

## APPLICATION REPORT – 16/00533/FUL

Validation Date: 28 June 2016

Ward: Chorley North West

Type of Application: Full Planning

Proposal: Variation of condition 4 attached to 03/00044/COU (the change of use from mixed use (residential/day nursery) to day nursery) to increase the total number of children within the building from 55 to 70.

Location: Pipers Private Nursery 11 Southport Road Chorley PR7 1LB

Case Officer: Andrew Williams

Authorising Officer: CT

Applicant: Pipers Day Nursery

Agent: Jane Dickman

Consultation expiry: 19 August 2016

Decision due by: 12 October 2016

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### RECOMMENDATION

#### Refuse Full Planning Permission

This application is brought before members following deferment of the application at the 6<sup>th</sup> December Development Control Committee to appraise supporting information submitted by the agent in the form of a Counsel Opinion by Kings Chambers earlier on the day and to allow a site visit to take place.

#### UPDATE

**Below is an update since the previous committee. The previous report and addendum from 6<sup>th</sup> December is set out beneath it for completeness.**

#### Summary of Counsel Opinion

In summary, it has been agreed within the Counsel Opinion that the use of a planning obligation through a S106 undertaking, as recognised through case law, is not applicable through Section 106(1) of the Town and Country Planning Act 1990. However, the author remains satisfied that the attachment of an appropriately worded condition would suffice.

The Counsel Opinion considers that the tests of enforceability of the condition previously considered is of no real substance given that whilst the Council itself could not directly control the behaviour or third parties to use the permits provided, *'the reasonable availability of suitable provision, be it on-site spaces or those nearby car parks, is what matters. And the reasonable availability of the latter can be enforced by condition through the obtaining by the nursery of the parking permits'*.

In respect to reasonableness, the author maintains that the purchasing of parking permits would not amount to an unjustifiable and disproportionate burden on the applicants given that *'while it is true that an applicant's agreement to an unreasonable condition is not an answer to unreasonableness, the fact that the applicant has agreed here to the purchasing of parking permits is nevertheless good evidence that there is not an unjustifiable and disproportionate burden'*.

With this in mind, the Opinion concludes that a Grampian condition [this is a condition that prevents the start of a development until something off site has been secured on land not controlled by the applicant] could be used through the provision of a parking management strategy which could provide additional sustenance to the enforceability of the case which imposes an obligation on employees who are provided with parking permits.

### **Response to Counsel Opinion**

In response to the Counsel Opinion, the Council's Legal Department remains unconvinced that a parking management strategy is appropriate or reasonable to outweigh the evidential harm caused through the proposed increase in child capacity which would undoubtedly lead to the need for additional staff resources, as acknowledged by the applicant.

The Legal Department maintains that the example employed by Manchester City Council and referred to in the Counsel Opinion for the inclusion of a parking management strategy is not appropriate and bears little comparison to this particular situation and therefore fails on the tests of reasonableness. This is because the Manchester City Council example was for a residential scheme and not for commercial purposes. As such, staffs are more likely to use on-site spaces were there a sufficient number as opposed to more distant town centre car parks and therefore the Counsel Opinion's comparison of on-site spaces as compared to town centre spaces is not a realistic one.

### **Concluding Remarks**

The application is recommended for refusal on the following grounds:

It has not been demonstrated that the use of a condition or legal agreement to secure parking permits for staff members in perpetuity meets the tests of set out in the National Planning Policy Framework and therefore it is recommended that the application be refused on highway safety grounds in accordance with the Chorley Local Plan (2012-2026) policies BNE1 and ST4 and the guidance contained within paragraph 32 of the NPPF (2012) as the benefits of the scheme do not outweigh the harm.

## **PREVIOUS APPLICATION REPORT 6<sup>th</sup> December committee**

### **RECOMMENDATION**

**Permit Full Planning Permission [note this was changed to a recommendation to refuse on the addendum set out below].**

### **SITE DESCRIPTION**

1. The application site consists of a semi-detached three storey building located along Southport Road with three car parking spaces to the principal elevation and additional gated access to the rear from Shaftesbury Place.
2. The building is typically late Victorian/early Edwardian in appearance, being constructed in brick with pediment bay windows to the ground and first floors with front entrance under a stone archway and curved window above. The main pitched roof is lined with slates whilst the modern single storey rear extension is protected by grey concrete tiles.

3. The immediate area is characterised by similarly scaled buildings of corresponding design which occupy long narrow plots with access onto Shaftesbury Place to the southern boundary. The connecting building to the east (No.9) is understood to be in commercial use whilst No.13 to the west, adjacent to the application site, is in residential use. The properties located along Shaftesbury Place to the southern aspect are also in residential use.
4. Each building within the immediate vicinity of the application site has undergone extension and alteration to the rear elevation through the construction of various single storey and two storey extensions of different sizes under a mixture of flat, mono-pitched and gable ended roofscapes.
5. The application site is in use as a children's day nursery.

#### **DESCRIPTION OF PROPOSED DEVELOPMENT**

6. This application seeks the variation of condition 4 attached to 03/00044/COU which sought the change of use of 11 Southport Road from a mixed use (residential/day nursery) to a day nursery.
7. Condition 4 attached to the decision notice dated 30 April 2003 reads:  
  
*'4. The total number of children within the building shall not exceed 55 at any time.  
Reason: In the interests of the amenities of the local residents'*
8. This application seeks to vary the condition to increase the total number of children within the building from 55 to 70.
9. Committee members are reminded that a separate application is also reported on this committee agenda for an application for extensions to the nursery (ref: 16/00527/FUL).

#### **RELEVANT HISTORY OF THE SITE**

**Ref: 00/00627/COU Decision: REFFPP Decision Date: 25 October 2000**  
**Description: Change of use from mixed use (Day Nursery/Residential) to Day Nursery use with ancillary office and staff accommodation,**

**Ref: 03/00044/COU Decision: PERFPP Decision Date: 30 April 2003**  
**Description: Change of use from mixed use (residential/day nursery) to day nursery,**

**Ref: 05/00421/INV Decision: APPVAL Decision Date:**  
**Description: Demolish existing wall , remove trees and create a parking area to the rear of the existing nursery**

**Ref: 05/01203/FUL Decision: REFFPP Decision Date: 8 February 2006**  
**Description: Demolish existing wall, remove tree and create a parking area to the rear of the existing nursery**

**Ref: 14/00589/ADV Decision: PERADV Decision Date: 12 August 2014**  
**Description: Retrospective application for advertisement consent for a Non-illuminated sign on gable end of property**

**Ref: 16/00065/FUL Decision: WDN Decision Date: 18 March 2016**  
**Description: Erection of single storey rear extension and first floor rear extension**

**Ref: 16/00527/FUL Decision: PDE Decision Date:**  
**Description: Single storey extension and first floor extension to rear elevation of Nursery.**

**Ref: 16/00890/FUL Decision: PDE Decision Date:**  
**Description: Build an open wooden canopy/shelter at the bottom of the garden to be used by the children during outdoor play.**

**Ref: 93/00403/FUL Decision: PERFPP Decision Date: 3 August 1993**  
**Description: Single storey side extension to form additional classroom and toilet accommodation**

**Ref: 92/00829/FUL Decision: PERFPP Decision Date: 7 December 1992**  
**Description: Formation of vehicular access**

**Ref: 92/00280/FUL Decision: REFFPP Decision Date: 19 May 1992**  
**Description: Vehicular access**

**Ref: 91/00110/TPO Decision: PERTRE Decision Date: 2 April 1991**  
**Description: Pruning of horse chestnut tree covered by TPO No.6 (Chorley) 1984**

**Ref: 89/00070/FUL Decision: REFFPP Decision Date: 2 May 1989**  
**Description: Vehicular access**

**Ref: 89/00069/ADV Decision: PERFPP Decision Date: 28 March 1989**  
**Description: Display of name board**

**Ref: 87/00549/FUL Decision: PERFPP Decision Date: 8 September 1987**  
**Description: Conversion of two ground floor reception rooms into pre-school nursery**

**Ref: 86/00420/TPO Decision: REFTRE Decision Date: 23 September 1986**  
**Description: Felling 2 horse chestnut trees covered by a tree preservation in garden of**

**Ref: 85/00737/TPO Decision: REFFPP Decision Date: 19 December 1985**  
**Description: Felling 2 horse chestnut trees**

**Ref: 81/00032/FUL Decision: PERFPP Decision Date: 9 February 1981**  
**Description: Conversion of coach house to granny flat**

**Ref: 80/00859/FUL Decision: PERFPP Decision Date: 20 October 1980**  
**Description: Change of use to Nursery and Support Unit for parents of mentally handicapped children (Use Class XV)**

**Ref: 80/00711/FUL Decision: PERFPP Decision Date: 29 September 1980**  
**Description: Conversion of former Coach House into Granny Flat**

## **REPRESENTATIONS**

10. During the determination of this application the following representations were received objecting to the proposal:

- 6 letters of objection received from the same household at no.13 Southport Road;
- 1 letter of objection received from the occupier of no.2 Shaftesbury Place;
- 1 letter of objection received from the occupier of no.7 Shaftesbury Place;
- 1 letter of objection received from the occupier of no.9 Shaftesbury Place;
- 1 letter of objection received from the occupier of no.15 Shaftesbury Place;
- 1 letter of objection received from the occupier of no.16 Shaftesbury Place; and
- 1 letter of objection received from the occupier of The Coach House, Shaftesbury Place.

11. In summary, the objectors raised the following concerns:

- The rear extensions would reduce light levels in the kitchen and dining room area of No.13 Southport Road;

- Insufficient car parking provision for nursery clients;
- At peak times Shaftesbury Place is blocked with customer's cars blocking driveways and access for neighbouring occupiers;
- There is insufficient 30 minute spaces available with customers regularly using 'resident only' spaces;
- Children are unable to play on Shaftesbury Place due to the traffic;
- The lack of turning space causes cars to use resident's driveways;
- Minor damage has occurred to neighbours cars;
- Obstructions from car parking in unauthorised locations along neighbouring roads, particularly Shaftesbury Place;
- At peak times it is impossible for emergency vehicles to access the site;
- Refuse collection lorries cannot access the road at peak times;
- Noise implications which will intensify;
- There have been successive applications to enlarge the nursery with great concern raised by local residents.
- Loss of light and risk of overlooking to the occupiers of The Coach House;
- The extension will exacerbate the traffic problems;
- If the condition variation is granted and the extension refused, the numbers will be increased to an even greater level and perhaps be used at some future date to justify extensions either at appeal or by a future application;
- In 2000/2001 an application to change the first floor residence to a nursery use (total 55 children) was refused due to the increase in vehicle movements. The decision was appealed and dismissed by an Inspector who considered that Shaftesbury Avenue was inadequate to serve the number presently associated with the nursery. In 2003, an application was granted for the use of the building for a maximum of 55 children however the current application indicates that the children numbers have increased to 62 which is in breach of condition 4;
- Application 16/00065/FUL was submitted and later withdrawn after many objections from residents;
- The submitted Transport Statement offers no solution to the problem of excessive vehicle movements; and
- The application is for an increase in floor area of 50sqm to accommodate 8 more children. However this number is likely to be more.

12. In the submission documentation, the following letters of support have been included which summarise that:

- Pipers Nursery is essential in working closely with the Duke Street Children's Centre which supports vulnerable families;
- The nursery shares resources with support through a Speech and Language screening and intervention package;
- The future of child care is to offer working parents 30 hours of free childcare whereas at present they only get 15 hours. This infers that, from September 2017, there will be a large shortfall of nursery places available if all working parents take up the offer.
- The Nursery contributes substantially to the Derian House Children's Hospice; and
- The Nursery supports the local Astley and Buckshaw Junior Football Club.

## **CONSULTATIONS**

**Lancashire Highway Services** – No objection subject to permit parking for staff members and the submission of a Travel Plan promoting the reduced dependence of car borne journeys.

**Regulatory Services - Environmental Health** – No objection.

## **PLANNING CONSIDERATIONS**

13. In the determination of this application the main considerations are:
- Principle of development;
  - Highways;

- Amenity to neighbouring properties; and
- Other matters.

### **Principle of development**

14. Paragraph 7 of the NPPF (2012) identifies three dimensions to sustainable development which involves economic, social and environmental considerations. This is further supported through paragraph 14 which indicates that there is a presumption in favour of sustainable development which should be seen as a 'golden thread' running through local policy and during the decision making process. In regards to the decision making process, the NPPF states that:
  - Development proposals which accord with the development plan shall be approved without delay; and
  - Where the development plan is absent, silent or relevant policies are out-of-date permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies of the framework as a whole; or specific policies which indicate that development should be restricted.
15. In addition to the above, paragraph 17 of the NPPF seeks to encourage sustainable economic development to positively meet the needs of local communities with consideration given to delivering sufficient community and cultural facilities.
16. As indicated within paragraph 72 of the NPPF the Government attaches great importance *'to ensuring that a sufficient choice of school places is available to meet the needs of existing and new communities. Local Planning authorities should take a proactive, positive and collaborative approach to meeting this requirement and to development that will widen choice in education'*.
17. At a local level, there are no specific policies relating to nursery development however policies relating to school and higher education provision are demonstrated through policy 14 of the Cores Strategy. Policy 14 encourages provision for education by enabling new schools and other educational facilities to be built in locations where they are accessible by the communities they serve, using sustainable modes of transport. Furthermore, the support for the retention of Children's Centres is mentioned within policy HW6 of the Local Plan.
18. Whilst it is acknowledged that a nursery is not incorporated within the definition of a 'school' or a 'Children's Centre', its assimilation with education is of great importance to the local community and should be given due weight in the determination of a planning application.
19. The principle use of the building as a nursery is previously established and the proposal is considered acceptable in principle subject to the acceptability of the cumulative impacts of the increased capacity on the highway network and the amenity of neighbouring residential properties.

### **Highway considerations**

21. Paragraph 32 of the NPPF states that planning decisions should take into consideration:
  - Opportunities available for sustainable transport modes depending on the nature and location of the site;
  - Safe and suitable access to the site can be achieved for all people; and
  - Improvements proposed to limit significant impacts of development.
22. Moreover, paragraph 32 reiterates that:
 

*'development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe'*.

23. Policy BNE1 of the Chorley Local Plan (2012-2026) indicates that planning permission will be granted where the residual cumulative highways impact of the development is not severe and would not prejudice highway safety, pedestrian safety, the free flow of traffic, and would not reduce the number of on-site parking spaces.
24. In support of the application a Transport Statement produced by SK Transport Planning (dated June 2016) has been submitted. The Statement identifies the current arrangements for car parking provision for existing staff numbers and the level of available parking bays available within the surrounding area for the dropping off/picking up of children.
25. In this regard the Statement recognises that there are 5 available car parking spaces off Southport Road for 22 full-time and 3 part-time staff members (of which there are only 18 staff members on the site at any given time) with access gained for customers from Shaftesbury Place to the rear of the application site. Parking is available to the general public within 9 marked bays on the northern side of Shaftesbury Place for a maximum stay of 30 minutes, as well as various other roads within the immediate area contributing towards the provision of car parking for public use. It is noted, however, that the southern side of Shaftesbury Place is exclusive to residential permits.
26. In reference to car based journeys the Statement surmises that 44% of staff are reliant on the car (61% if including passengers) whilst at table 3.7 nursery activity on Shaftesbury Place considers an accumulation in numbers of cars using the 9 available public spaces as between 1-4 cars at peak times throughout the day. This figure is based upon a survey undertaken between 07.15 to 9.30am and 04.15 to 6.30pm on Tuesday 10<sup>th</sup> May 2016. The same survey was undertaken at Ashfield Road (table 3.9) which also showed an accumulation of between 1-4 cars at peak times throughout the day.
27. As a result of the findings, the assessor considered that the existing provision of short-stay space on the northern side of Shaftesbury Place (9 vehicles) and those available along Ashfield Road is sufficient to meet the current demand generated by the nursery.
28. In addition to the above, a parent survey was undertaken to consider the modes of transport for the children. The data (table 3.4) showed that between weekdays dependence on the car ranged from 56% to 74% (this excluded travel with staff members) and between 21% and 37% for parents walking or using public transport.
29. In terms of future modes (based upon 70 children), the analysis considered that the future accumulation patterns over the same timeframe would range from 1-5 cars and therefore would be accommodated by the existing provision. Furthermore, the results showed that Ashfield Road was significantly underutilised and therefore the applicant would actively encourage parents to also use the additional parking bays available on Ashfield Road and Collison Road to further spread the impact of the nursery on the surrounding highways network.
30. In response to the Transport Statement, Lancashire County Council Highways acknowledged the accessibility and general sustainability of the site to various transport networks. However, concerns were raised by the suppositions made within the submitted Statement.
31. The Highway Officer accepted the approach taken in respect to staff parking however noted that the evidence base assumed that there would only ever be 18 staff on site. As indicated within the Statement (paragraph 3.11) the nursery currently hires 22 full-time and 3 part-time staff members and therefore concern was raised as to whether consideration had been given to the possibility of more than 18 being present on site at any one time. In this regard, and based upon the car journeys evidenced, there would be insufficient spaces to accommodate any additional staff members if all 23 staff were to be accounted for.

32. As indicated within the Statement, the existing staff off-street parking provision is located to the front of the building along Southport Road. It is stated that this area accommodates 5 car park spaces however from a highways safety point of view and based upon the standard sized parking space (2.4m x4.8m), it is estimated by the Highways Officer that the site is only capable of accommodating 3 cars to the front of the site. It is therefore apparent that the nursery lacks adequate off-street car parking facilities to meet the needs of the staff. It has been acknowledged by the Highways Officer that whilst the applicant is not expected to fully meet the standard due to the size and location of the site, any deficit in parking must be made up for by measures to encourage more sustainable travel choices.
33. In respect to the capacity issue and cumulative impact of additional car journeys of parents accessing the facility, the Highway Officer eludes to Shaftesbury Place having no turning facility and although vehicles in the limited waiting bays are permitted to partially park on the footway, consideration must be given to this being a two way street where the presence of parked cars on both sides severely hinders traffic movements and can cause additional delays. Moreover, as young age children require parents to escort them into the scheme, inappropriately parked cars are often left unattended longer than the 10 minutes specified in paragraph 3.24 of the Transport Statement. As a result, and as experienced on site by the Officer, the delays are often compounded by drivers undertaking unacceptable turning and reversing manoeuvres into Ribblesdale Road with an increase in the number of car journeys exacerbating which is already considered to be unsatisfactory traffic conditions on Shaftesbury Place and the surrounding highway network.
34. The Highway Officer also considers that given the high number and percentage of parents driving their children to and from the nursery as explained in paragraphs 3.18-3.32, the proposal seems rather reliant on the availability of limited on-street waiting facilities provided on the local network with no consideration given to the use of those spaces by members of the public who are undertaking unrelated activities. As a result it is deliberated that should these spaces be unavailable, given the nature of the facility, parents would have difficulties and potential contravene the existing waiting restrictions and the general highway safety of the immediate area.
35. It was therefore considered that based on the information provided the nursery lacked adequate parking facilities customers with the effect of increased traffic movements compromising the safety of the highway network. As a result, the Highways Officer recommended the application to be refused.
36. In receipt of the consultation response and further to extensive negotiation between the highways consultant and Lancashire County Council, the initial consultation response detailing a recommendation of refusal by the Highways Officer was retracted and substituted on the 28<sup>th</sup> October 2016 by a revised consultation response.
37. The amended response detailed the Highway's Officers recognition that parking provision for staff is inadequate with the proposed increase in the number of nursery children from 55 to 70 potentially causing a material increase in travel demands whereby impacting upon the usability of the highway network.
38. In an effort to negate these concerns, the Highway's Officer has agreed with the applicant's intention to purchase two additional car parking permits for use of the nearby public car parks (the nearest being approximately 350m away) by staff that require the additional spaces is sufficient. This was considered acceptable taking into account the additional 1 staff member hired through the enlargement of the facility and also, realistically, the applicants use of the front car parking area by 5 cars which despite not meeting the parking standard, is not enforceable to restrict.
39. The applicant had also agreed to the introduction of a School Travel Plan with measures to encourage sustainable modest of travel to and from the nursery.

40. As a result of these arrangements the Highways Officer is now of the opinion that the proposed increase in capacity to the nursery is acceptable providing the School Travel Plan is implemented and the off-site staff parking arrangements are confirmed. The permits for staff are considered necessary to make the development acceptable. The advice of the Council's legal department has been sought to check that the purchase of car parking permits for staff can be secured, either via a condition or through a legal agreement and therefore taken into account as a material consideration in determining the application. This matter will be updated on the addendum.
41. An interim School Travel Plan has now been submitted as a means of providing additional information on the intentions of the applicants to promote sustainable travel alternatives. This includes the creation of a Travel Plan Coordinator responsible for the day-to-day running of the travel plan and also the development, implementation and monitoring the travel plan's effectiveness. The Coordinator will also be responsible for raising awareness and marketing of the travel plan.
42. As confirmed through Paragraph 32 of the NPPF the applicant has identified measures which have the capability to negate the concerns raised previously and improve the effectiveness of the highway network to the benefit of the nursery and local residents. The paragraph reiterates that '*development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe*'. In this regard the Highways Officer does not consider that the residual cumulative impacts of development are now severe and therefore in the opinion of the Planning Officer, based upon the specialist advice provided, the proposal complies with policy BNE1 of the Local Plan and relevant paragraphs of the NPPF (2012). This is subject to the Council being able to secure the parking permits as detailed above.

#### **Amenity to neighbouring properties**

43. Policy BNE1 of the Local Plan states that new development must not cause harm to any neighbouring property. This is supported by the NPPF (2012) which under paragraph 17 states that development should seek to secure a good standard of amenity for all existing and future occupants of land and buildings.
44. The application has generated 12 letters of objection from local residents largely concerning the level of traffic generated at peak times and the impact this has upon the amenities of those occupiers. Furthermore, noise impacts were also raised as a concern.
45. It is important to note, however, that the impact of the extensions themselves is not a material consideration in the determination of this application and has been assessed within the associated planning application 16/00527/FUL.
46. In regard to the potential noise impacts associated with the increased capacity of children the Council's Environmental Health department have been consulted and have raised no objection to the proposal given the site's existing established use as a day nursery which generates a level of noise which is not considered to be amplified by the addition of 15 children.
47. It is considered, however, that any increase in capacity has the ability to impact upon highway safety and the usability of the surrounding streets by immediate residents. Notwithstanding this, and as demonstrated above, the intention of the applicant to implement a School Travel Plan will have a positive impact upon the amenities of local residents with customers made more aware of the underutilisation of surrounding streets and the promotion of more sustainable modes of travel through public transport, car sharing or walking.
48. The concerns raised by local residents are duly noted however with the implementation of a School Travel Plan, alongside additional permits being bought for staff members, should improve the usability of the local network and therefore the amenities of local

residents in accordance with Policy BNE1 of the Local Plan and guidance contained within paragraph 17 of the NPPF.

### **Other matters**

49. As noted within one of the representations received by a local resident, the change of use of the building from a mixed use (day nursery and residential) to a day nursery with ancillary office and staff accommodation was refused under 9/00/00627/COU on the 25<sup>th</sup> October 2000. The reason for refusal considered that:

*'The proposed change of use would result in an increased number of children accommodated within the nursery, which would in turn lead to an increased number of vehicles being brought to the site and, in particular, onto Shaftesbury Place. Due to the lack of any on-site parking provision, the restricted width and limited street parking this would add to the congestion and be detrimental to the amenities of residents on Shaftesbury Place'*

50. In receiving a refusal notice, the applicant brought the application before the Planning Inspectorate (PINS ref no. APP/D2320/A/01/1058972) where it was later dismissed on the 31<sup>st</sup> May 2001 due to concerns raised by the Inspector that Shaftesbury Place was inadequate to serve the numbers presently associated with the nursery based upon vehicle movements and the children numbers which was at the time controlled by the amount of floor space permissible for nursery activities.
51. However, since this decision, planning permission was granted in 2003 (03/00044/COU) for the change of use of the building as a nursery. This application was permitted on the transport information submitted alongside the proposal and a maximum capacity within the building of 55 children.
52. For the purposes of this application it is not considered that 9/00/00627/COU is of irrelevant given that planning policy has significantly changed since 2001 and the principle has been now been established through the grant of 03/00044/COU. No weight is therefore attributed to the previously refused application.

### **CONCLUSION**

#### **Planning Balance**

53. The proposal seeks to increase the capacity of children at the nursery from 55 to 70 in an effort to support the financial viability of the nursery given the Government's intentions of offering free funding for nursery places from 15hrs a week to 30hrs a week. The expansion is therefore to allow the nursery to accommodate the proposed changes in Government policy. This is considered to be in accordance with the main thrust of paragraph 72 of the NPPF and carries significant weight.
54. It is considered the initial concerns raised by the Lancashire County Council's Highways Officer could be negated through the acceptability of providing additional car parking permits for staff members elsewhere (subject to legal advice that the purchase of car parking permits for staff can be secured, either via a condition or through a legal agreement) and the implementation of a School Travel Plan to reduce the reliance, and therefore the amount, of car journeys anticipated by customers using the site.
55. It is in the opinion of the Planning Officer that, on balance, the benefits of the proposal outweigh the harm when assessed against the policies of the framework as a whole. The applicant has shown willingness to achieve suitable solutions in an effort to reduce the concerns raised by local residents and the Highways Authority.
56. Notwithstanding the above, it is a finely balanced application and it is for Members to consider if the commitments made by the applicant will sufficiently negate the concerns detailed above.

57. The application is recommended for approval subject to legal advice that parking permits can be secured through a condition or a legal agreement. This will be updated on the addendum.

**RELEVANT POLICIES:** In accordance with s.38 (6) Planning and Compulsory Purchase Act (2004), the application is to be determined in accordance with the development plan (the Central Lancashire Core Strategy, the Adopted Chorley Local Plan 2012-2026 and adopted Supplementary Planning Guidance), unless material considerations indicate otherwise. Consideration of the proposal has had regard to guidance contained within the National Planning Policy Framework (the Framework) and the development plan. The specific policies/ guidance considerations are contained within the body of the report.

**Suggested Conditions (6<sup>th</sup> December report)**

1. The development hereby permitted shall be carried out in accordance with the approved plans below:

*Reason: For the avoidance of doubt and in the interests of proper planning*

Title	Plan Ref	Received On
Location Plan	N157P1	8 June 2016
Proposed Plans	N157P2 REV A	8 June 2016

2. Prior to the commencement of the development a full Travel Plan for the site shall be submitted to and approved in writing by the Local Planning Authority. The Plan shall be generally in accordance with document submitted with the application entitled 16/00533/FUL. The development thereafter shall be carried out in accordance with the approved details unless otherwise agreed in writing by the Local Planning Authority.

*Reason: To reduce the number of car borne trips and to encourage the use of public transport.*

3. The total number of children within the day care nursery facility shall not exceed 70 at any time.

*Reason: In the interests of the amenities of the local residents.*

4. All windows in the first floor of the building's west elevation shall be fitted with obscure glass and obscure glazing shall be retained at all time thereafter.

*Reason: In the interests of the privacy of occupiers of neighbouring property.*

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**Addendum from 6<sup>th</sup> December committee:**

**ITEM 3k- 16/00533/FUL - Pipers Private Nursery, 11 Southport Road, Chorley**

**The recommendation has changed as follows:**

**The application is recommended for refusal due to a legal opinion being received which evidenced that the suggested parking permits could not be secured by condition or through a legal agreement.**

The Council's legal department have assessed the options and have concluded that neither a condition or unilateral undertaking would suffice in the purchasing of parking permits to outweigh the highway safety concerns raised by Lancashire County Council.

On this basis, the application for the variation of condition of condition 4 attached to 03/00044/COU is recommended for refusal.

The legal department have quoted a High Court judgement (Westminster City Council v SSCLG and Anr 2013) in which the Judge deemed that the 'tests' for a S106 contribution would not be met through prohibiting development authorised by the planning permission until a specified action has been taken. To meet the tests of a s106, it was considered the obligation must

- restrict the development or use of land; require operations or activities to be carried out on the land; or
- require a use to be carried on or require a sum or sums of money to be paid to the local planning authority.

In this case the obligation had none of those characteristics and so was not therefore considered enforceable by the Courts.

In respect to the attachment of a condition, conditions must only be imposed if they meet the six tests and therefore the tests of concern to the Legal Department were the 'enforceable' and 'reasonable' test. With regards to enforceability, the applicant could obtain parking permits but it does not necessarily mean that the staff will use and park in the Council's car parks. This indicates that technically the applicant would have complied with the condition but the Council would not be able to enforce that the staff use those permits. Furthermore, consideration has been given as to whether the condition is 'reasonable', depending on the size of the nursery and how many staff are employed. In this respect, the Officer's interpretation of the advice received is that legally, it would be deemed unreasonable to impose a financial obligation/burden on the nursery to meet the cost of the permits, even with a confirmation from the applicants themselves to enter into such an arrangement.

In response to the advice obtained by the legal department, the applicant has provided evidence where an example of imposing such conditions have been used and accepted by Manchester City Council as a means of negating the inconformity to parking standards. In this regard, the applicant has quoted a case in which a residential scheme for 201 units provided no on-site parking and therefore opportunities for residents to purchase parking permits/season tickets for off-street car parks run by NCP was incorporated into a Travel Plan.

With this in mind, the applicant has suggested the following conditions be attached to any grant of planning permission:

- 1) The development hereby approved shall be carried out in accordance with the Travel Plan Framework prepared by SK Travel Planning stamped as received by the Council on (date). In this condition a travel plan means a document that includes the following:
  - i) the measures proposed to be taken to reduce dependency on the private car by residents and those [attending or] employed in the development;
  - ii) a commitment to surveying the travel patterns of residents during the first three months of use of the development and thereafter from time to time;
  - iii) mechanisms for the implementation of the measures to reduce dependency on the private car;
  - iv) measures for the delivery of specified travel plan services; and
  - v) measures to monitor and review the effectiveness of the Travel Plan in achieving the objective of reducing dependency on the private car

Within six months of the first use of the development, a revised Travel Plan which takes into account the information about travel patterns gathered pursuant to item (ii) above shall be submitted to and approved in writing by the Council as local planning authority. Any Travel Plan which has been approved by the Council as local planning authority shall be implemented in full at all times when the development hereby approved is in use.

*Reason - To assist promoting the use of sustainable forms of travel , pursuant to policies*

2) No part of the development shall be occupied unless and until details of a parking management strategy for employees has been submitted to and approved in writing by the Council as Local Planning Authority.

*Reason - The development does not provide sufficient car parking facilities and in order to provide alternative arrangements (e.g. parking leases with car parking companies; car sharing; or car pool arrangement) for the needs of future employees who may need to use a motorcar.*

In response to this, the legal department has indicated that irrespective of whether or not Manchester City Council has agreed to such a condition, the legalities associated with its enforceability is still not considered to be sound and therefore without the purchasing of parking permits to outweigh the highway safety concerns raised by Lancashire County Council the application is recommended for refusal.

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**The reason for the refusal thus reads:**

**The applicant is unable to secure the requirement to provide an additional two car parking spaces for staff members through a permit scheme through condition or legal agreement to justify the deviation from the Parking Standards as set out under Policy ST4 of the Chorley Local Plan (2012-2026). The proposed development would therefore cause additional local parking congestion to the detriment of the highway network and cannot be supported.**

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The applicant has provided a response as follows:-

Following Andrew's email yesterday late afternoon our clients have taken counsel opinion see attached regarding the conditions we proposed to address the matter of staff parking permits. Given this we ask that the original recommendation of approval on both applications is reinstated and reported to your committee tonight please as the proposed conditions do meet the NPPF condition tests.

#### **Officer Response**

The legal advice will need to be considered by the Councils legal team and recommendations provided to Committee about the weight to be attached to the advice and the applicants representations.

The advice in full is as follows:-

PIPERS PRIVATE NURSERY, 11 SOUTHPORT ROAD, CHORLEY

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## ADVICE

1. I am asked in this case to advise on behalf of Pipers Private Nursery, 11 Southport Road, Chorley.
2. The nursery operates under a planning permission which has a condition restricting the maximum number of children in the building to 55.
3. The nursery wishes to increase this number to 70. Two planning applications have been submitted to Chorley Borough Council. One application seeks to vary the condition which imposes the restriction accordingly. The other seeks permission for an extension of the building.
4. One of the key issues in relation to the applications has been the highway and parking implications of the proposals. Ultimately matters have been resolved with the highway authority, Lancashire County Council, provided that concerns in relation to the availability of staff parking at the nursery are resolved by purchase by the nursery of two additional car parking permits for use of the nearby public car parks.
5. However, Chorley Borough Council is now taking the view, on the basis of legal advice, that the permit solution cannot be appropriately secured through a planning obligation or a condition.
6. The fullest explanation of Chorley's position is contained in an email of 2nd December 2016 from the case officer to my Instructing Consultant. In relation to a planning obligation, the email makes reference to advice received from the Council's legal department to the effect that case authority suggests that it would not be possible to devise an obligation which would fall within the scope of section 106 of the Town and Country Planning Act 1990 ("the 1990 Act") and thus qualify as a planning obligation. The case law is not identified in the email but I believe it is probably *Westminster City Council v Secretary of State for Communities and Local Government*. The case was one where a purported planning obligation was in the form of an undertaking not to apply for a residential parking permit. It was held that the undertaking did not meet any of the requirements of section 106(1) of the 1990 Act. It did not: (a) restrict the development or use of the land in any specified way; (b) require specified operations or activities to be carried out in, on, under or over the land; (c) require the land to be used in any specified way; or (d) require a sum or sums to be paid to the authority. The case was followed in the later decision of *Khodari v Royal Borough of Kensington and Chelsea*.
7. The above cases dealt with a different situation from the present in that they related to undertakings not to apply for residential parking permits. The present case would involve an undertaking to purchase parking permits for use on off-street public car parks. Be that as it may, it seems to me that a similar problem in terms of bringing such an undertaking within the scope of a planning obligation under section 106(1) could well arise in the present case. I would not therefore disagree with the Council's position in relation to a planning obligation. This is perhaps not of particular significance in that the present way forward which is envisaged by my Instructing Consultant is through the use of a condition and it is in that connection that my specific advice is sought.
8. In respect of the use of a condition, the case officer's email reports that the advice received from the Council's legal department is that a condition would not meet the policy tests of enforceability and reasonableness. In respect of enforceability, it was

said that the applicant could obtain parking permits but that would not necessarily mean that the staff would use and park in the car parks. The point was made that the applicant would have complied with the condition to obtain the parking permits but the Council would not be able to enforce the use of those permits by the staff. In respect of reasonableness, it was said that the advice received from the Council's legal department was understood to be that it would be considered unreasonable to impose on the nursery a financial obligation or burden to meet the cost of the permits.

9. It seems to me that the concern of the Council's legal department about enforceability is not of any real substance. As I understand it, the concern is not as to the enforceability of a condition which would require permits to be obtained by the nursery but about the enforceability by the Council of the use of those permits, once obtained, by the staff in question. However, that level of enforceability does not seem to me to be required. It might often be said that the Council itself could not directly control the behaviour of third parties, such as employees of a business, through a planning condition. For instance, it could be said that, while there are on-site parking spaces at the nursery, the Council itself could not actually ensure that staff took up the opportunity of parking there. It seems to me that the reasonable availability of suitable parking provision, be it on-site spaces or those in nearby car parks, is what matters. And the reasonable availability of the latter can be enforced by condition through the obtaining by the nursery of the parking permits.

10. It is not entirely clear whether the Council is continuing to maintain its enforceability objection. I say this in the light of the case officer's latest response to the suggestion most recently made by my Instructing Consultant to the Council. That suggestion refers to a solution used by Manchester City Council in relation to apartment development where there is insufficient on-site parking available. The solution is to have both a condition for a travel plan and one for a parking management strategy which would provide for alternative arrangements, including, by way of example, parking leases with car parking companies.

11. The Council's response to this suggestion via a further email from the case officer is that, whatever view Manchester City Council may take, Chorley do not consider that the suggested condition would meet the test of reasonableness. On one view of matters, therefore, the issue has become simply one of reasonableness rather than enforceability and reasonableness. I assume that the reasonableness point relates only to that aspect of a parking management strategy which might require the purchase of car parking permits. There is nothing at all unreasonable about conditioning a parking management strategy per se. A condition in respect of a travel plan is entirely unobjectionable and I do not think that there is the remotest suggestion otherwise from the Council.

12. It is not entirely clear what the real concern of the Council is in relation to reasonableness in connection with the car park permits. There is reference in the case officer's email of 2nd December 2016 to the Council's reasonableness judgment depending on the size of the nursery and how many staff are employed. In this context it may be that the Council considers that a condition which would involve the purchase of parking permits by the nursery would be one which would place an unjustifiable and disproportionate burden on an applicant. This is given as an example in the Planning Practice Guidance of a condition which would fail the test of reasonableness. However, I do not see why the purchase of parking permits would amount to an unjustifiable and disproportionate burden. While it is true that an applicant's agreement to an unreasonable condition is not an answer to unreasonableness, the fact that the applicant has agreed here to the purchase of parking permits is nevertheless good evidence that there is not an unjustifiable and disproportionate burden.

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13. It is also correct that positively worded conditions requiring payment of money or other consideration are not acceptable: see again the Planning Practice Guidance on this point. However, what is suggested in this case is a negatively worded Grampian condition on the lines of the Manchester City Council model. That is acceptable, as the Planning Practice Guidance also makes clear.

14. Overall, I consider that the Manchester City Council approach is one which meets the test of reasonableness. I see no good reason why a similar Grampian condition should not be used in the present case in respect of a parking management strategy. I would suggest only that the reference to “parking leases with car parking companies” in the reason is changed to parking permits for the relevant car park(s) in Chorley, which should then be identified by name. A parking management strategy could provide additional sustenance to the enforceability dimension of the case (if this were still thought to be required) by incorporating a requirement that the nursery impose a contractual obligation on employees who are provided with parking permits to utilise them. This is no different in principle from the sort of contractual mechanism that might be employed in, say, a conditioned routing strategy to ensure lorries use only specified roads.

15. If the Council do not have time to consider the points made in this advice before the committee meets, I do not see why it would not be sensible to see if a deferment could be obtained.

16. I trust that the above is of some assistance. If I can assist further, my Instructing Consultant should not hesitate to contact me.

Kings Chambers  
36 Young Street  
Alan Evans  
Manchester M3 3FT  
6th December 2016

PIPERS PRIVATE NURSERY, 11 SOUTHPORT ROAD, CHORLEY