



Appeal Decision

by Thomas Shields DipURP MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 October 2026

Appeal Ref: APP/P4605/X/26/3377912

2353 Coventry Road, Sheldon, Birmingham, B26 3PN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) ("the Act") against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Elmdon Day Nursery against the decision of Birmingham City Council.
 - The application Ref: 2024/07992/PA, dated 18 December 2024, was refused by notice dated 19 August 2025.
 - The application was made under section 191(1)(c) of the Act.
 - The failure to comply with any condition or limitation for which a certificate of lawful use or development is sought is conditions 2 and 5 of planning permission 2011/00619/PA which relate to the maximum number of children permitted to attend at any one time (34) and be outside in the external play area (12).
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Since the appeal turns on historical evidence relating to the number of children attending the nursery up to the date of the application, it was unnecessary for a site inspection to be carried out.
3. The planning merits of the use of the appeal site are not relevant to my decision which must be determined having regard to factual matters, the law, and to any relevant Court judgments.
4. The onus of providing proof of lawfulness is firmly upon the appellant with the test of the evidence being on the balance of probabilities. Also, the appellant's evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence alone is sufficiently precise and unambiguous.
5. My reasons for dismissing the appeal, as set out later, go beyond the Council's reason for refusing the application. However, I must look at all of the evidence before me, and in this regard s195(3) of the Act provides that appeals should be dismissed if the Council's refusal (i.e. rather than its *reason* for refusal) is well-founded.

Main Issue

6. The appeal property has been in use as a children's nursery since 2003. In May 2011 planning permission (2011/00619/PA) was granted for single storey front, side and rear extensions to the property subject to conditions including the following:-

Condition 2:

The external play area shall only be used between the hours of 0900 to 1800 hours Monday to Friday and shall be restricted to a maximum of 12 children at any one time.

Condition 5:

The number of children attending the nursery hereby approved shall not exceed 34 at any one time.

7. The planning conditions place a strict limit on the number of children who can attend the nursery and be outside in the external area at any one time.
8. Therefore the main issue is whether the appellant can demonstrate that a higher level of child numbers has continued in breach of the conditions (more than 12/34) continuously for a period of at least 10 years before the date of the application, hence since before 18 December 2014. If such a higher number of children could be established as being lawful, then the two conditions would remain extant but with an LDC certifying a new higher limitation on the numbers of children.

Reasons

9. The appellant suggests that the conditions are not clear in their requirements. I disagree. As established in *Trump*¹, a planning permission must be interpreted in its legal and factual context. The correct approach is to consider what the reasonable reader would understand the words to mean in the context of the overall purpose of the planning permission and with common sense. In this regard I consider any reasonable reader would interpret the conditions in the ordinary meaning of the language used. Hence, the conditions restrict the operational use of the nursery. They do so by setting a limitation on the number of children who may be in attendance at the nursery (and in the external play area) at any one time while it is operating.
10. The evidence before me comprises an affidavit on behalf of the appellant company stating that the numbers of children attending the nursery, and being outside in the play area, has exceeded the condition 2 and 5 limitations for more than 10 years. Exhibit A to the affidavit are copies of attendance registers for the years 2013 to 2024. Further evidence in support of the appeal, attached as appendices A to H to the appellant's statement,² include among them Ofsted reports for the nursery, correspondence with the Council, and a previous appeal Decision relating to a nursery in Surrey (APP/Z3635/X/23/3331411).
11. As set out in the main issue earlier, it is important to note that since the lawfulness being claimed in breach of conditions relates to a higher number of children, then that higher number needs to be established. If that were not the case then the extent of any continuous breach above the condition limitations, and therefore any new level of lawfulness, would be unknown.
12. Turning to the evidence, the affidavit itself does not state in numerical terms what number of children above the condition limitations are now claimed to be lawful; it merely states that the limitations of 12 and 34³ have been exceeded.

¹ *Trump International Golf Club Scotland Ltd v the Scottish Ministers* [2015] UKSC 74

² Statement of Case, Evolve Planning

³ The affidavit states '35' but it is assumed this is a typographical error

13. The overall data capture presented as evidence comprises a sample of daily child attendance registers between January 2013 to October 2024. However, it is a very limited sample consisting of only 1 day for each month (so 12 individual days for each year). This equates to a sample total of 142 days (only 4.7%) out of a possible 3000 (approximate) operational days. No detailed methodology or explanation is provided as to how or why such a small sample is sufficiently representative of a continuous higher level of attendance across a whole 10 year period.
14. Notwithstanding that the overall data sample is very limited in scale, the monthly summary table⁴ is said to be a “summary of the register numbers” for each month, but I am unclear as to what the numbers in the table actually represent. They do not all appear to correspond with the single-day register totals representing each month, and there is no analysis before me demonstrating any average higher number of daily attendance at any one time across a whole 10 year period.
15. The limitations in clarity of evidence resulting from such a small scale of data capture is also apparent in the particular single days stated to be representative of whole weeks, months and years. For example, of the 48 days cumulatively representing the 4 years in 2017, 2018, 2019 and 2023, 38 of those days (79%) fell on Monday to Wednesdays, 9 of the days were Thursdays (19%), and only 1 out of the 48 days for the whole of those 4 years was a Friday (2%).
16. While it is not for me to undertake a detailed analysis on behalf of the appellant, these observations indicate to me that the distribution of data captured in the sample registers is, in part at least, heavily skewed towards Mondays to Wednesdays, rather than being more representative of whole weeks. As such, I am not convinced that the data provides a reasonable basis for assessing any new higher level of lawfulness beyond the limitations in conditions 2 and 5 over a 10 year period.
17. The submitted Ofsted reports refer to both ‘children on roll’ and to ‘total number of places’, summarised below:

Ofsted Report 24/09/2014 – 77 children on roll (40 places)
Ofsted Report 30/04/2018 – 111 children on roll (52 places)
Ofsted Report 03/01/2024 – 102 children on roll (52 places)
18. Having regard to the numbers of children in attendance at any one time in the daily registers, viewed alongside ‘roll numbers’, and ‘places’, it is clear that these are different calculations. This may be, for example, because some children might only attend for one or two days per week, and/or may only attend for part days. Hence, the numbers ‘on roll’ or ‘places’ does not provide accurate data as to how many children are in actual attendance at the nursery at any one time.
19. The appellant refers to the evidence analysis in the Surrey appeal as a comparator case. However, the evidence in Surrey was substantially more comprehensive than in this current appeal, using data of attendance (based on bookings) on every single day of operation over a whole 10 year period, including an analysis of the data showing average attendance by week, month and year to demonstrate that a new higher ceiling of numbers attending was lawful.

⁴ Appellant’s Statement of Case, para 3.5

20. With regard to condition 2 none of the data or other evidence provided demonstrates that a higher number of children in excess of 12 have been in the external play area continuously in breach of the condition over a 10 year period.
21. While it is a matter for an appellant to decide what level of evidence might be reasonably required for demonstrating lawfulness, there are significant limitations in the scale and nature of data analysis in this appeal as I have previously described, and hence, taking account of the whole 10 year period, I find that it is imprecise and ambiguous overall.
22. The Council's reason for refusal related only to the period of time during and shortly after the period of Government restrictions during the 2020 coronavirus pandemic, when children were in low numbers of attendance.
23. On this particular point, having regard to the caselaw⁵ referred to by the appellant, it is clear to me that this 2020 period of compliance with conditions 2 and 5 may not constitute a significant interruption of an otherwise 10 year continuous breach of the conditions. Such a consideration will be fact-sensitive dependent on the length of time of the non-breach in relation to the whole of the rest of the 10 year period. However, for the reasons I have explained earlier, I do not find the evidence for the that wider period convincing or sufficiently precise and unambiguous.
24. Consequently, having regard to all of the information before me, I find that the appellant has failed to demonstrate, on the balance of probabilities, with clear and unambiguous evidence that any higher level of children beyond 12 and 34 in breach of conditions 2 and 5 has continued without significant interruption for at least 10 years before the date of the application.

Conclusion

25. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development for non-compliance with conditions 2 and 5 of planning permission 2011/00619/PA was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

Thomas Shields

INSPECTOR

⁵ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226; *Miles v National Assembly for Wales* (2007) EWHC 10 (Admin)