WRITTEN STATEMENT

OF

WINCHESTER CITY COUNCIL

APPEAL BY MR R FERNANDEZ

THE BUNGALOW BOTLEY ROAD, BISHOPS WALTHAM, SOUTHAMPTON, HAMPSHIRE, SO32 1DR

PINS REFS: APP/L1765/C/20/3248513

WCC REF: 18/00159/COU

PLANNING OFFICER'S STATEMENT

JUNE 2020

INTRODUCTION

This written statement relates to an enforcement notice issued on 12 February 2020 and the alleged material change use of the land from a single dwelling house to a mixed used as a single dwelling house and for commercial leisure and recreational purposes that are not incidental to the lawful use of the land.

The notice requires the cessation of the non incidental use of the swimming pool, identified in blue on the plan, for commercial leisure and recreational purposes together with the parking. At the time of serving the notice two companies were using the pool for lessons; Baby Squids and Lucy Williams Swimming Academy. Three planning contravention notices (PCNs) were served on the businesses as well as the owner of The Bungalow and two were returned completed. The PCNs are attached at **Appendix A**. A Stop Notice was issued on 12 February 2020.

The Inspector if he so chooses can amend a notice under s176 of the Town and Country Planning Act 1990 (as amended) without causing any injustice to either party. It should be noted that there is a typographical error as section 3 – the description of the breach of planning control – where the word "use" has been omitted after the word "lawful".

The enforcement appeal relates to grounds (b) and (f) only.

SITE DESCRIPTION

The Bungalow is accessed off Botley Road, Bishops Waltham via a private track which serves a number of properties and which terminates at Brooklands Farm.

PLANNING HISTORY

17/02161/HOU Removal of existing polycarbonate pool cover and replace with timber clad pool house. Approved 1.11.17

19/00464/FUL Change of use of domestic swimming pool to commercial use. Refused 16.9.19

NULLITY

The *Miller - Mead* principles were upheld on 3rd November in 2017 by Judge Waksman QC in the High Court judgement in *Oates v SoSCLG and Canterbury City Council* [2017] EWHC 2716 (Admin). Namely, in order for a Notice to be effective it must inform the recipient "with reasonable certainty what the breach of planning control was and what was needed to remedy it". However the court also held that although there may be a degree of uncertainty or other defect in a notice, it does not necessarily mean there has been non-compliance with statutory requirements. Further, even where one section of a notice is too uncertain and cannot stand;

notices may be endorsed where the offending part did not “infect” the rest of the requirement of the notice. Moreover, standing back and looking at the notice as a whole, Inspectors should not adopt an approach which is unduly technical or formalistic.

It is well established (see e.g. *Harrogate Borough Council v Secretary of State for the Environment* [1987] J. P. L 288) that on appeal against an enforcement notice, the Inspector may correct or vary an enforcement notice to allow for considerable alteration pursuant to s.176 of the Town and Country Planning Act 1990 as amended (“TCPA”) such that it is directed to the correct planning unit, as long as she or he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

The High Court case of *Burdle v Secretrary of State for the Environment* [1972] 1 WLR 1207 is the principal authority for the determination of the appropriate planning unit, to consider in deciding whether there has been a material change of use.

The second *Burdle* test involves the consideration of the entire unit of occupation as the planning unit even though the occupier carries out varieties of activities or uses, which may fluctuate in their intensity from time to time and which are not physically contained within separate and physically distinct areas of the site.

In this case there is a single main unit of occupation within the appellant’s control; i.e. the use the land as a dwelling house together with the use of the land for commercial leisure and recreational purposes not incidental to the residential occupation of the land. This is a mixed use within the same unit of occupation and includes areas that are shared such as the changing rooms, the swimming pool and driveway/ parking area.

In *Richmond - upon - Thames LBC v Secretary of State for the Environment & Beechgold Ltd* [1988] JPL 396 it was held that a notice could be directed at ancillary uses, without losing its meaning; i.e. non incidental parking, and while the concept of a planning unit and ancillary uses are crucial in determining whether there has been a material change of use, they do not govern the wording of the notice.

The appellant has raised an issue with the notice in respect of the wording of the alleged breach and the requirements; namely the meaning of “commercial leisure and recreational purposes” and the term “parking”. The appellant claims that the use is educational. However, the returned PCNs clearly refer to the hiring out the pool and as such this would be a commercial activity and could easily be defined as an assembly and leisure use typically termed when referring to swimming pools.

With regards to parking, it appears that a number of third party representation letters for the refused planning application refer to parking on site as part of the commercial activity and the supporting statement to the application refers to staff parking on the existing driveway. Moreover, the PCNs corroborate that there is parking available for up to 12 vehicles. The supporting statement also states in its conclusions that the swimming pool at the Bungalow provides an important social and recreational benefit to adults and children. The planning application documents can be viewed via the link below by searching under ref 19/00464/FUL.

https://planningapps.winchester.gov.uk/online-applications/search.do?action=simple

It is therefore considered that the notice sets out with reasonable certainty what the breach of planning control is and what is needed to remedy it. As such the notice is capable of being amended by the Inspector should they consider that it is not a nullity.

The appellant claims that the notice cannot be varied without causing an injustice because they have not had the opportunity to appeal on ground (a) in the event that it is amended. However, as with all enforcement appeals this ground would have been available to them in any case should the notice be varied and moreover the enforcement appeal could have been co-joined with the s78 appeal which remains invalid. It is now too late for the appellant to appeal on ground (a).

GROUND (B) THAT THE BREACH OF PLANNING CONTROL HAS NOT OCCURRED AS A MATTER OF FACT

The definition of development under s55(1) of the Town and Country Planning Act 1990 (as amended) is the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

The change of use of the land must also constitute material development under s56 of the Act in respect of the time when the development began.

The appellant claims that they cannot identify the breach of planning control and as such are relying on the Inspector's findings of the nullity argument. Although the onus is on the appellant to argue that a breach has not occurred, clearly the Council's evidence in the planning contravention notices indicates the nature and intensity of the commercial use with potentially a maximum of 60 people attending the site/ pool per week. It is considered that this level of activity would have constituted a material change of use requiring planning permission. Also, the fact that there was a planning application to regularise the use of the property indicates that the commercial use of the pool was accepted by the appellant as something that required planning permission. Moreover, the appellant has not challenged the Stop Notice and as such has ceased the commercial use. It can therefore be accepted that a breach of planning control has occurred triggering the issuing of the enforcement notice. As such the appeal on ground (b) should fail.

GROUND (F) THE STEPS REQUIRED TO COMPLY WITH THE REQUIREMENTS ARE EXCESSIVE, AND LESSER STEPS WOULD OVERCOME THE OBJECTIONS

The appellant claims that they do not know whether the requirements of the enforcement notice are excessive because they "do not relate to any breaches in the EN". Should the Inspector find that the notice is not a nullity and the breach at section 3 of notice on the face of it is either varied or remains unaltered then the

requirements would relate to the breach and would not be excessive and the appeal on ground (f) should fail. Council records indicate that the mixed use of the site has been taking place to the extent that it triggered a planning application made by the appellant. Moreover the appellant has not provided any lesser steps to overcome the objections.

CONCLUSION

Evidence indicates that there has been a material change of use of the land to a mixed use and this has been identified in the enforcement notice. A notice can be varied at the discretion of the Inspector and only where it does not cause an injustice to either party. It is considered that the notice is not a nullity and as such grounds (b) and (f) can be determined.