



LEGAL NOTE

Lawful Determination of

Planning Application PL/26/0704

Proposed increase in childcare spaces from 37 to 50 children at

Wigwam Day Nursery, 22 Fatherson Road, Reading, RG1 4PL

Introduction and Background

1. This legal note sets out the background and legal considerations relevant to the determination by Reading Borough Council (“the LPA”) of the application for planning permission (“the Application”) for the increase in childcare spaces from 37 to 50 children (“Proposed Development”) at the Wigwam Day Nursery, 22 Fatherson Road, Reading, RG1 4PL (“the Property”).
2. The Property has a long-established lawful use as a children’s nursery, and additionally benefits from express planning permission for use as a children’s nursery for up to 37 children, by virtue of planning permission granted by the LPA in 2008 reference 08/00714/FUL (“Existing Consent”).
3. The Application is clear that the Proposed Development is a change of use only, and it is confirmed at paragraph 1.5 of the Planning Statement submitted with the Application that:

“The proposal does not involve any physical extension to the building, alterations to the site layout, or changes to the existing operating hours. The application relates solely to an increase in operational capacity”.

4. During the course of determination of the Application, the LPA's planning officer ("the Officer") has raised an issue relating to an outbuilding within the garden of the Property ("the Outbuilding"), which the Officer considers may be unauthorised development.
5. The Officer has indicated that, as a result, the Officer considers the existing business "***is likely to be***" operating at a higher level than permitted in Existing Consent (i.e. accommodating more than 37 children). Additionally, the Officer has indicated that if the Application is retrospective, the Outbuilding would be considered by the LPA to be unlawful on the basis of the "***Murfitt principle***", and has indicated that the Application will be recommended for refusal on this basis.
6. The reasoning of the Officer is based on a number of assumptions, which would lead the determination of the Application on this basis into legal error.
7. The purpose of this Legal Note is to set out the correct approach to ensure the lawful determination of the Application, and to consider the extent of and applicability of the "Murfitt Principle" in the context of the Application.

Legal Background

8. When determining the Application, Section 70(2) of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act") requires regard to be had to, inter alia, the provisions of the development plan, so far as material to the Application, and to any other material considerations.
9. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (as amended) states that if regard is to be had to the development plan, determination must be made in accordance with the development plan, unless material considerations indicate otherwise.
10. A decision to grant or refuse planning permission which fails to have regard to a material planning consideration or takes into account a consideration which is not a material planning consideration, constitutes an error of law liable to quashing by judicial review.
11. It is, therefore, essential in the determination of the Application that the decision-maker ensures that they have considered all relevant matters, and no irrelevant matters, when considering the balance between the development plan and material considerations.

12. The High Court has confirmed in the case of London Borough of Hackney v Secretary of State for Housing, Communities and Local Government (2018) that existing alleged breaches of planning control relevant to a planning application are not material considerations. Any planning application must be considered on its own merits in accordance with the development plan and any material planning considerations.
13. The Hackney case confirmed that ***“the mere fact that an aspect of the scheme in respect of which permission was sought may have been built in breach of development control was not a justification for refusing the application”***.
14. It is notable that this case was decided in 2018, several years after the 2015 Written Ministerial Statement relating to intentional unauthorised development was introduced, showing that the guidance and case law are distinguishable.
15. The 2015 Written Ministerial Statement has now, of course, been replaced by the very new NPPF (2026) policy DM8(2). This relates to weight to be given in the determination of a retrospective application, based on evidence that the unauthorised development was intentional. The principles of law as set out in the Hackney case are still relevant and compatible for cases where the application is not retrospective (as well as having potentially wider relevance).
16. The “Murfitt Principle” referenced by the Officer is a reference to the doctrine set out in the case of Murfitt v Secretary of State for the Environment (1980) that where unauthorised operational development is facilitating a material change of use of land, the operational development can be removed under enforcement powers, notwithstanding that it might otherwise have become lawful by reason of having been there for more than four years under Section 171B of the 1990 Act.
17. The recent Court of Appeal decision in the case of Caldwell and Timberstone v SSLUHC (2024) confirmed that the principle must not be overstated and is limited by the statutory scheme within Section 171B of the 1990 Act. It would only apply when the operational development has not brought about the change of use – it must be ancillary to the unauthorised change of use, and not causative of it.

Assessment

18. Although the applicant has confirmed that the Outbuilding is currently used as part of the nursery accommodation, the Application for the Proposed Development is not made in

reliance on the floorspace provided within the Outbuilding, nor seeks to authorise the use nor construction of the Outbuilding. There is sufficient space within the main building on the Property to accommodate 48 children to Ofsted Early Years space standards within the current internal layout, and minor internal tweaks (for which express planning permission is not required) could be made to increase that space to accommodate the full 50 children as and when required. The Ofsted Early Years space standards are not directly applicable to the determination of the Application, being a separate and distinct regulatory scheme, but serve as an illustration that the main building has sufficient capacity for the Proposed Development.

19. In light of the legal and planning policy framework, there are several key factors in the lawful determination of the Application, as follows:
 - a. The new NPPF (2026) policy DM8(2) relating to the weight to be given to intentional unauthorised development in the determination of planning applications, only applies to retrospective applications;
 - b. As such, it does not apply to the Application as the Proposed Development is not retrospective. The Application does not relate to nor rely upon the Outbuilding, and there is no evidence that the change of use to 50 children is retrospective – as the applicants have confirmed, there is no breach of the limit on numbers of children authorised by the Existing Consent;
 - c. The Application must be determined in accordance with the case law regarding unauthorised development as set out above. In short, even in the event that the Outbuilding is unauthorised development (which is refuted), this is not a justification for refusing planning permission. The Application must be determined on the basis of the Proposed Development, in accordance with the development plan and any material planning considerations;
 - d. The reference to the Murfitt Principle has been applied incorrectly in the context of the Application. There is no evidence of any unauthorised change of use which the Outbuilding is ancillary to;
 - e. We understand the Outbuilding was completed in January 2020 and so would likely be immune from enforcement action, however whether it is or is not lawful is simply not relevant to the determination of the Application. The Application does not seek

retrospective authorisation for the Outbuilding, but simply an increase in capacity of the existing lawful use of the Property; and

- f. It would be open to the LPA to decide whether it is expedient to take enforcement action in respect of the Outbuilding, but this has no bearing on the determination of the Application.

Conclusion

- 20. In order to determine the Application lawfully, the decision-maker must (inter alia):
 - a. Determine the Application on the basis of the Proposed Development (i.e. change of use from 37 to 50 children only) in accordance with the development plan, unless material considerations indicate otherwise;
 - b. Not consider the Application as a retrospective application, given that it is for a change of use only, and there is no evidence of any breach of the children numbers permitted by the Existing Consent; and
 - c. Disregard the Murfitt Principle and the presence of the Outbuilding with the garden of the Property, as even in the unlikely event that the Outbuilding is unauthorised development which is not immune from enforcement, this is not a matter that can be considered as a material consideration in law for the determination of the Application.
- 21. On this basis, it is clear that no weight can be given, lawfully, to the presence of the Outbuilding within the garden of the Property in the determination of the Application, given the nature of the Application and Proposed Development.
- 22. The determination of the Application must consider the Proposed Development only, namely whether an increase in the number of children that could be accommodated within the existing business, without any operational development proposed, is acceptable in planning terms in accordance with the development plan and any material considerations.