matters stated in the notice as a breach of planning control. The appellant's ground (a) appeal is confined to a proposal not to comply with Condition 6, which concerns approved details of cycle parking areas, including means of enclosure; and not to comply with Condition 7 which concerns approved details of car parking and turning areas.

### **Main Issues**

10. The main issues are therefore whether Conditions 6 and 7 ought to be discharged, and substituted with alternatively worded conditions instead.

### **Reasons**

#### *Condition 6*

11. The originally approved cycle parking includes stands at the front and side of the main building. However, the cycle parking area to the side has now been altered to accommodate a pram parking / storage area instead. In support of their case, the appellant states that allowing for pram storage encourages visitors to walk to and from the site, with parents able drop off children and leave a pram there, before proceeding directly to work; the residual number of cycle parking spaces is said to exceed current demand and to be in accordance with Policy T1 of the City of York Draft Local Plan 2018 (DLP), which does not quantify required levels of cycle parking.
12. However, whilst it is said the level of provision is sufficient to cater for demand and there have been no complaints from staff or parents, and there may be a case to reduce the required number of spaces, I have not been provided with any compelling evidence to support this proposition. I am also mindful that demand for cycle parking may grow, especially as the company's Travel Plan is designed to promote cycle usage, in the context of Policies T1 and DP3 of the DLP and the National Planning Policy Framework (the Framework) which seek to support and maximise sustainable transport use. I have no evidence that these objectives are contradicted or diluted by the Council's Local Transport Plan, to which the appellant has referred in support of the appeal.
13. Furthermore, I acknowledge the benefits of allowing for pram storage on the site, in terms of promoting walking, however I am not persuaded there are not alternative areas of the site that can accommodate this, which would not be at the expense of cycle parking.
14. I conclude that a compelling case has not been made for the appellant not to comply with the approved details of cycle parking areas within the site.

#### *Condition 7*

15. The originally approved parking layout includes 12 visitor spaces, but no provision for staff parking within the site. Whilst the 12 spaces have been provided in accordance with the approved details, a single staff space has been added at the front of the building. The additional space encroaches within an area which is shown on the approved plan as being kept clear to allow for vehicle turning.

16. When the original planning application was under consideration, the car parking layout was acknowledged at the time to be tightly constrained. I am not therefore persuaded that the provision of the staff space would be conducive to safe manoeuvring and access in accordance with Policy T1 of the DLP. Furthermore, whilst I have not been provided with a copy of the recently approved Travel Plan, it is undisputed that Condition 8 seeks to prevent staff parking on the site.
17. It is stated that an attendant is employed to help manage safety in the car park at drop off and pick up times. However, this would not account for delivery vehicles manoeuvring on the site outside these times, and in any event does not overcome the point that the Travel Plan should be seeking to resist staff parking on the site in principle. A compelling case has not been made for the appellant not to comply with the approved details of car parking and turning areas.

### ***Ground (a) appeal conclusion***

18. Having regard to the above considerations, I conclude the proposals are in conflict with the DLP and the Framework insofar as they seek to support and maximise sustainable transport and safe access. The appeal should not, therefore, succeed on ground (a). Accordingly, planning permission will not be granted to carry out the development without complying with conditions 6 and 7.

### **The appeal on ground (f)**

19. The ground of appeal is that the steps required by the notice to be taken exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in s173 of the 1990 Act and include remedying the breach of planning control. The 1990 Act sets out that the breach may be remedied by making the development comply with the terms (including conditions and limitations) of any planning permission granted in respect of the land.
20. The appellant's ground (f) appeal is simply that they recognise Conditions 3 and 9 require ongoing compliance, but that does not justify enforcement action being taken. I have already concluded that the notice should be corrected accordingly due to success on the ground (b) appeal. This will include omitting reference, in the notice, to the requirement to comply with the aforementioned conditions. The ground (f) appeal does not therefore need to be considered further.

### **The appeal on ground (g)**

21. The appeal on ground (g) is that the time given to comply with the notice is too short. The Council have allowed for a compliance period of six weeks. The appellant requests six months. I am mindful of the importance of striking a balance between enforcement that is intended to be remedial rather than punitive, whilst maintaining public confidence in the planning system.
22. In light of the conclusion on the ground (b) appeal, and that there is an ongoing requirement to comply with the restrictions in Conditions 3 and 9, the requirements of the notice itself will specifically relate to Conditions 4,6,7 and 8.
23. As set out above, details have now been approved in relation to Conditions 4 and 8. The construction of the acoustic fence is also well underway on the site. Compliance with Condition 7, would essentially require the removal of the markings denoting the designated staff parking space. I am not persuaded there is a strong case to increase the length of time to comply with the requirements relating to

these conditions, even when considering the need for the works to be conducted in a safe manner.

24. However, I am mindful that compliance with Condition 6 will result in the loss of the pram storage area. I have concluded that an alternative space may be available on the site to allow for this. Extending the compliance period would allow time for the appellant to apply to the Council to vary the existing permission to accommodate an alternative pram storage area, should this be considered feasible and necessary; in the alternative to provide further evidence as to why the approved level of cycle parking is too high; and ultimately to comply with the notice should these alternatives be unsuccessful.
25. I consider that extending the compliance period to **four months** would amount to the optimum position. The ground (g) appeal therefore succeeds to this extent.

### Overall Conclusion

26. For the reasons given above I conclude that the appeal should succeed in part only. The notice is corrected to delete the relevant allegation and requirement for part of the matters the subject of the notice (in relation to Conditions 3 and 9). Otherwise, I conclude that the appeal should not succeed. I shall uphold the enforcement notice, with corrections and a variation, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

### Formal Decision

27. It is directed that the enforcement notice is corrected within Section 3 by the deletion of the following paragraphs, describing the breach of planning control, in their entirety:

*“3.2 Condition 3 of the Planning Permission requires that “No more than 30 children shall be permitted within the gardens at any one time. Reason: to protect the amenity of neighbouring residents and to protect the health and recovery of patients in near by hospital.” It appears to the Council that condition 3 is not being complied with and the operator of the nursery has not responded to the Council’s requests to demonstrate that the nursery is operating in accordance with the requirement of this condition.”*

*“3.7 Condition 9 of the Planning Permission required that: “All deliveries associated with the use shall be confined to between the hours of 10:00 and 15:00 Monday to Friday. Reason: To prevent conflict with vehicles, pedestrians and cyclists dropping children off at the nursery during peak hours and vehicles delivering goods to the site.” It appears to the Council that condition 9 is not being complied with and the operator of the nursery has not responded to the Council’s requests to demonstrate that the nursery is operating in accordance with the requirement of this condition.”;*  
and

That it is corrected within Section 5 by the deletion of the following paragraphs, describing the requirements, in their entirety:

*“5.1 Comply with condition 3 of the Planning Permission by ensuring that no more than 30 children are permitted within the gardens at any one time.”*

“5.7 Comply with condition 9 of the Planning Permission by ensuring that all deliveries associated with the use of the Land are confined to between the hours of 10:00 and 15:00 Monday to Friday.”

28. It is directed that the enforcement notice is varied within the first paragraph of Section 5 by the deletion of the words “six weeks” and their substitution with the words “four months” instead.
29. Subject to the corrections and variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*R. Merrett*

INSPECTOR