



Appeal Decision

Site visit made on 21 July 2020

by **JP Roberts BSc(Hons) LLB(Hons) MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 11 August 2020

Appeal Ref: APP/L1765/C/20/3248513

The Bungalow, Botley Road, Bishops Waltham, Southampton, Hampshire SO32 1DR

- 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 Mr Ricky Fernandez against an enforcement notice issued by Winchester City Council.
 - The enforcement notice was issued on 12 February 2020.
 - The breach of planning control as alleged in the notice is:
Without planning permission, the material change of use of the land from use as a single dwelling house to a mixed use as a single dwelling house and for commercial leisure and recreational purposes that are not incidental to the lawful(sic) as a single dwelling house.
 - The requirements of the notice are:
 - Cease the use of the swimming pool (shown coloured blue on the attached plan) for commercial leisure and recreational purposes that are not incidental to the lawful use of the land as a single dwelling house.*
 - Cease the use of the land for parking that is not incidental to the use of the land as a single dwelling house.*
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. It is directed that the enforcement notice be corrected by the insertion of the word "use" after the word "lawful" in the description of the breach of planning control. Subject to this correction the appeal is dismissed and the enforcement notice is upheld.

Procedural matters

2. There is an obvious missing word from the recitation of the alleged breach of planning control. I shall correct the notice to insert the word "use" after the word "lawful". The omission is an obvious typographical error, and no-one would be prejudiced by my correcting it.
3. The appellant has suggested that the planning permission for the erection of the swimming pool did not preclude commercial use. I have treated this as a hidden ground (c) appeal and will deal with it below.

Appeal on ground (b) – that the matters alleged in the notice have not occurred

4. The appeal on this ground argues that the notice is a nullity, in that the alleged breach of planning control does not tell the recipient what he or she has done wrong. The leading case on the question of nullity is *Miller-Mead v Ministry of Housing and Local Government* [1963] QB 196, where the key passages of the judgment of Upjohn, LJ are, in summary and of relevance to this appeal, that the recipient of a notice is entitled to find out from the four corners of the document exactly what he is required to do or abstain from doing, and that upon its true construction, if the notice is hopelessly ambiguous and uncertain so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission, the notice would be bad on its face and a nullity.
5. That case involved a notice alleging the parking of caravans on a site and required that all caravans should be removed. However, both parties knew that the storing of caravans on the site was lawful, and therefore both the allegation and the requirements were cast too wide. The Court held that the notice was not a nullity and could be corrected, as the defect was not material and the correction would not cause injustice.
6. In this case, the notice is directed at the use of the swimming pool in the appellant's garden. The appellant is clearly aware that this is the Council's sole concern from the way the breach is described, from the reasons for issuing the notice and the requirements of the notice. The allegation of the breach does not mention use of the swimming pool, but refers to commercial, recreational and leisure uses. The hire of the swimming pool to organisations or individuals providing swimming lessons is a commercial transaction, and distinguishes the use from that which is incidental to the use of the dwellinghouse as such. Thus the commercial allegation is made out. The appellant argues that swimming lessons are educational rather than recreational or leisure uses. Whilst lessons teach skills, which might be said to be part of the remit of education, the activity of swimming is a leisure or recreational one. My view is reinforced by the inclusion of swimming baths and areas for indoor sports or recreation within Class D2 *Assembly and Leisure* in the Town and Country Planning (Use Classes) Order 1987, which suggests that leisure, sport and recreation are all closely associated words. In my view, the notice is not hopelessly ambiguous as to constitute a nullity; it is clear and the appellant can have been left in no doubt as to what was the matter complained about.
7. Whilst the framing of the alleged breach potentially has a wide application, encompassing activities that would be ancillary to the use of the dwellinghouse as such, for example, the rearing of chickens referred to by the appellant, it is clear from the requirements of the notice, that it is not aimed at such uses, and does not require them to cease. Thus, I find that the use of the swimming pool by members of the public or by organisations is a use that is encompassed by the notice.
8. The case of *Sheila Moore v Secretary of State for Communities and Local Government and Suffolk Coastal District Council* [2012] EWCA Civ 1202 dealt with an enforcement notice which alleged "a change of use from a C3 dwelling to use as commercial leisure accommodation which does not fall within Class C3(a)-(c), and which therefore constitutes a sui generis use". The

requirements of the notice were to cease the use of the property as commercial leisure accommodation.

9. The “commercial leisure accommodation” was a holiday dwelling, but the notice did not refer to this, and an appeal was made under ground (b). Nevertheless, the Inspector found that the formulation used was clear, it covered the particular use to which the property was put, and it was obviously understood by the appellant whose business it was. The Court found that the Inspector rightly dismissed the appeal on ground (b), saying that even if the description of the breach of planning control was too wide it was neither “misconceived” nor “practically unintelligible.” For the reasons given by the Inspector, the description of the current use as “commercial leisure accommodation” covered the particular use to which the property was being put.
10. I consider that there are direct parallels with that case, albeit that here, the requirements of the notice are directed squarely at the matter which both the Council and the appellant understand to constitute the breach, and thus other uses which might otherwise be encompassed by the description of the breach are not caught by the requirements of the notice. This makes the notice even clearer than was the case in *Moore*.
11. I therefore find the notice is not a nullity, and that the breach of planning control alleged in the notice has occurred. The appeal on ground (b) fails.

Appeal on ground (c) – that the matters alleged in the notice do not constitute a breach of planning control

12. I have been provided with a copy of the planning permission for the swimming pool. The appellant argues that there is no condition on it controlling the way in which the building and pool are used or by whom. However, the application was made as one for operational development by a householder. It did not involve any change of use of the land, and therefore a condition controlling who might use it was unnecessary. Here, the pool is used by two commercial organisations to provide swimming instruction to members of the public. The nature and scale of this activity, both in the numbers of people attending, the frequency of the lessons and the comings and goings are of a materially different character from the incidental use by occupiers of the dwellinghouse.
13. I therefore conclude that the matters alleged in the notice constitute a breach of planning control and that the appeal on ground (c) fails.

Appeal on ground (f) – that the requirements of the notice are excessive

14. The appellant’s grounds are predicated on the premise that the notice is unclear and ambiguous. I have found that it is not, and the requirements of the notice do no more than is required to remedy the breach. The appeal on ground (f) therefore fails.

Conclusion

15. The appeal is dismissed, and subject to correction, the notice is upheld.

JP Roberts

INSPECTOR