

Appeal Decisions

Hearing held on 4 February 2021

Site visit made on 1 February 2021

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 April 2021

Appeal Refs: APP/U5360/C/20/3253676, U5360/C/20/3253677 & U5360/C/20/3253721

43 Durley Road, London N16 5JR

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Tomer Devorah Seminary, Totally Kids and Talmud Torah D'Chasidei Gur Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The notice was issued on 24 April 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission the material change of use of the property to a nursery school and a college; and the erection of an outbuilding in the front garden area of the property.
 - The requirements of the notice are to:
 - (1) Cease the use of the Property as a Nursery.
 - (2) Cease the use of the Property as a College.
 - (3) Remove the outbuilding from the front garden area of the Property.
 - (4) Make good all damage to the Property resulting from the removal of the unauthorised works and restore the relevant parts of the Property to the condition they were before the unauthorised change of use occurred and the unauthorised outbuilding was constructed in the front garden area.
 - (5) Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the Property and its premises.
 - The period for compliance with the requirements is eighteen (18) months after this notice takes effect.
 - The appeals together are proceeding on the grounds set out in section 174(2)(a),(c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Summary of Decision

1. The appeal succeeds in part and permission for that part is granted, but otherwise the appeal fails, and the enforcement notice is upheld as set out below in the Formal Decision.

Background

2. In 2012 the Council granted planning permission (ref 2012/1408) for the erection of a part single, part two storey rear extension at ground and first floor levels in connection with the change of use from a family and support centre (Class C2) to
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a primary school (D1). The permission was subject to a series of conditions which, amongst other things, required for details on the following:

- 1) An updated School travel plan, to be submitted to the Council for its subsequent approval;
 - 2) A Management Plan for the school mini-bus service; and
 - 3) Details of internal soundproofing between the site and No 41 Durley Road, the adjacent property.
3. In 2013, under ref 2013/0346, details were submitted and approved regarding boundary treatment, landscaping, bin and cycle storage, on-site parking and vehicular access and boundary treatment and surfacing to front garden. However, the Council subsequently received complaints that certain conditions were being breached. Investigations also showed that the premises were in use as both a girls' college and a nursery. Requests were then apparently made to the operator to submit a retrospective planning application in an attempt to regularise matters, but this was not forthcoming. As such, without adequate regulation, the Council saw it expedient to issue the enforcement notice.

Preliminary Matters

4. Two of the appeals; those by Totally Kids and Talmud Torah D'Chasidei Gur Ltd, were concerned only with Grounds C and F. The lead appeal, by Tomer Devorah Seminary, also included a Ground A submission, meaning that an application for planning permission is deemed to have been made. However, all three appellants withdrew the Ground C appeals just prior to the Hearing.
5. In the event, with reference to my decision regarding the deemed planning application only the said lead appeal falls to be determined as the other two appeals fall away.
6. The withdrawal of the Ground C appeals would indicate that the appellants have reassessed the materiality of the 2011 planning permission having been implemented without full observance of the terms and conditions to which it was subject. The Council asserts that a number of these were never properly discharged.
7. Further, the Council took the view that the totality of the non compliance meant that the permission no longer had effect and the continuing school and nursery use were unauthorised. This assertion is no longer being disputed by the appellants.
8. Given the site's planning history the 2012 planning permission remains a significant material consideration in my determination of this appeal.
9. Since the enforcement notice was issued the Council has adopted the new Hackney Local Plan (HLP) which supersedes the policies of the Hackney Development Management Local Plan cited in the notice. A replacement London Plan (LP), which forms the second strand of the Council's development plan was adopted in March 2021.

The Appeal on Ground (a) and the Deemed Planning Application (DPA)

Main Issues

10. These are:

- 1) the effect of the development on the living conditions of neighbouring occupiers, with particular regard to any noise and disturbance;
- 2) the effect of the development on highway safety; and
- 3) the effect of the development on the character and appearance of the surrounding area.

Living conditions

11. The appeal building, a two-storey former dwellinghouse which has been extended to the rear, is positioned close to the common boundary with No 41, which is in residential use. The site's opposite side boundary abuts the rear gardens of properties on Amhurst Park.
12. In 2019 the appellant, Tomer Devorah Seminary, commissioned specialist consultants to produce a Noise Impact Assessment regarding the operations of the school use which, at that time, involved the nursery and also the girls' college, as is the current arrangement. Following a site survey being undertaken the report concluded that BS 8233 guidance, as relied on by the London Plan, was not contravened by the use of the rear garden as a play area and, due to fencing, the noise in the gardens and living rooms at both No 41 and No 2 Bergholt Crescent, beyond the property's rear boundary, would be less than the BRE recommendations and background noise levels. Also, all the school rooms are provided with air conditioning units so, as necessary, there is no real need to have windows remaining open during periods of warm weather.
13. To further mitigate the use conditions restricting the numbers of pupils, hours of use, defined play areas and the drawing up of a management plan are now proposed.
14. In the circumstances I conclude that the use, subject to the mitigation measures required by the relevant conditions, would not be harmful to the living conditions of neighbouring occupiers, and there would be no material conflict with HLP policy LP2 and LP policy D14.

Highway safety

15. The site has a good public transport accessibility location rating of '4', largely in view of the number of bus services that run along Amhurst Park. Notwithstanding this, and the assertion that a number of pupils will arrive by foot, many children, particularly those at the nursery, are likely to arrive via car potentially causing congestion and indiscriminate parking in the immediate area.
16. The 2012 planning permission required for the submission of a school travel plan. However, as it appears that this condition was not discharged, and in view of the change in the make-up of the school attendees since that time, both main parties – rightly in my view – are agreed as to the need for an updated travel plan to be drawn up and submitted to the Council for subsequent approval.

17. Also, in this connection, the appellant indicated that, although the mini-bus service no longer operated for the school, a condition as to a management plan for such was necessary should it recommence.
18. Together, if the above safeguards are secured, I conclude that the use, subject to the mitigation measures required by the relevant conditions, would not be prejudicial to highway safety and the free flow of traffic and would not conflict with the objectives of HLP policy LP43 and LP policy T4.

Character and appearance

19. This issue relates solely to the stand alone outbuilding in the front garden which is largely used for the parking of buggies. The Council objects to its retention as it considers that the structure fails to respect the area's character due to its prominence. At my site visit I too noted its prominence with its appearance failing to integrate within the street scene. During the Hearing the Council indicated that, given the need for associated external storage, it is satisfied that a replacement structure of an appropriate appearance could potentially mitigate the siting forward of the building line.
20. Accordingly, both parties are agreed that a suitably worded condition should be applied requiring for the removal of the existing structure and its replacement with a new outbuilding details of which will need to be the subject of an application for planning permission. I am therefore imposing a condition to the above effect, with a suitable timeline schedule. Subject to this requirement being observed I conclude that the development would be acceptable in this regard and there would be no material conflict with HLP policies LP1 and LP8 and LP policies D4 and S3.

Conclusion and Conditions

21. For the above reasons, and having had regard to all matters raised, the appeal is allowed. In terms of conditions, these were agreed in principle by the main parties prior to the Hearing, and largely reflect those imposed on the 2012 planning permission. However, whilst I agree that control is required in the specific areas and operations mentioned I am not convinced that the various wordings suggested allow for a sufficient degree of certainty as to the adequacy of the details that are required to be produced, nor the necessary implementation. Also, the previous difficulties regarding the discharge of conditions gave rise to concern.
22. In the circumstances the alternative retrospective wording which I have here applied, although amounting to the same thing, achieving the same ends, and also applying the time periods already put forward by the appellant, gives incentive to both the appellant to make comprehensive submissions and, particularly, for the Council to assess and determine the details expeditiously.
23. It was apparent from the Hearing's proceedings that there seems to be a better understanding between the main parties than appears to have been the case previously. Indeed, with dialogue and a mutual understanding I am satisfied that neither party is prejudiced by the wording I have here applied.

24. Condition No 12, again retrospective in form, is worded differently, but this reflects the fact that it relates to operational development which requires planning permission, rather than the case with the conditions which relate to the use of the premises and the potential consequential impacts therefrom.
25. Stipulating a maximum number of pupils – that number specified by way of the 2012 permission – days and hours of use and restriction within the relevant use classes are necessary given the nature and location of the use. The requirement for a school management plan, and the conditions addressing noise and disturbance along with restrictions on areas to be used outside play are similarly required to protect the living conditions of neighbouring occupiers.
26. The conditions relating to cycle, pushchair and buggy storage and the management of refuse storage relate to a good standard of development whilst the conditions requiring for a travel plan and a minibuss service management plan are necessary in the interests of highway safety and as an attempt to limit inconsiderate parking at dropping off/picking up times.

The Appeals on Ground (f)

27. Appeals on ground (f) are that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f) it is essential to understand the purpose of the notice. S173(4) provides that the purpose shall be either to remedy the breach of planning control or to remedy any injury to amenity. However, given my decision to grant permission on the DPA it is not necessary for me to explore this matter further.

Overall Conclusion

28. For the reasons given above I conclude that the appeal should succeed in part only, and I will grant planning permission for one part of the matter the subject of the enforcement notice, but otherwise I will uphold the notice and refuse to grant planning permission for the other part. The requirements of the upheld notice will cease to have effect so far as inconsistent with the permission which I will grant by virtue of s180 of the Act. Also, the stipulated eighteen month compliance period will be overridden by the requirements of Condition 12 and the relevant timetable to be agreed between the main parties.

Formal Decision

29. The appeal is allowed in part and planning permission is granted on the application deemed to have been made under s177(5) of the 1990 Act as amended for the material change of use of the property to a nursery school and a college, subject to the conditions set out in the attached Schedule. The appeal, however, is dismissed, and planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended for the erection of an outbuilding in the front garden of the property.

Timothy C King

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The school use permitted shall only be used for purposes within Use Class F1(a) and the nursery hereby permitted shall only be used for purposes within Use Class E(f) of the Schedule to the Town and Country Planning (Use Classes Order 1987 (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order and for no other purposes within use classes F1 or E.
- 2) No more than 140 pupils maximum should be accommodated at the premises across both uses at any one time.
- 3) The school and nursery uses hereby permitted shall only be operated between the hours of 08.30 and 18.30 hours Monday to Friday, not at all on Saturdays and between 09.30 and 16.00 hours on Sundays and Bank Holidays.
- 4) Within three months of the date of this decision, a nursery and school management plan covering both uses within the premises, shall be submitted to the local planning authority for approval in writing. This management plan shall include details of:
 - i) Staggered school play times including times and pupil numbers;
 - ii) Supervision of the pupils during play times;
 - iii) Arrangements for children arriving or leaving school.

Unless the approved nursery and school management plan is implemented in full within two months of the date of the local planning authority's approval, the use of the site shall cease until such time as a relevant scheme is approved and implemented. Upon implementation of the approved school management plan specified in this condition it shall thereafter be operated, accordingly.

- 5) Within three months of the date of this decision details of the provision to be made for parking of cycles and pushchairs/buggies within the site shall be submitted to the local planning authority for approval in writing. Such details shall include the number of spaces, type, location and enclosure of the storage.

Unless the approved details are implemented in full within two months of the date of the local planning authority's approval, the use of the site shall cease until such time as the relevant details are approved and implemented in full.

- 6) Within three months of the date of this decision an updated nursery and school travel plan shall be submitted to the local planning authority for approval in writing. The travel plan shall include details of:
 - i) A parking beat survey of the existing on street parking situation;
 - ii) Initiatives to be implemented by the development to encourage access to and from the site by a variety of non-car means (including walking, cycling and public transport);

- iii) Monitoring arrangements for the operation of the development to ensure compliance with the travel plan objectives.

Unless the approved travel plan is implemented in full within two months of the date of the local planning authority's approval, the use of the site shall cease until such time as a relevant scheme is approved and implemented. Upon implementation of the approved school travel plan specified in this condition it shall thereafter be operated, accordingly.

- 7) Within three months of the date of this decision a detailed minibus service management plan addressing the matters set out below shall be submitted to the local planning authority for approval in writing. This management plan shall include details of:

- i) Bus dimensions
- ii) Frequency
- iii) Seat numbers
- iv) Management of stopping and collection

The minibus service shall be operated in accordance with the details as approved in perpetuity.

- 8) Within three months of the date of this decision, detailed drawings/full particulars of refuse storage and its management shall be submitted to the local planning authority for approval in writing. The development shall not be carried out otherwise than in accordance with the details thus approved which shall be implemented in full within two months of the decision of the approval of details application and retained in perpetuity.

- 9) There shall be no amplified PA system used or a school bell audible outside the school and nursery buildings at any time except in the case of an emergency.

- 10) There shall be no group singing sessions at any time held outside the nursery and school buildings.

- 11) The rear external staircase, door and flat roofs shall be used only in the event of an emergency and shall at no time be used as external amenity space.

- 12) The existing unauthorised outbuilding shall be removed within six months of the date of failure to meet the following criteria:

Within two months of the date of this decision, full details of a replacement outbuilding, as is intended, in the form of annotated drawings showing the elevations and floorplan, including a timetable for implementation, shall be submitted to the local planning authority through a formal application seeking full planning permission for the proposed development.

Within six months of the date of this decision the application shall have been approved by the local planning authority or, if refused or the local planning

authority fails to give a decision within the prescribed period, an appeal shall have been made to, and accepted as valid, by the Secretary of State.

Should the planning application be approved by the local planning authority the approved scheme shall be implemented in accordance with the agreed timetable. Should, however, an appeal be necessary, but ultimately unsuccessful, then the existing outbuilding shall then be removed in its entirety within two months from the final decision date.

APPEARANCES

For the Appellant

Giles Atkinson of counsel

Alvin Ormonde

For the Local Planning Authority

Martha Clark London Borough of Hackney

Documents

1. Council's notification letters of appeal and the Hearing.
2. Statement of Common Ground, as agreed between the main parties.